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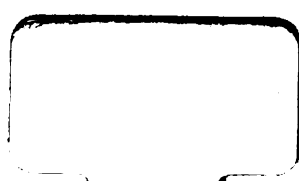
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THE PACIFIC REPORTER, VOLUME 125

(37 Kan. 624)

GORDON v. MUNN et al.
(Supreme Court of Kansas. July 6, 1912.)

(*Syllabus by the Court.*)

1. DIVORCE (§ 168*)—JUDGMENT—COLLATERAL ATTACK.

A wife domiciled in Missouri began an action in a circuit court of that state against her husband, a resident of this state, for divorce. Service was made by publication. The husband did not appear, and a judgment for divorce was rendered, as prayed for. The proceedings were regular according to the laws of Missouri, unless the verification of the petition was insufficient; the affidavit bearing date 33 days before the petition was filed. It is held that the Missouri court had jurisdiction, and the judgment for divorce is not open to collateral attack in an action in a district court of this state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 549, 550; Dec. Dig. § 168.*]

2. JUDGMENT (§ 499*)—COLLATERAL ATTACK—PROCEEDINGS.

Where a judgment rendered by publication is offered in evidence in a collateral action in the same court in which the judgment was rendered, and the affidavit on file shows by its recitals that the publication was insufficient, parol evidence is admissible to prove that due publication was in fact made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 940; Dec. Dig. § 499.*]

3. JUDGMENT (§ 818*)—FOREIGN JUDGMENT—CONCLUSIVENESS.

In an action to quiet title to land in Arkansas, where service was made by publication and the defendant did not appear, she is not bound beyond the property which was the subject of that suit. Title to land in this state is not affected by the judgment of the Arkansas court in that action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458-1481; Dec. Dig. § 818.*]

4. HUSBAND AND WIFE (§ 35*)—ANTENUPTIAL CONTRACT—PLEADING—ISSUES.

Where the execution of an antenuptial contract pleaded by a defendant is denied under oath, and the execution of a like contract differing but slightly in its material terms is alleged in the reply, the issue is not restricted to the execution of the contract as pleaded by the defendant.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 209-217; Dec. Dig. § 35.*]

5. HUSBAND AND WIFE (§ 29*)—ANTENUPTIAL CONTRACTS—VALIDITY.

If the intended wife is competent to make a contract and has a fair and adequate knowledge concerning the future husband's property when she enters into an antenuptial agreement, which is free from deceit or fraud, it should

not be set aside merely because the court or jury find that the provision made for her is in great disproportion to his property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 158-168, 882; Dec. Dig. § 29.*]

6. EVIDENCE (§ 271*)—DECLARATION—CONFESSION.

In an issue arising upon an allegation that an antenuptial contract had been canceled and destroyed by mutual consent of the parties thereto, declarations of the husband, since deceased, were admitted in evidence in behalf of the widow tending to prove that the contract had been destroyed and canceled by mutual consent of the parties thereto. The adverse party then offered other declarations of the husband tending to prove the contrary which were rejected. The evidence showed that the instrument had been destroyed and the intent of the parties concerning its destruction was material. It is held, that the rejected evidence should have been received.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.*]

(*Additional Syllabus by Editorial Staff.*)

7. DIVORCE (§ 79*)—PROCESS—PUBLICATION.

That publication notices in divorce proceedings did not run in the name of the state did not render the divorces void.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 258-263; Dec. Dig. § 79.*]

8. HUSBAND AND WIFE (§ 83*)—ANTENUPTIAL CONTRACT—EVIDENCE.

In determining whether an antenuptial contract was canceled by mutual agreement, all the circumstances tending to prove the intention of the parties, including the husband's failure to make a conveyance, the conveyances of other property to the wife, the age and condition of the husband, the care and attention of the wife, the disposition made of the instrument, should be considered.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 196-202, 885; Dec. Dig. § 33.*]

Appeal from District Court, Shawnee County.

Action by Jennie S. Gordon against Lillie Gordon Munn and others: From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

See, also, 83 Kan. 642, 112 Pac. 615.

D. R. Hite, Mulvane & Gault, Robert Stone, James A. Troutman, and George T. McDermott, all of Topeka, for appellants. Otis S. Allen, S. H. Allen, and J. B. Larimer, all of Topeka, and A. E. Crane, of Holton, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-Note Series & Rep'r Indexes.

BENSON, J. This is an action for the partition of land by the widow against the daughter of the deceased owner of the land.

G. S. Gordon, a widower 72 years of age, owning property of the value of about \$55,000, contracted a marriage with the appellee, then 36 years of age, who had been married and divorced and whose property was of little value. The marriage took place on June 30, 1898, immediately after the execution of an antenuptial agreement. Mr. Gordon died March 26, 1908, leaving the appellant Lillie Gordon Munn his only heir at law except the appellee.

The answer contained a general denial, and pleaded: (1) A former marriage of the appellee with one Richmond from whom the appellee had obtained a decree of divorce in the state of Missouri, but in a court that had no jurisdiction, without the issuance and service of process as required by the laws of that state; (2) a later marriage with one Starr, from whom she was not legally divorced, although a pretended decree therefor had been obtained from the district court of Shawnee county without jurisdiction and without the service of process; (3) an antenuptial contract whereby the appellee had waived all right, title, interest, and inheritance in the property of her intended husband in consideration of two parcels of real estate of which she became the owner by virtue of such agreement; and (4) a decree of a circuit court of Arkansas quieting title in the daughter of the deceased, defendant in this action, to land in that state owned by Mr. Gordon at the time of his death, in which action, it is alleged, the title to the lands involved in this action was adjudicated.

The reply alleged the validity of the divorces referred to and averred that the courts in which they were granted had jurisdiction of the parties and subject-matter; that the appellee was never subject to the jurisdiction of the circuit court in Arkansas; and that that court had no jurisdiction of the subject of this action, and had proceeded solely upon service by publication to quiet title to lands in Arkansas only. In the reply the appellee denied under oath the execution of an agreement as pleaded in the answer, but alleged that an antenuptial contract had been entered into by the terms of which Mr. Gordon had agreed to convey to the appellee, by deed forthwith to be executed, two pieces of real estate to be her sole property, together with the rents and profits, but that he had never made such conveyance, but kept, controlled, enjoyed, and used the property as his own until his death, collecting, keeping, and using as his own the rents therefrom. She also alleged that this property was of the value of only \$2,500, while Mr. Gordon then owned property of the value of \$80,000, but that she was not in-

formed and did not know the nature or amount of his property, except his homestead and the property so to be conveyed to her; that the contract was drawn up without her knowledge by Mr. Gordon's attorney, and she was requested to sign it on the day of the marriage, when it was first shown to her, Mr. Gordon then promising to convey the two pieces of property to her immediately. Upon these facts more fully stated in the reply, it is alleged that the agreement is not enforceable against her because of the failure of her husband to make the conveyance or to give her possession or dominion of the property or the rents, and because it was unreasonable, and was procured by concealment and without a fair disclosure of the husband's property. It is further alleged in the reply that, after living with her husband for several years, the appellee first learned of the amount of his property and then repudiated the agreement, which was thereupon destroyed in his presence with his knowledge, upon the agreement that it should thereby be annulled and canceled, both parties relieved wholly from its obligation, and that she should have the rights of a widow in his property at his death.

The first trial was by the court, and judgment was given for the plaintiff which was reversed because of the denial of a trial by jury, *Gordon v. Munn*, 83 Kan. 242, 111 Pac. 177, 21 Ann. Cas. 1299. The second trial was before a jury, which returned a general verdict for the appellee with special findings, upon which judgment was again rendered for the plaintiff. The abstract contains 70 specifications of error, which may, however, be fairly considered in a few propositions embracing material points.

[1] After hearing the evidence relating to the divorces obtained by the appellee, the court held and instructed the jury that they were valid, that her marriage with Gordon was legal, and that she was his widow. The attack upon the decree rendered in Missouri is based upon the fact that Mr. Richmond was never a resident of Missouri, and that the judgment rendered against him by publication was without jurisdiction. It is not disputed that the plaintiff in the action was domiciled in Missouri, and the proceedings appear to be regular according to the laws of that state, unless the verification of the petition was insufficient. The date of the affidavit is 33 days before the petition was filed, and it is contended that this fact avoids the service and defeats jurisdiction; but it was held otherwise in *Aherné v. Investment Co.*, 82 Kan. 435, 108 Pac. 842. The decree was not open to collateral attack. *McCormick v. McCormick*, 82 Kan. 31, 107 Pac. 546.

[2] The only defect alleged in the decree of divorce against Starr is that the affidavit for publication, although examined and approved by the court when the judgment was

rendered, was void because it showed that the notice had not been published for the length of time required by the statute. The court allowed the testimony of the publisher to be given on the trial of this action from which it appeared that the publication had in fact been made for the requisite time. This evidence was properly received. *Lipscomb v. Bank*, 66 Kan. 243, 71 Pac. 583; *Morris v. Hardie*, 84 Kan. 9, 113 Pac. 808.

[7] Again, it is contended that both the Missouri and Kansas divorces are void because the publication notices did not run in the name of the state. The same contention was made in *McKenna v. Cooper*, 79 Kan. 847, 101 Pac. 662, but not sustained. That decision is adhered to. The same rule appears to prevail in Missouri. *Hansford v. Hansford*, 34 Mo. App. 262. See, also, *Doan et al. v. Boley et al.*, 38 Mo. 449.

[3] The district court held that the Arkansas decree was insufficient as a defense. The answer in this action averred that the petition in that action contained an allegation that the appellee had not been legally divorced from Starr—that the pretended decree of divorce from him was void “for want of jurisdiction in the court in which it was granted.” The service in the Arkansas suit was by publication only, and the appellee, then and now a resident of this state, did not appear. A copy of the decree attached to the answer recites the default, and a finding that the allegations of the petition are true. The judgment purported only to quiet title to the Arkansas land situated within the jurisdiction of that court. That judgment relating solely to lands in that state cannot affect title to lands here. *Freeman on Judgments* (4th Ed.) § 564.

“The judicial determinations of a state can have force and operation in another state, only so far as the court promulgating such determinations has jurisdiction over the persons or things to be affected by such determinations.” *Amsbaugh v. Exchange Bank*, 33 Kan. 100, 105, 5 Pac. 384, 387.

The contention that the decree in the Arkansas case, reciting that the averment in the petition that the Starr divorce was void conclusively establishes the invalidity of that divorce in this action, cannot be sustained. It was held, in *Iles v. Elledge*, 18 Kan. 296, that: “The recitals of a judgment in rem, obtained without personal service in a sister state, and by publication only, where none of the defendants to the suit make any appearance in the court rendering the judgment, are no evidence of debt, nor evidence of tender of a deed, in a separate action pending in this state between the same parties to recover upon a promissory note.” The judgment referred to in the above quotation was rendered in an action for specific performance. In all such cases of constructive service the defendant is not bound beyond the judgment relating to the property

in question or subject of the suit. *Herman on Est.* §§ 518, 522. Title to land in this state cannot be affected by the decree of a court of another state. *Cooper v. Ives*, 62 Kan. 395, 63 Pac. 434. This rule is recognized in *Eckman v. Eckman*, 68 Pa. 471; *Price v. Hickok*, 39 Vt. 292; *Cooper v. Reynolds*, 77 U. S. 308, 19 L. Ed. 931; *Durant v. Abendroth*, 97 N. Y. 132.

[4] Upon the issue relating to the antenuptial contract it is insisted that, having denied the execution of the agreement as pleaded in the answer, the allegation in the reply that a different, although similar, agreement had been made, was immaterial, and that the evidence should have been limited to the averment in the answer and denial in the reply. Both parties alleged the existence of an antenuptial agreement, but the appellants averred that by its terms appellee became at once, upon its execution, the owner of the property described therein, while the appellee alleged that it was an executory agreement for a conveyance which did not vest the title, and that the possession, use, and dominion of the property had been retained by her husband. The appellee was not limited to a mere denial of the execution of the contract as pleaded by the appellant, but could, and in a system of practice which requires facts to be pleaded properly did, set out the contract as she understood it; the paper having been destroyed. Even if the ruling should be held erroneous under strict rules of pleading, no prejudice resulted. The only witness to prove the contents of the agreement was called by the appellants. Both parties accept his version as true, and the jury found that it was as alleged by the appellee.

[5] The special findings of the jury, in substance, were that the plaintiff is the widow of G. S. Gordon; an antenuptial agreement was made, as alleged in the reply, which was carefully read and explained to the appellee before she signed it; Mr. Gordon did not in any manner conceal the fact that he owned other property; her life had been one of hardship, and she was at the time serving as an attendant in a state hospital, earning \$22.50 per month besides board; she knew the kind of home he occupied; and the prospect of being relieved from necessity of earning her own living was an inducement to accept his offer of marriage, whereby she secured a better home than she had ever had before. She was an experienced woman of mature years, fully capable of managing her own affairs, and might by the exercise of slight effort have ascertained the fact that her prospective husband owned considerable real estate in Topeka and vicinity and knew that he was in good circumstances. She fully understood the terms of the contract and expressed satisfaction therewith, and Mr. Gordon did not do or say anything to induce her to sign it. She considered the prospect of a comfortable home,

an assured social position, and the property referred to in the contract a fair provision in view of her own situation, without regard to Mr. Gordon's ownership of other property, and was satisfied with its terms and effect when she signed it. Since the marriage she has received from her husband conveyances for the homestead (in the city), 120 acres of land, and \$1,000 in money. The antenuptial agreement was destroyed by Mrs. Gordon just after Mr. Gordon's recovery from a severe illness (spring of 1902). The contract contained an agreement of Mr. Gordon to convey to her the two pieces of property described therein, but the conveyance was never made, and he did not carry out or perform its terms on his part. In addition to these findings, the jury answered questions as follows: "Q. Did such antenuptial contract make fair and reasonable provisions for the plaintiff, Jennie S. Gordon? A. At the time it was, but as the widow of G. S. Gordon it was not. Q. Taking into consideration the previous social position and financial condition of plaintiff as shown by the evidence, was the marriage contract of June 30, 1898, unreasonable or unfair to her? A. It did not make reasonable provision for her widowhood."

It appears from the evidence that Mr. Gordon died on March 28, 1908. The appellee contends that she is not deprived of her inheritance as a widow by the antenuptial contract because it was never performed by her husband. On the other hand, the appellant contends that, upon the execution of the agreement and the marriage of the parties, the equitable title vested in the wife, which could not be defeated by any act of the husband; that the contract was as conclusive upon him and his heirs as the most formal warranty deed; and that the wife, having never demanded a conveyance, should be considered as consenting that the naked legal title should remain in the husband.

The purchaser of land in possession under an agreement for a conveyance is considered the owner in equity, subject to the payment of the purchase money, and the vendor is treated as the trustee of the legal title. *Jones v. Hollister*, 51 Kan. 310, 32 Pac. 1115; *Gilmore v. Gilmore*, 60 Kan. 606, 57 Pac. 505; *Campbell v. Town Co.*, 69 Kan. 314, 76 Pac. 839. The fact that possession was not transferred in this instance may be accounted for by the relationship of the parties. It is not uncommon for a husband to manage his wife's property, and, in the absence of any evidence to the contrary, it may be presumed that such control and management is with her consent. No request for possession or the control of the property is shown.

Authorities are not wanting to support the proposition that, when an intended husband has failed to make a conveyance as agreed in such a contract, the decree will not be specifically enforced at the suit of his heir, although it would be at the suit

of his widow. In many of the cases holding that such an agreement thus remaining unexecuted does not bar the widow's dower or inheritance, the inexperience of the wife, her want of adequate knowledge of the husband's property, or other equitable considerations, appear to have influenced the judgment. In this case the woman was of mature years, and the findings negative any deception or fraud. She knew that her intended husband was in good circumstances. The provisions of the contract were explained, and she understood its terms, conditions, and effect.

It was held in *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537, that marriage settlements of this character are looked upon with favor, and are to be liberally interpreted to carry out the intention of the parties. Applying this rule which has become the judicial policy of this state, it cannot be held, in the circumstances disclosed by the findings, that the fact that a formal conveyance was not made is sufficient to defeat the agreement. The property to be conveyed in equity belongs to the widow. The rents and profits have been absorbed by the taxes, and she will have all the benefits that a previous conveyance would have given.

The failure to make a conveyance as agreed is, however, a circumstance to be considered in determining another issue in the case. The appellee pleaded that the contract had been canceled and annulled by mutual consent, and several questions were submitted to the jury upon that issue upon which they found that the contract was destroyed by Mrs. Gordon after a severe illness of her husband. They were asked to state, "whether or not said contract was canceled or destroyed by the mutual agreement of the parties thereto." To which they answered, "On account of contradictory evidence it is hard for us to determine just what happened to the contract or what was done with it."

It is the opinion of the court that, in view of the general verdict, this answer should be considered as relating to the document—the paper itself—rather than to the agreement. The actual destruction of the paper would be competent evidence upon that issue in connection with the accompanying circumstances; but if the contract was canceled by agreement—that is, if the parties mutually agreed that it should be annulled and no longer be in effect—the destruction of the paper upon which it was written was not controlling. In view of the probable misapprehension of the jury of the real intent of the question, and of the fact that even if the meaning was understood no real answer was given, it is believed that an important issue of fact in this case has not been definitely decided and that justice requires that it should be submitted upon another trial.

It will be observed that the court asked the jury to find whether the antenuptial contract was fair and reasonable. It was

held in the *Hafer Case* that if the parties are competent to contract, and the agreement, considering the circumstances, is reasonable and just in its provisions, it will be upheld. Without attempting now to settle the apparent ambiguity in the findings of the jury upon this matter, it is deemed proper to say that the court, instead of submitting to the jury the general question whether the agreement was reasonable, as the instructions indicate, should have explained to them her right to contract, and his duty to make a fair disclosure of his property and financial situation, and submitted to them the question whether she had been reasonably well informed of his property and had entered into the agreement with a fair knowledge of his financial condition. If the intended wife is competent to make a contract and has a fair and adequate knowledge concerning the future husband's property when she enters into an antenuptial agreement, which is free from deceit or fraud, it should not be set aside merely because the court or jury find that the provision made for her is in great disproportion to his property.

[8] In determining whether the antenuptial contract was canceled or annulled by mutual agreement, as alleged in the reply, all the circumstances of the situation tending to prove the intention of the parties should be considered. These include the failure to make the conveyance before referred to, the conveyances of other property which the evidence shows were made to the wife, the age and enfeebled condition of the husband, the care and attention of the wife, their feelings toward each other, the disposition made of the instrument, and every other fact having a natural relevancy to the inquiry. Consent to a rescission of a contract may be implied from the circumstances and conduct of the parties with respect to the subject-matter. *Evans v. Jacobitz*, 67 Kan. 249, 72 Pac. 848.

[6] In view of the fact that a new trial of this issue is to be allowed, it becomes necessary to refer to evidence offered by the appellants upon that question and rejected. After the testimony of a witness, who said that he was present when the contract was destroyed, tending to prove that it was done by mutual consent, was received, the testimony of other witnesses was given purporting to relate statements of Mr. Gordon that he and his wife had destroyed the contract so that she should get her share of his property, and other similar statements tending to prove a cancellation of the agreement by mutual consent. Thereupon the appellants offered the testimony of witnesses purporting to relate other statements of Mr. Gordon tending to prove statements that the contract was lost and that he had not consented to its destruction. This rebutting testimony was rejected on the ground, as alleged, that it was self-serving.

Declarations of a person since deceased against his pecuniary or proprietary interest are admissible, although the declarant is not a party or in privity with a party to the action. *Mentzer v. Burlingame*, 85 Kan. 641, 118 Pac. 698. It is insisted, however, that this rule does not necessarily permit the admission of other declarations made by the same person to the contrary. It is the general rule that the declarations first referred to are admitted because against the interest of the declarant, while those last referred to are rejected because self-serving. It remains to consider whether this general rule should be applied in the situation now presented. The question to be determined was whether the contract was destroyed by mutual assent in order to abrogate the agreement, or by one party only and without the consent of the other and without any intention on his part to annul it. The declarations of the husband as testified to by the appellee's witnesses tended to show that the agreement had been destroyed by mutual assent with the intention thereby to abrogate it. Testimony of other declarations of the husband was offered tending to the contrary. Conduct is constantly shown to prove intention, and declarations, if not within the rule requiring rejection because they are self-serving, may be shown for the same purpose. Even when self-serving, they are admitted in evidence if part of the *res gestæ* and declarations of an occupant of land which import title in himself are admissible as verbal parts of his occupation. *Liebbelt v. Enright*, 77 Kan. 321, 94 Pac. 203.

Prof. Wigmore, in a discussion of impeaching testimony offered in rebuttal of dying declarations, says that "almost all courts have agreed, therefore, that a self-contradiction may in this situation be offered, although the preliminary question (required in case of an attempted impeachment of a living witness) has, of course, not been asked and can never be." After other observations on this subject, the author adds: "Wherever any other statements are admitted, by exception to the hearsay rule—for example, statements of *facts against interest*—the same principle is applicable, and the requirement of prior asking should be dispensed with." *Wigmore on Ev.* § 1083. It is argued that the rejected testimony falls under this rule, i. e., the rule relating to impeaching evidence, and appellant insists that it should have been admitted on this ground. It is doubted whether this is the best reason. Impeachment by proof of self-contradiction is based upon the supposed capacity or disposition of the declarant to err through mistake or dishonesty, and the relation of contradictory declarations is permitted in order that a comparison may be made in finding the truth. *Wigmore on Ev.* §§ 1017-1040. It is probable that the argument intended to be drawn by the appellants from the re-

jected testimony is that the appellee's witnesses were mistaken or dishonest in their report of his conversations. In other words, it was not a comparison of one statement with another, but rather an effort to show that the deceased did not make the statements attributed to him by the appellee's witnesses by showing that he had made contradictory statements to appellant's witnesses. But the purpose for which the evidence was offered—which was not stated—is not very important. The real question to be considered is whether it had probative force. If it fairly tended to show the intention of the deceased with respect to the destruction of the instrument or the abrogation of the contract, no good reason is apparent for its rejection. Why should it not be left to the jury, after hearing the various witnesses relate the declarations attributed to the deceased, to find what his statements really were, and what they proved concerning the intent of the parties to the contract, in the transaction referred to?

In a case where the issue was whether a promissory note had been given to the maker by the payee, the defendant, the maker of the note, was allowed to prove the declarations of his brother, since deceased, who held it, that he intended to make the gift, and it was held that evidence of other declarations of the deceased of an intention to insist upon payment of the note should also have been admitted. The court said: "The intent of a person to do or not to do any given thing can only be shown by his acts, declarations, and conduct, and when declarations are introduced in evidence tending to show such intent, other and subsequent declarations tending to show a contrary intent, made prior to the consummation of the act, are admissible for the purpose of enabling the jury to determine what in fact the intent of the person was, and thus making it probable or improbable that the act, whatever it may be, in controversy was consummated in accordance with the expressed intent of the party." *Sherman v. Sherman*, 75 Iowa, 136, 138, 39 N. W. 232, 233.

It is true that a different situation is presented here. The declarations in that case related to intention before the act had been done. Here they related to a past transaction. But this is true of the declarations offered by both parties, and it is believed does not necessarily affect the principle. Another difference, however, should be noted. In that case the court was careful to observe that a different rule might prevail if the intent referred to might disturb a vested right. It is true a person may not, after making a gift or other disposition of property, jeopardize the title given or right surrendered by declarations to the contrary. *Pentico v. Hays*, 75 Kan. 76, 88 Pac. 738, 9 L. R. A. (N. S.) 224. The evidence, however, is not admitted for that purpose, but to show

whether other declarations already in evidence expressed the real purpose of the party in the transaction; in other words, to show his intention.

In another case of an alleged gift, statements of the supposed donor, who died before the trial, made at different times before and after the alleged gift, and which were inconsistent with it, were held admissible to contradict the testimony of the donee, although not made in his presence. *Whitwell v. Winslow*, 132 Mass. 307. The court said that the declarations, although in some sense in favor of the party making them, and in the nature of hearsay, ought to have been admitted upon principles declared in *Whitney v. Wheeler*, 116 Mass. 490. In that case the court held that statements of a deceased person indicating a previously fixed state of mind inconsistent with an alleged gift was admissible when there was ground to doubt the intent with which the property had been delivered. In the case last cited the statement related to an intention existing before the alleged gift, but in the former the same rule was apparently extended to cover statements made after as well as before that time.

In a case involving the question of a parol gift to a son-in-law who relied upon possession and the declaration of the alleged donor, evidence of his counter declarations was allowed. The court said: "Where declarations have been heard, counter declarations cannot be excluded for the reason that the mind has reached a conclusion as to the truth of the case. This the verdict of the jury alone can reveal. Such evidence is somewhat analogous to the testimony of different witnesses to the same transaction." *Stone v. Stroud*, 6 Rich. (S. C.) 306.

Where evidence of confidential statements of a testator had been related by a witness for one of the parties, the court admitted the testimony of another witness purporting to give other statements of the testator tending to show that the first witness was not on the terms of intimacy with the testator which his own testimony tended to show. *Lightner et al. v. Wike*, 4 Serg. & R. (Pa.) 203. It must be conceded that the evidence so held admissible was quite remote; but the opinion says that it tended in some degree to contradict the assertion of the first witness, and to show the improbability of his testimony.

The declarations excluded on the trial of this case are not direct evidence of the fact in issue, but they tend to show the intent of the deceased respecting it, or, as some writers say, his particular mental state, and for that purpose have probative force, the weight of which is for the court or jury trying the fact. 16 Cyc. 1188.

At the conclusion of an illuminating discussion of exceptions to the hearsay rule, Wigmore quotes briefly from judges

and authors who have lamented that the declarations of persons since deceased were not received in all cases when they would be admissible if the person were living. Wigmore on Ev. § 1576.

Without impairing the force of the general rule excluding self-serving hearsay declarations, it is held that the statements offered by the appellant do not fall under the ban of that rule in the circumstances disclosed upon the trial of this case.

The special findings do not sustain the contention that the contract is invalid because of any suppression of information or other misconduct of the other contracting party. The issues concerning the validity of the marriage and the effect of the Arkansas judgment are properly determined. The only remaining issue to be tried is upon the annulment of the contract as alleged in the reply.

The judgment is reversed, and the cause remanded for a new trial of that issue. All the Justices concurring.

(87 Kan. 519)

MUNN et al. v. GORDON.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. JUDGMENT (§ 580*)—RES JUDICATA—EVIDENCE.

A judgment pleaded as an estoppel is admissible in evidence, although an appeal therefrom is pending and execution of the judgment is stayed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1024; Dec. Dig. § 580.*]

2. JUDGMENT (§ 581*) — RES JUDICATA — PLEADING.

The reversal of the judgment afterward is not a ground for reversing a judgment rendered in the action in which the first judgment was admitted in evidence, where another trial of the action in which it was rendered has resulted in the same judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1025; Dec. Dig. § 581.*]

3. APPEAL AND ERROR (§ 1067*)—HARMLESS ERROR—INSTRUCTIONS.

In an action where the findings of a jury are only advisory, and the court has made independent findings upon the same issues, upon the same evidence, and rendered judgment thereon, any error in refusing further instructions relating to the burden of proof is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1067.*]

Appeal from District Court, Shawnee County.

Action by Lillie Gordon Munn and others against Jennie S. Gordon. Judgment for defendant, and plaintiffs appeal. Affirmed.

See, also, 83 Kan. 242, 111 Pac. 177, 21 Ann. Cas. 1299.

James A. Troutman, Robert Stone, D. R. Hite, and Mulvane & Gault, all of Topeka, for appellants. J. B. Larimer and S. H. Allen, both of Topeka, and A. E. Crane, of Holton, for appellee.

1. **BENSON, J.** This is an action to cancel two deeds of conveyance bearing date December 20, 1907, made by G. S. Gordon to his wife, Jennie S. Gordon, the appellee. One of these deeds conveyed the homestead upon which the grantor and grantee resided. The other deed conveyed 120 acres of land. Mr. Gordon died on March 26, 1908, leaving his daughter the appellant Lillie Gordon Munn, and the appellee, his only heir. Mr. Gordon and the appellee were married on June 30, 1898. He was then 72 years of age, and she was 38 years of age. Both had been previously married, and the appellee had been twice divorced. The grounds upon which the appellants ask to have the deeds canceled are the allegations that the grantor was of unsound mind when they were signed, and that they were obtained by fraud and undue influence. It is stated in the petition that Mr. Gordon was decrepit from age and infirmities; that he was mentally and physically incompetent for more than a year before his death; and that the appellee, taking advantage of his incapacity and his dependence upon her, induced him to sign the deeds when he was not of sound mind; and, further, that she withheld from him the fact that she had been twice married and twice divorced, or that the legality of both divorces was questioned, or that any doubt existed about her legal right to enter into the marriage with him, which he believed to be legal; that she was thereby able to exert an influence over him which would have been impossible had he been informed of the facts concerning these prior marriages and divorces, and had not been influenced by the mistaken belief that she was his lawful wife. The delivery of the deeds was denied. The answer contained a general denial and pleaded a former adjudication in an action of partition in the same court between the same parties, wherein it was finally determined that the appellee was the widow of G. S. Gordon. The reply, among other things, stated that the judgment in partition had been vacated by an order superseding it, entered in this court upon appeal. The district court submitted to a jury the questions whether the grantor was of sound mind and memory when he executed the deeds—whether they were made and signed by means of undue influence of the appellee, and whether they were obtained by fraud. The jury found that the grantor was of sound mind, and that the deeds were not made or signed by means of undue influence nor obtained by fraud. The court also made findings that the deeds were delivered to the appellee by her husband on or about January 19, 1907; that neither of them was obtained by fraud or undue influence; and that the grantor was of sound mind and continued to attend to his affairs until confined to his bed by his last illness, beginning February 19, 1908; and concluded

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from all the findings that the appellants were not entitled to relief. Judgment was thereupon rendered for the appellee.

[1.2] The appellants allege error in the admission in evidence of the judgment in the partition suit, because an appeal therefrom was then pending, and the judgment was afterwards reversed, of which facts this court should take judicial notice. The ruling was not erroneous. The appeal and stay of execution did not destroy or suspend the effect of the judgment as evidence. *Willard v. Ostrander*, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294; *State v. Lawrence*, 78 Kan. 940, 92 Pac. 1181. It is true that the judgment was afterwards reversed (*Gordon v. Munn*, 83 Kan. 242, 111 Pac. 177, 21 Ann. Cas. 1299); but, since the reversal, that case has again been tried, and the same judgment rendered, which judgment, so far as it establishes the validity of the marriage, is now affirmed (*Gordon v. Munn*, 125 Pac. 1, just decided). By the same rule of judicial notice invoked by the appellants, notice may be taken of the fact that another judgment to the same effect, in the same action, upon the same issues, has been rendered and affirmed. The ruling admitting the evidence was clearly right when made, and, if the same question should be presented in a new trial, the ruling would be the same. Therefore another trial should not be granted because of the admission of that testimony.

[3] Error is alleged in the instructions placing the burden of proof upon the plaintiff. It is not denied that the burden of proof was first upon the plaintiff; but it is insisted that when the age and infirmity and dependence of the grantor upon his wife, the confidential relations existing between them, and want of consideration were shown, the burden shifted to the appellee to prove good faith and the absence of undue influence and fraud. The findings of the jury were only advisory. *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307; *Hospital Co. v. Philippi*, 82 Kan. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194. The court having made independent findings upon consideration of the same evidence, any error in refusing the instructions asked for is immaterial. An opinion upon the abstract question of law involved in the request could not affect the result.

It is earnestly argued that this court should examine and weigh the evidence and determine the facts, although concurrently found by the jury and the court. There was competent testimony to support the findings, both the jury and the court believed it, and, although there was also evidence to the contrary, the findings will not be set aside.

The judgment is affirmed. All the Justices concurring.

(37 Kan. 752)

STATE v. COPPAGE.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 15*)—CONTRACTS—VALIDITY.

An employer has no inherent right to coerce an employé to make a written or verbal contract, as a condition of remaining in his employment, not to become or remain a member of a labor organization.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 15.*]

2. MASTER AND SERVANT (§ 15*)—CONTRACTS—LABOR ORGANIZATION—CONSTITUTIONAL LAW.

The Legislature, deeming such coercion against public policy, violated no constitutional rights of employers in the enactment of sections 4674 and 4675 of the General Statutes of 1909, and such sections are valid.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 15.*]

Porter and West, JJ., dissenting.

Appeal from District Court, Bourbon County.

T. B. Coppage was convicted of violating Gen. St. 1909, §§ 4674, 4675, and appeals. Affirmed.

James G. Sheppard, of Ft. Scott, R. R. Vermillion and W. F. Lilleston, both of Wichita, and Hubert Lardner, of Ft. Scott, for appellant. John S. Dawson, Atty. Gen., for the State.

SMITH, J. About July 1, 1911, one A. R. Hedges was employed as a switchman in the yards of the St. Louis & San Francisco Railway Company at Ft. Scott, Kan., and was a member of a labor organization called the Switchmen's Union of North America. The appellant was employed by said railway company as superintendent. The appellant, as such superintendent, requested Hedges to sign an agreement which he presented to Hedges in writing and informed him that, if he did not sign it, he could not remain in the employ of the railway company. The following is the writing presented: "Ft. Scott, Kan.,, 1911. Mr. T. B. Coppage, Superintendent, Frisco Line, Ft. Scott. We, the undersigned have agreed to abide by your request, that is, to withdraw from the Switchmen's Union, while in the service of the Frisco Company. [Signed]"

Hedges refused to sign the writing and refused to withdraw from the labor organization. Thereupon appellant, as such superintendent, discharged Hedges from the service of the railway company. Thereafter this criminal action, was instituted by information, setting forth, in substance, the above facts. The appellant moved to quash the information on several grounds, the principal of which was that the information charged no public offense under the laws of the state of Kansas, and that there was no valid law making the acts charged in the

information a public offense. The motion was overruled. The case came regularly on for trial, a jury was waived, and the parties stipulated that the case be tried to the court. Arraignment was waived and a plea of not guilty entered. Thereupon the state offered evidence of the facts above stated, and the appellant submitted the case without evidence. On consideration thereof the court found the appellant guilty as charged. Motions for new trial and in arrest of judgment were overruled and proper exceptions saved.

The only question presented on the appeal is the validity of sections 4674 and 4675 of the General Statutes of 1900, which read:

"Sec. 4674. * * * That it shall be unlawful for any individual or member of any firm, or any agent, officer or employé of any company or corporation, to coerce, require, demand or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm or corporation.

"Sec. 4675. * * * Any individual or member of any firm or any agent, officer or employé of any company or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty dollars or imprisoned in the county jail not less than thirty days."

Each party, in argument, assumed that if section 4675, making it a misdemeanor to do any of the things denounced as unlawful in section 4674, is constitutional and valid, then the ruling on the motion to quash the information and the final judgment of the court should be affirmed; otherwise the ruling and judgment of the court should be reversed.

Our attention has been called to no other decision upon a statute, except *State ex rel. v. Orin Daniels et al.* (Minn. 1912) 136 N. W. 584, like the statute in question. The statute of Minnesota, the validity of which was involved in the decision, is practically the same as ours. The syllabus reads: "Under the decision of the Supreme Court of the United States in *Adair v. United States*, 208 U. S. 161 [28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764], which this court must follow and apply, it is held that a criminal complaint based on section 5097, R. L. 1905, which merely alleges that the employer required the employé to enter into a verbal agreement not to remain a member of a labor organization as a condition of retaining his employment, does not state a criminal offense." The relator was charged and had been convicted of requiring an employé of a railroad company, as a condition of remaining in such employ, to enter into a verb-

al agreement not to remain a member of a certain labor organization. He was convicted and sentenced to jail in the custody of the sheriff. The district court in a habeas corpus proceeding released him from custody. The case in the Supreme Court was on the appeal of the sheriff from that judgment.

It will be observed that Minnesota decision is based upon the *Adair Case*. In the latter case the accused was not convicted of requiring the employé to make an agreement not to become or remain a member of a labor organization, but was convicted for discharging the employé because of his membership in a labor organization. After discussing the case generally, the opinion (*Adair v. U. S.*, 208 U. S. 161, at page 171, 28 Sup. Ct. 277, at page 279 [52 L. Ed. 436, 13 Ann. Cas. 764]) says: "It thus appears that the criminal offense charged in the count of the indictment upon which the defendant was convicted was, in substance and effect, that being an agent of a railroad company engaged in interstate commerce and subject to the provisions of the above act of June 1, 1898 [30 Stat. 424, c. 370 (U. S. Comp. St. 1901, p. 3205)], he discharged one Coppage from its service because of his membership in a labor organization; no other ground for such discharge being alleged." In the next paragraph of the opinion the court formulated the question presented as follows: "May Congress make it a criminal offense against the United States—as by the tenth section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employé from service simply because of his membership in a labor organization?" By the syllabus it also appears that the provision in section 10 of the act, making it a crime for an employer to discharge an employé for the reason that the employé is a member of a labor organization, was the only provision of the act which was held unconstitutional. We think the *Adair Case* did not support the Minnesota decision and has no application to the case at bar.

It is a matter of common knowledge, of which Legislatures and courts should take cognizance, that many individual laborers are unable to cope on an equal footing with wealthy individual or corporate employers as to the terms of employment; also, that both employers and employés are in fact separately associated in organizations for the purpose of advancing their respective, and, in certain respects conflicting, interests. It goes without saying that the individual employé cannot coerce his employer from remaining a member of his association, and that the individual employer may so coerce his employé unless restrained therefrom by law. If no restraining law is held valid by the courts, we then have this situation: The employers' association prescribes to its members conditions which they, perhaps under

penalty, must impose upon their several employes. The individual employé is, in the supposed case, pitted not only against his employer in contracting the conditions of employment, but also against the aggregation of associated employers. That such a condition, if real, tends to reduce employes to mere serfdom, cannot be questioned. The public cannot be said to be uninterested. The Legislature stands in the place of the public as its representative, and, if the Legislature is not debarred therefrom by constitutional limitations, it devolves upon it to determine whether any restrictions are necessary, and, if so, what the restrictions shall be. The courts should enforce the acts of the Legislature unless they are repugnant to the Constitution of the nation or state. If experience and changed conditions demonstrate that the constitutional limitations work or permit injustice, there is still a remedy; but it is not in the courts.

[1] It is said that an employer has the right to prescribe such conditions of employment as he may choose and the employé may accept or reject them. This, if true, does not dispose of this case. Here the employer required the employé to make a contract pledging his honor not to do an act, which he had a legal right to do, which did not necessarily affect his duty to his employer, and which the Legislature by the act in question, in effect, said it is against public policy and unlawful to coerce an employé to do.

The gravamen of the offense charged in this action is the attempt to coerce, require, demand, or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association as a condition of said person or persons securing employment or continuing in the employment of the individual, firm, or corporation making the demand. The force of the statute is to make it illegal to compel any employé to make a written or oral agreement which presumably he may not wish to make. None of the other statutes except the statute of Minnesota, the validity of which has been adjudicated, is like this.

In *Brick Co. v. Perry*, 69 Kan. 297, 76 Pac. 848, it was held that a statute which makes it unlawful to discharge an employé because he belongs to a labor organization is void for the reason that it invades the right of the employer to terminate a contract. It is held in *Railway Co. v. Brown*, 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 133 Am. St. Rep. 213, 18 Ann. Cas. 346, that an employer has a right to discharge at any time for any reason or for no reason, being responsible in damages for violating a contract as to the time of employment. This is the general doctrine, we believe, without dissention. Conversely, it is the right of the employé to quit his employment

at any time for any reason or without any reason, being likewise responsible in damages if he violates his contract with the employer.

In *State v. Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443, it is held that "a right to insist that employes shall withdraw from or refrain from joining any trade union or labor union as a condition of employment or continued employment is within the constitutional rights of an employer," and that a statute making such acts criminal is in violation of the Constitution of the United States.

In *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176, it is held that "a statute making it unlawful to prevent, or attempt to prevent, an employé from joining any lawful labor organization, or to discharge an employé because of his connection with such an organization, and providing a penalty therefor, * * * is void, since the right to terminate a contract, subject to the liability to respond in a civil action for an unwarranted termination, is within the protection of the provisions of the state and federal Constitutions, which guarantee that no person shall be deprived of life, liberty, or property without due process of law." This and the *Julow Case* were the pioneer decisions on the question involved, namely, the construction of statutes relating to labor organizations. They have been frequently quoted and followed. The statutes are held unconstitutional for the reason that they deprive the employer of the right to contract or to terminate a contract. In a sense, the questions therein decided are the converse of this case. Our statute denounces as crime the requiring or coercing of an employé to make a written or verbal contract, as a condition of employment or continuing employment, that he will not join a labor organization.

The freedom of the employes to contract, or to terminate a contract, is as sacred under the Constitutions of the state and nation as is the freedom of the employer to contract or to terminate a contract. Labor organizations are generally recognized as beneficent to both the members thereof and to the public. The members are in the meetings taught to greater efficiency in their vocations. They are also bound to assist the sick, infirm, and unfortunate among the members, and in many other respects are not only not inimical to the best interests of society, but are helpful and beneficial. The Legislature, in passing the act in question, probably also took into consideration a fact of general knowledge that employes, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making a contract of purchase thereof.

To many the demands for housing, food, and clothing for their families and the edu-

cation of their children brook no interruption of wages to the bread-winner. Necessity may compel the acceptance of unreasonable and unjust demands. The state is interested in healthful conditions for its wage-earners and in the moral and intellectual development of their children; also, that none should become dependent upon the state for support. Employers, so far as they may be considered a class of society, ought to be, and usually are, interested in all that tends to better the conditions of their employes. To such, as to other good citizens, the condemnation of just criminal laws has no terror, but are recognized as shields and safeguards. The employer, and not the employe, is the master of the business to be carried on, and it follows that he has the right to impose such terms of employment as within reason and justice seem good to him. The employe must accept the conditions or refuse the employment. The employer has no right by virtue of these relations to dominate the life nor to interfere with the liberty of the employe in matters that do not lessen or deteriorate the service. For instance, where the employer may rightfully discharge for drunkenness, he has no inherent right to dictate the church communion of the employe. Our statute implies that labor unions are lawful and not inimical to the rights of employers, although no qualifying word or words are used in that connection. If so, liberty of lawful action being an inviolable right, the Legislature was within the exercise of its proper power in denouncing as criminal any attempt to coerce an employe, under the resistless pressure of necessity, to bargain away his liberty.

No right of the employer to contract is taken away or interfered with by the act in question. Practically, the liberty of the employe to contract or to refuse to contract not to join a labor union is of little or no commercial value to him; but this is also true of many cherished personal liberties. The employer may discharge an employe for the reason that the employe belongs to a labor union, or for the reason that he belongs to a particular church, or to any church, or for any reason, or from mere whim without assigning any reason, and the employe is equally free to quit his employment. Yet an employer has no constitutional or inherent right to coerce or compel his employe to make any contract or agreement, written or verbal, which he does not wish to make, whatever may be the condition or purpose.

[2] The state has the right to protect the freedom and independence of employes from any encroachment thereon and make such encroachment a criminal offense whenever in the judgment of the Legislature such encroachment constitutes a wrong upon the public generally, as when one makes an assault upon another it is a crime against the state.

The judgment is affirmed.

JOHNSTON, C. J., and BIRCH, MASON, and BENSON, JJ., concur.

PORTER, J. (dissenting). The law obviously was not passed because any person seriously believed its enforcement would result in real benefit to the laboring men or to labor unions. It is like the old soldier's preference law, and similar enactments, "that keep the word of promise to our ear, and break it to our hope." After reading the majority opinion, members of labor unions may rest for a time under the delusion that the Legislature, in the exercise of the police power, has reached out its strong arm to shield the laboring man from the attempts of his employer to deprive him of the right to become and continue a member of labor unions, and that the construction placed upon the act by the court has made the legislation effective to accomplish the purpose; but a perusal of former decisions of this court, in *Brick Co. v. Perry*, 69 Kan. 297, 76 Pac. 848, and *Railway Co. v. Brown*, 80 Kan. 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, 183 Am. St. Rep. 213, 18 Ann. Cas. 346, will cause the delusion to disappear.

It was held in the *Brick Co. Case* that: "A statute which makes it unlawful to discharge an employe because he belongs to a lawful labor organization and provides for the recovery of damages for such discharge, is void. The right to terminate a contract is within the protection of the state and federal Constitutions, which guarantee to every citizen the protection of life, liberty, and property." (Syl.)

In *Railway Co. v. Brown*, supra (1909), this court held that an employer has a right to discharge an employe at any time for any reason or for no reason. Those decisions are cited with approval in the majority opinion without serious attempt to distinguish the principle upon which they were decided from that involved in this case. Nor is there any substantial ground upon which to rest a distinction. If it is not within the power of the Legislature to make it a criminal offense for an employer to discharge an employe because the latter belongs to a lawful labor organization, it is equally beyond the power of the Legislature to make it a criminal offense for him to notify the employe of his intention to discharge him for that reason, and to inform him that he will be retained if he ceases to be a member of such organization. The employer may lawfully discharge him for being a member and inform him of the reason. The employe may, by renouncing his membership in the organization, at once be re-employed by the same person; so that under the former decisions the employer is permitted lawfully to accomplish indirectly the same thing that the present statute declares to be a crime.

It was said by the late Justice Harlan, in *Adair v. United States*, 208 U. S. 161, 172, 28 Sup. Ct. 277, 279 (52 L. Ed. 436, 13 Ann.

Cas. 764): "It was the right of the defendant (the employer) to prescribe the terms upon which the services of Coppage (the employé) would be accepted, and it was the right of Coppage to become or not, as he chose, an employé of the railroad company upon the terms it offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.' With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress.'"

In the opinion in the Perry Case, supra, this court quotes from a decision of the Illinois Supreme Court in a case involving substantially the same kind of a statute. The Illinois court said: "The Legislature cannot prevent persons, who are sui juris, from laboring, or from making such contracts as they may see fit to make relative to their own lawful labor, nor has it any power by penal laws to prevent any person, with or without cause, from refusing to employ another or to terminate a contract with him, subject only to the liability to respond in a civil action for an unwarranted refusal to do that which has been agreed upon. Hence we are of the opinion that this act contravenes those provisions of the state and federal Constitutions, which guarantee that no person shall be deprived of life, liberty, or property without due process of law." *Gillespie v. People*, 183 Ill. 176, 185, 58 N. E. 1007, 1010 (52 L. R. A. 283, 80 Am. St. Rep. 176).

The opinion of this court in the Perry Case approved the doctrine declared by the Supreme Court of Missouri in *State v. Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443, which was a criminal proceeding, and in which a statute was held to be void because it sought to deprive, without due process of law, the employer of the right to make and terminate contracts. The Missouri statute made it a criminal offense for an employer to enter into any contract or agreement with any employé for the latter to withdraw from any labor or other lawful organization.

I confess my inability to appreciate the force of the supposed logic by which the statute involved in the present action is held to differ substantially from the Missouri statute. In *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073, 7 L. R. A. (N. S.) 282, 113 Am. St. Rep. 902, 7 Ann. Cas. 118, a criminal proceeding was based upon a New York statute which read as follows: "Any person or persons, employer or employers of labor, and any person or persons of any corporation or corporations on behalf of such corporation

or corporations, who shall hereafter coerce or compel any person or persons, employé or employes, laborer or mechanic, to enter into an agreement, either written or verbal from such person, persons, employé, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person or persons securing employment, or continuing in the employment of such person or persons, employer or employers, corporation or corporations, shall be deemed guilty of a misdemeanor." *People v. Marcus*, page 259 of 185 N. Y., page 1073 of 77 N. E. (7 L. R. A. (N. S.) 282, 113 Am. St. Rep. 902, 7 Ann. Cas. 118). The New York Court of Appeals held the statute void because in conflict with the state and federal Constitutions. A similar statute enacted in Nevada was declared unconstitutional upon the same grounds. *Goldfield Consol. Mines Co. v. Goldfield M. U. No. 220 (C. C.)* 159 Fed. 500.

A Wisconsin statute prohibited an employer from discharging an employé because he was a member of any labor organization. The Supreme Court of Wisconsin held the statute void as an unwarranted infringement of the constitutional right of liberty in making private contracts. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 545, 90 N. W. 1008, 1104 (58 L. R. A. 748, 91 Am. St. Rep. 934). The court in the opinion used this language: "On this subject Mr. Tiedeman (Cont. of Pers. & Prop. p. 332) declares the opinion that a state statute which made it unlawful for an employer to refuse to employ union men, or to compel an employé to withdraw from a trade union on pain of dismissal, would be clearly unconstitutional."

People v. Marcus, *State v. Julow*, *Gillespie v. People*, and *State ex rel. Zillmer v. Kreutzberg*, supra, are cited with approval by Justice Harlan in *Adair v. United States*, supra. In the majority opinion comment is made on the fact that the court in the *Adair* Case considered only a section of the act of Congress which made it an offense for a carrier engaged in interstate commerce to discharge an employé simply because of his membership in a labor organization, and that the court declined to consider the precise question involved here. There being no conviction under the section making it an offense to require the employé to agree not to become or remain a member of such organization, the court, of course, did not have before it the question as to the validity of that section, and any opinion expressed upon that question would have been outside the issues and obiter. I think it is clear that, if it is not within the power of Congress to make it an offense for an employer to discharge the employé for such a reason, it would be equally beyond its power to make it an offense to notify him of the intention to do so unless he agreed to discontinue such membership.

The mere fact that in the present statute the Legislature has seen fit to define such

conduct as coercion will not avoid the objection that the law is beyond the scope of the proper exercise of the police power. The state cannot under the mere guise of police regulation, where it is apparent that its real object is not to protect the community or promote the general well-being, deprive an individual of his liberty. *Mugler v. Kansas*, 123 U. S. 623, 669, 8 Sup. Ct. 273, 31 L. Ed. 295.

In *Brick Co. v. Perry*, supra, Justice Greene, speaking for this court, said: "Before approaching a discussion of the question, let us exclude any notion that the act in question is a police regulation. It will be observed that it does not affect the public welfare, health, safety, or morals of the community, or prevent the commission of any offense or other manifest evil. Where the object of the act cannot be traced to the accomplishment of some one of these purposes, it is not a police regulation. * * * The right to follow any lawful vocation and to make contracts is as completely within the protection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the Legislature without violating the letter and spirit of the Constitution. Every citizen is protected in his right to work where and for whom he will. He may select not only his employer but also his associates. He is at liberty to refuse to continue to serve one who has in his employ a person, or an association of persons, objectionable to him. In this respect the rights of the employer and employé are equal. Any act of the Legislature that would undertake to impose on an employer the obligation of keeping in his service one whom, for any reason, he should not desire, would be a denial of his constitutional right to make and terminate contracts and to acquire and hold property. Equally so would be an act the provisions of which should be intended to require one to remain in the service of one whom he should not desire to serve." 69 Kan. 299, 300, 76 Pac. 848.

In the case of *State v. Julow*, supra, the Missouri court said: "Nor can the statute escape censure by assuming the label of a police regulation. It has none of the elements or attributes which pertain to such a regulation, for it does not in terms or by implication promote, or tend to promote, the public health, welfare, comfort, or safety; and, if it did, the state would not be allowed, under the guise and pretense of police regulation, to encroach or trample upon any of the just rights of the citizen, which the Constitution intended to secure against diminution or abridgement. In re *Jacobs*, 98 N. Y. 98 [50 Am. Rep. 636], and cases cited."

129 Mo. 177, 31 S. W. 783, 29 L. R. A. 257, 50 Am. St. Rep. 443.

The Minnesota case cited in the majority opinion (*State v. Daniels*) was decided in June, 1912, and the statute there construed is substantially the same statute involved in this case. It reads: "It shall be unlawful for any person, company, or corporation, or any agent, officer or employé thereof, to coerce, require, or influence any person to enter into any agreement, written or verbal, not to join, become, or remain a member of any lawful labor organization or association, as a condition of securing or retaining employment with such person, firm, or corporation." R. L. 1905, § 5097. In the opinion the court accepts the ruling of the United States Supreme Court in the *Adair Case* as declaring it the law of the land "that an employer may dismiss from his service any employé he sees fit for no cause or for any cause assigned or unassigned, arbitrary, capricious, or otherwise," and that "discriminating against members belonging to labor organizations, by discharging them from employment and retaining those employes only who do not belong or are willing to quit such organizations, cannot be an offense, because the Constitution of the United States protects the employer in his liberty to so discriminate."

I concur in all that is said in the majority opinion respecting the right of laboring men to form organizations for the purpose of advancing their mutual interests and of protecting their rights as against unjust conditions of employment, which are sometimes imposed by wealthy individual and more frequently by corporate employers; but I cannot agree that, because labor organizations are lawful, therefore the liberty of an employer of labor to insist that no person who remains in his service shall continue to belong to such organizations is subject to the control of the Legislature. In the majority opinion it is said that an employer "has no inherent right to dictate the church communion of the employé." On the contrary, I think he has the inherent right to say to an employé that unless the latter becomes a Methodist, a Presbyterian, a Christian Scientist, or adopt whatever religious faith the employer professes, he will be discharged. And so has the employé the same right to refuse to enter or remain in the service unless the employer shall adopt his religious views. In *Nat. Protective Ass'n v. Cummings*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648, it has been held within the constitutional rights of employes to exact from an employer, as a condition precedent to entering into his employment, an agreement that he will not employ nonunion laborers. To the same effect is *Jacobs v. Cohen*, 188 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280. What would be said

of an attempt by the Legislature to make it a crime for members of labor organizations to coerce an employer into an agreement to discharge all nonunion workmen as a condition precedent to remaining in his service? That would clearly be an unwarranted interference with the liberty of the members of such organizations to fix the terms upon which they would agree to continue to work and would deprive them of a right guaranteed by the Constitution of the United States as well as by the state Constitution. And yet such a statute would be simply the reverse of the one now under consideration, and would be no more repugnant to the constitutional provisions against depriving persons of liberty of contract.

For the foregoing reasons, I dissent from the majority opinion.

WEST, J. I dissent from the majority opinion.

STATE v. ACKENHAUSEN.

(Supreme Court of Kansas. July 6, 1912.)

Appeal from District Court, Leavenworth County.

Alfred Ackenhansen was indicted for crime, and brings error. From a judgment sustaining a motion to quash, the State appeals. Reversed and remanded.

John S. Dawson, Atty. Gen., and Lee Bond and Malcolm N. McNaughton, both of Leavenworth, for the State. A. E. Dempsey and F. P. Fitzwilliams, both of Leavenworth, and James G. Sheppard, of Ft. Scott, for appellee.

PER CURIAM. This case is submitted with State v. Coppage, 125 Pac. 8, just decided. On the trial the court sustained a motion to quash the information on the ground that the statute, making the acts charged unlawful and criminal, is void. On the authority of the Coppage Case the order of the court and judgment dismissing the action is reversed, and the case is remanded, with instructions to set aside the order and judgment and proceed to trial.

CITY OF OTTAWA v. BARNES.

(Supreme Court of Kansas. July 6, 1912.)

Appeal from District Court, Franklin County. G. E. Barnes was charged with violation of a city ordinance. On verdict of guilty the court sustained a motion of an arrest, and the City of Ottawa appealed. Dismissed.

J. S. Dawson, Atty. Gen., and F. A. Waddle and Ralph E. Page, both of Ottawa, for appellant. W. W. Whitaker, of Ottawa, and S. D. Bishop, of Lawrence, for appellee.

PER CURIAM. The defendant was charged with the violation of a city ordinance requiring plumbers to obtain a permit before making sewer connections and doing repair work. The jury returned a verdict of guilty. The court sustained a motion in arrest of judgment on the ground that the ordinance was void. The city has appealed.

There are two reasons which prevent an inquiry into the merits: First, the notice of ap-

peal was served upon defendant's attorney instead of upon the defendant, as required by section 285 of the Criminal Code (Gen. St. 1909, § 6859). Second, it is conceded that since the rendition of the judgment the ordinance has been amended to avoid the objections thereto raised by the decision of the trial court. The validity of the ordinance has therefore become a moot question.

Appeal dismissed.

(87 Kan. 671)

HUTCHINSON SANITARY PLUMBING & HEATING CO. v. LOCAL UNION NO. 363, JOURNEYMEN PLUMBERS, et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 781*)—DISMISSAL—MOOT QUESTION.

Plaintiff sued to enjoin defendants from entering premises where plaintiff's employes were at work completing certain contracts for plumbing and steam fitting, and by threats and force inducing them to quit work. On a motion to vacate the temporary injunction, the court vacated the order as to all except two of the defendants. All the defendants appealed. Before the controversy reached this court, the plaintiff completed the contracts referred to in the petition. *Held*, that the question of the right of members of a labor union to use lawful means to induce nonmembers to quit work for employers with whom the union may be at variance is not involved in the case, and that, in view of the completion of plaintiff's contracts and the ending of any controversy between the parties, there is nothing left for the court to decide, and the appeal is therefore dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.*]

Appeal from District Court, Reno County.

Action by the Hutchinson Sanitary Plumbing & Heating Company against the Local Union No. 363, Journeymen Plumbers, and others. Judgment for plaintiff, and defendants appeal. Dismissed.

George A. Neeley, of Hutchinson, for appellants. Fairchild & Lewis, of Hutchinson, for appellee.

PORTER, J. This is an appeal from an order modifying a temporary injunction. Plaintiff brought suit to restrain Local Union No. 363, Journeymen Plumbers, and 11 individual members of the union, from entering upon certain premises in the city of Hutchinson where plaintiff had contracts for doing plumbing and steam fitting, and from interfering with its employes and using threats or force to induce them to quit work. The district judge being absent from the county when the suit was filed, a temporary injunction was granted by the probate judge. Upon a hearing of a motion to vacate the injunction, the district court made an order vacating the injunction as to all the appellants except Albert Morrow and Willard Morrow. From this order all the defendants appeal. The hearing to vacate the temporary injunction was upon affidavits and oral testimony.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The appellants have presented a number of propositions, which, it is contended, show such error as to require a reversal. These propositions are: First, that it was error to enjoin them from entering upon premises in which plaintiff had no right or title; second, that it was error to enjoin a naked trespass; third, that it was error to enjoin from interfering with appellee's agents, employes, or tools; fourth, that it was error to suspend the injunction as to certain of the defendants. As to the first two contentions, the injunction did not enjoin a naked trespass, nor did it enjoin the mere entering of premises owned by persons other than plaintiff. The whole order must be read together, and thus read it enjoined defendants from entering upon certain premises and by means of threats and force inducing plaintiff's employes to quit work.

As to the fourth contention, we are unable to discover how any of the defendants except the two Morrows can complain of the order. All the defendants moved to vacate the injunction. The court granted the motion except as to the only defendants against whom there was evidence to sustain the averments of the petition. Each of the defendants filed an affidavit denying that he had committed any of the acts charged in the petition. The Morrow brothers, in their affidavits, admitted entering certain of the premises, and that one of the brothers assaulted an employe of the plaintiffs after a discussion of his right to continue work. It is true, both of the brothers denied that the assault was made for the purpose of intimidating the employe, and alleged that it resulted from a private quarrel and that the assault would not have been committed except for the reason that the employe had disputed the word of Willard Morrow, who thereupon struck him. There was a conflict in the testimony as to the circumstances connected with the assault. The injured employe was a witness and contradicted the affidavits of the Morrow brothers. The court heard the oral testimony and obviously discredited the affidavits. As to the third contention, numerous authorities have been cited in respect of the right of members of labor unions to picket premises where workmen are employed who are not members of the union, and to persuade and induce non-members to quit work for employers with whom the union is at variance; and the case has been argued as though these questions were in some manner involved in the order continuing in force the temporary injunction as to the two defendants. We fail to see how any of these questions can be brought into the case. The order purported only to restrain the defendants from using unlawful means (that is, using threats and force) to induce plaintiff's employes to quit

work. The right of union labor men to use peaceful methods to bring about such results was never involved in the suit. For another reason, however, it becomes wholly unnecessary to consider the contentions raised by the appeal. It appears that all of plaintiff's contracts for plumbing and steam fitting which are referred to in the petition were completed before the appeal was taken. The relief sought was in its nature merely temporary. The occasion for restraining the Morrow brothers from the unlawful acts complained of ceased before the controversy reached this court. Every question raised by the appeal is necessarily moot. The court would perform a useless function, therefore, to enter upon a discussion of the propositions argued or to attempt to decide questions of such serious importance in a case where no decision it might render could affect the rights of the parties, and no order it might make could be enforced. *City of Kansas City v. State*, 66 Kan. 779, 71 Pac. 1127; *Knight v. Hirbaur*, 64 Kan. 563, 67 Pac. 1104; *Crouse v. Nixon*, 65 Kan. 843, 70 Pac. 885; *City of Ottawa v. Barnes*, 125 Pac. 14.

Appeal dismissed. All the Justices concurring.

(87 Kan. 526)

O'LEARY v. METROPOLITAN ST. RY. CO.
(Supreme Court of Kansas. July 6, 1912.)

On petition for rehearing. Denied.
For former opinion, see 123 Pac. 746.

PER CURIAM. The city had power to authorize the street changes involved in the action. Had it done so in the regular way, the plaintiff would have been concluded, because she is obliged to submit to the city's lawful authority over the subject. Although the conduct of the city was irregular, the jury may well find facts, if permitted to do so, which preclude the city from disputing authorization. In that event the plaintiff will be bound to the same extent as if the defendant's plans and specifications were incorporated in the ordinance. Nothing said here, and nothing said in the original opinion, is to be taken as preventing recovery for changing the grade of the street in front of plaintiff's property. The purpose of the original opinion was to establish the right of the defendant to have the case presented to the jury on the theory that the work done was in legal effect authorized by the city. Under this theory the plaintiff may recover for the change in grade, because the city did not provide for an assessment of damages in the statutory way.

These observations are made in response to a petition for a rehearing, which is denied.

(87 Kan. 708)

CITY OF McPHERSON v. HANSON.
(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—EVIDENCE.

On an appeal from a police court, the transcript contained a copy of the complaint except the verification. After the jury had been sworn, the defendant objected to any evidence because there was no complaint on file. The court then allowed the original complaint to be filed, overruled the objection, and proceeded to trial. No motion for delay or other application was made by the defendant. It is held that the substantial rights of the defendant were not prejudiced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

2. MUNICIPAL CORPORATIONS (§ 958*) — STREETS—ROAD TAX—STATUTORY PROVISIONS.

The statutes authorized the collection of an annual road tax of \$3 from a class of persons in cities of the second class. An ordinance was enacted in harmony with these statutes. Afterwards, and before the tax became delinquent, the statutes were changed by a new enactment containing substantially the same provisions, but requiring 30 days' notice to the taxpayer before a prosecution could be maintained. It is held that the ordinance remained in force notwithstanding the change in statutes, and, the 30 days' notice having been given, a conviction should be sustained.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2023-2037; Dec. Dig. § 958.*]

West, J., dissenting.

Appeal from District Court, McPherson County.

S. B. Hanson was convicted of violating an ordinance of the city of McPherson, and appeals. Affirmed.

W. H. Carpenter, of Marion, for appellant. Jno. S. Dawson, Atty. Gen., P. J. Galle, and Nels Pearson, both of McPherson, for appellee.

BENSON, J. This is an appeal from a conviction under a city ordinance for refusal to pay a road tax in a city of the second class.

[1] The prosecution originated in the police court. On appeal a jury was impaneled and sworn in the district court without objection, but the appellant then objected to the introduction of any evidence upon the grounds that there was no complaint on file, and that the so-called complaint was based upon an ordinance which the city had no authority to pass. It appeared that a purported copy of the complaint contained in the transcript from the police court did not contain the verification. The court then allowed the original complaint to be filed and overruled the objection. No motion for a delay or other application was made. If there was any error in the ruling, it did not affect the substantial rights of the appellant.

He was not tried upon the copy, but on the original complaint. If he desired to object to the complaint, he should have done so before the jury was sworn. *State v. Otey*, 7 Kan. 69; *State v. Adams*, 20 Kan. 311. An objection made afterwards to the introduction of testimony was not a proper method of testing the sufficiency of the complaint. *Ft. Scott v. Dunkerton*, 78 Kan. 189, 96 Pac. 50. The complaint charges that: "S. B. Hanson did then and there unlawfully, willfully, refuse and fail to pay a road tax of \$3 for the year of 1911 to the city of McPherson, contrary to an ordinance of said city, and against the peace and dignity of said city." Without deciding whether a motion to quash, if presented, should have been sustained, it is sufficient to say that this court long since recognized the practice prevailing generally in police courts that brief and somewhat informal charges are permitted in police courts. It was said in *City of Kingman v. Berry*, 40 Kan. 625, 20 Pac. 527: "Liberal rules should be applied to complaints filed in police courts for the violation of city ordinances, and the same strictness of pleadings is not required in such cases as in prosecutions for public offenses in the name of the state by information or indictment." It would be contrary to common observation to say that this complaint did not sufficiently inform the appellant of the nature of the charge made against him. To hold that prosecutions in police courts should be conducted with a nice observance of the rules of pleading usually prevailing in trials upon indictments or information would add useless expense and unnecessarily prolong such trials.

[2] The ordinance became effective May 8, 1911. At that time chapter 198 of the Laws of 1909 and chapter 251 of the Laws of 1911 providing for the collection of an annual tax from persons of a specified class were in force. Before the last-named statute was passed, this court held that the provisions of the act of 1909 did not give authority to cities of this class to require road work from its citizens; that power having been taken away by a statute passed in 1907, and not restored by the act of 1909. *Heath v. Iola*, 81 Kan. 177, 105 Pac. 32. Chapter 251 of the Laws of 1911 was afterwards enacted conferring such power by an amendment of chapter 295 of the Laws of 1907. From an examination of the various statutory provisions referred to it is found that, when this ordinance was adopted, male persons between 21 and 50 years of age not a public charge were liable each year to pay \$3 to the overseer or street commissioner of the city to be expended upon roads, unless the proper authorities had recommended that work be allowed to be furnished in lieu of money. The ordinance provides that persons within the ages named in the stat-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ute who have resided 30 days in the state and 10 days in the city not a public charge shall be liable to pay the sum of \$3 to the street commissioner to be expended upon the streets, unless the commissioner shall at a regular meeting of the council be authorized to accept labor in lieu of money. Provision is made for prosecution if the payment is not made.

The ordinance appears to be within the authority of the statutes before referred to, and in harmony with their provisions, but it is said that they were repealed by a later statute. At the legislative session of 1911 another act was passed which took effect May 29, 1911, after the ordinance was passed, but before the alleged offense was committed. Chapter 248, Laws of 1911. This later act is comprehensive, containing the provisions of many former acts. Section 36 is a re-enactment in substance and effect of the former existing provisions relative to such road taxes, with the addition of a clause requiring a 30-day notice of the tax before commencing a prosecution for failure to pay. Section 15 of the new act is a like re-enactment of chapter 251 of the same session before referred to. This act in terms repeals the former statutes (except chapter 251) to which reference has been made. The provisions of an ordinance adopted in pursuance of a statute afterwards repealed, so far as they are in harmony with the new act, may be enforced. *Franklin v. Westfall*, 27 Kan. 614. "Where a statute which does not in express terms annul a right or power given to a corporation by a former act, but only confers the same rights and powers upon it under a new name, and with additional powers, the latter act does not repeal the former." *McQuillin*, Mun. Ordinances, § 221; *State v. Gumber*, 37 Wis. 298; *In re Hall*, 10 Neb. 537, 7 N. W. 287. While the acts of 1909 and chapter 251 of the Laws of 1911 were repealed, they are re-enacted. "The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment." Gen. Stat. § 9037 (First).

Referring to the rule of continuance by re-enactment, it was said in *Junction City v. Webb*, 44 Kan. 71, 23 Pac. 1073: "It has even been applied to criminal statutes, where a new law expressly repealed the one re-enacted; the re-enactment being construed to continue in force the uninterrupted operation of the old law." When the tax became delinquent, and when the prosecution was commenced, a statute was in force giving the same authority to the city conferred by the statutes in effect when the ordinance was adopted. In this situation the ordinance remained in effect. It is true that neither the former law nor the ordinance required in terms a preliminary notice, yet

it is probable that a reasonable notice would have been required by interpretation before a prosecution could have been sustained. The reasons for such an interpretation and policy upon which it is based are stated in *Gilmore, County Clerk, v. Hentig*, 33 Kan. 156, 5 Pac. 781, and *Railroad Co. v. Abilene*, 78 Kan. 820, 98 Pac. 224. This policy was later established in the last enactment, and the time to be given in the notice was definitely fixed. When the offense was committed and the case was tried, this statute was in effect, and the court gave the appellant the benefit of its provisions by instructing the jury that proof of such notice was necessary. It will not be claimed that the appellant had a vested right to be prosecuted without a notice for the reason that none was required by the express terms of the statute or the ordinance. The notice, even if not required, was not injurious.

The rights of the appellant were fully protected. He was subject to the tax, and, after due notice, refused to pay it. This default subjected him to prosecution. No error is found in the proceedings, and the judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, SMITH, and PORTER, JJ., concur. WEST, J., dissents.

(37 Kan. 668)

WASHBON et al. v. LINSOTT STATE BANK.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 130*)—FUNCTIONS AND DEALINGS—MISAPPROPRIATION OF TRUST FUNDS.

Where a bank knowingly participates with a depositor in a misappropriation of trust funds and reaps the fruit of the breach of trust, it becomes liable to the beneficiary for whatever loss the latter sustains.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 319-325, 327; Dec. Dig. § 130.*]

2. BANKS AND BANKING (§ 150*)—FUNCTIONS AND DEALINGS—MISAPPROPRIATIONS OF TRUST FUNDS.

The treasurer of the Grand Lodge of Masons deposited the funds of the order in defendant bank. With knowledge that he was a defaulter, the bank, for the purpose of aiding him in concealing his shortage, permitted him to overdraw his account, and issued to him a certificate to be exhibited to the Grand Lodge showing that he had on deposit the amount of the certificate; the bank taking as collateral security for the overdraft notes representing loans made by him as treasurer to various individuals. After his re-election as treasurer, he returned the certificate to the bank, it was credited to his account, the overdraft was taken up, and the collateral returned to him. Upon his death the Grand Lodge for the first time learned that he was a defaulter and sued the bank for the amount of the overdraft. Held, that the overdraft was a loan to the treasurer individually, that it was paid when the account was credited with the proceeds

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 125 P.—2

thereof, and that the bank with knowledge of the trust character of the fund could not accept any part thereof in payment of the personal debt of the treasurer and is liable to the Grand Lodge for the amount of the overdraft.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 455-464½; Dec. Dig. § 150.*]

3. ACTION (§ 27*)—NATURE AND FORM—CONTRACT OR TORT.

An action by the Grand Lodge against the bank to recover the amount of such overdraft, wherein the petition states the facts in ordinary and concise language, is *held* to be an action upon an implied contract to refund the money and not in tort nor for relief on the ground of fraud.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.*]

4. LIMITATION OF ACTIONS (§ 103*)—COMPUTATION OF PERIOD—BREACH OF TRUST—DISCOVERY.

Upon the facts stated the statute of limitations would not begin to run in favor of the bank against an action to recover the money until the beneficiary discovered the breach of trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506-510; Dec. Dig. § 103.*]

Appeal from District Court, Jackson County.

Action by Fred Washbon, Grand Master of the Most Worshipful Grand Lodge of Ancient, Free and Accepted Masons of Kansas, and others, against the Linscott State Bank. From a judgment for plaintiffs, defendant appeals. Affirmed.

This suit was brought by the officers of the Most Worshipful Grand Lodge of Ancient, Free and Accepted Masons of Kansas, hereinafter referred to as the Grand Lodge, against the Linscott State Bank, as the successor of the National Bank of Holton, to recover funds deposited in the bank by Albert Sarbach, Grand Treasurer of the lodge. The controversy is one of several arising out of Sarbach's defalcation as Grand Treasurer. Some of the legal propositions are the same as those involved in the recent case of *Washbon v. Hixon*, 124 Pac. 368. The plaintiffs recovered in the court below, and the bank appeals.

Albert Sarbach was first elected Grand Treasurer in 1903. He was annually re-elected until 1909, and was serving in that capacity at the time of his death, September 11, 1909. He deposited the funds of the Grand Lodge in and kept his account as Grand Treasurer with the National Bank of Holton, until the bank was changed to a state bank in 1909, after which he kept the account with the State Bank of Holton. George S. Linscott was cashier of the national bank and after the change was cashier of the state bank. The officers of the bank knew from a short time after he became treasurer that he was making a wrongful use of the lodge funds and that during a large portion of the time he was short in his accounts. In September, 1903,

he loaned \$4,000 of the funds to Linscott, cashier of the bank, and in 1905 made him another loan of \$10,000. Linscott gave Sarbach his individual notes for these loans, which were afterwards repaid with interest. At each annual meeting of the Grand Lodge it was necessary, as the officers of the bank well knew, for Sarbach to make his annual report as treasurer and produce the funds or evidence that he had the amount due from him as treasurer. In order to enable him to satisfy the officers of the Grand Lodge that the funds were intact, the bank aided him in concealing the shortages by issuing to him for temporary purposes certificates of deposit or certified checks for the amount he should have had on hand, without regard to the actual balance in his bank account. The bank extended credit to him for the deficit in his account, taking from him collateral security therefor. After his re-election as Grand Treasurer and upon his return from the annual meeting, the certificate of deposit or certified check would be indorsed by him officially and deposited in the bank, the collateral security would be returned to him, and the books of the bank would show no overdraft. In February, 1904, the certified checks issued to him amounted to \$30,440, which was the sum he should have had on hand, but was for \$7,734.96 more than he had in the bank. In February, 1905, the certificate of deposit which he presented to the Grand Lodge was for \$17,950.81 more than he actually had in the bank. In February, 1906, the bank gave him a certified check for the purpose of exhibiting to the Grand Lodge, which called for \$9,087.43 more than he actually had in the bank.

The foregoing transactions are not involved in this suit and have been mentioned merely for the purpose of showing the course of dealing between the bank and Sarbach. The controversy arises over two transactions. On February 16, 1907, the bank issued to Sarbach a certificate of deposit for \$29,185.97, which overdraw his account \$4,465.76. To secure this overdraft he deposited with the bank as collateral security a number of notes payable to him as Grand Treasurer executed by individuals to whom he had made loans. On February 23d, after his settlement with the Grand Lodge and his re-election, he deposited the certificate for \$29,185.97 in his account. The bank returned to him the collateral securities and paid to itself the overdraft out of the proceeds of the certificate. The trial court held that the \$4,465.76 overdraft was a loan made by the bank to Sarbach personally, that it constituted an individual debt, payment of which could not lawfully be made out of funds which the bank knew belonged to the Grand Lodge. There was another overdraft on January 2, 1908, of \$934.09, which was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

afterwards paid out of collections made by Sarbach as Grand Treasurer, which he deposited in his account, and the trial court likewise ruled that the bank, with knowledge of the trust character of the deposit, could not apply it in payment of Sarbach's individual debt. The judgment in plaintiff's favor was for the sums involved in these two transactions. The trial court made very complete findings of fact, which are too lengthy to be reproduced here. Among them are the following:

"(12) At the time of his death in September, 1909, Albert Sarbach was a defaulter in his account as Grand Treasurer to the amount of \$16,358.99. His account as Grand Treasurer with the State Bank of Holton was at that time overdrawn in the sum of \$2,707.48, and it had been overdrawn continuously from and after April 10, 1909. * * * On the evidence, I find that at the time of his death Albert Sarbach had misappropriated all of the funds of the Grand Lodge which he should have had on hand at that time, and that such misappropriation was made without the knowledge or consent of the plaintiffs or the other officers of said lodge, and they had no knowledge or notice thereof until after his death.

"(13) At the time the checks of Albert Sarbach, as Grand Treasurer, on the National Bank of Holton, were certified, and when the certificate of deposit of February 16, 1907, was issued, the officers of said bank knew that Albert Sarbach was Grand Treasurer of the Grand Lodge of Masons of Kansas, and knew that he had to make annual reports to said Lodge as such treasurer. When such checks were certified and certificates of deposit were issued, the officers of said bank also knew that such instruments were wanted by Sarbach for the purpose of showing that he had the amount of money, represented by each of said instruments, on deposit to his credit as Grand Treasurer at the time they were issued or certified, respectively.

"(14) The overdraft resulting from the certifying of such checks and the issuing of such certificates of deposit for amounts greater than Sarbach had at the time, to his credit, as Grand Treasurer, in said bank, were allowed to him as loans, he at the time turning over to said bank notes of solvent parties, payable to him as Grand Treasurer, which he held for money of said Grand Lodge which he had loaned to different persons, such notes being in amount at least equal to the particular overdraft for which they were given as security. When the certified checks and certificates of deposit were returned and credit for the amount given to Sarbach, as heretofore found, the notes which had been put up as security therefor were returned to Sarbach. The evidence does not show what disposition

was made of such notes after they were so returned to Sarbach.

"(15) The officers of said the National Bank of Holton knew that Albert Sarbach checked out moneys at different times, from his said account as Grand Treasurer, for the purpose of making loans thereof to various outside parties. The first loan of that kind was to George S. Linscott, then cashier of the National Bank of Holton, in September, 1903, for \$4,000, for which Linscott's note was taken, payable to Albert Sarbach, Grand Treasurer. Another loan of \$1,000 was made to George S. Linscott in March, 1904, and in March, 1905, a loan of \$10,000. These loans were repaid with interest, and the amounts credited in the Sarbach Grand Treasurer account with the bank. The evidence does not show any loans to third parties, either made or paid back after May 21, 1906. Sarbach never accounted to the lodge for any interest received on any such loans. This use of the Grand Lodge moneys was unauthorized by the Grand Lodge, and was without notice or knowledge on its part, or on the part of the officers having control of the Lodge funds. Several of said notes were from time to time sold by said Albert Sarbach, Grand Treasurer as aforesaid, to said National Bank of Holton for the face thereof with accrued interest thereon, and in each instance the amount so paid by said bank therefor was placed to the credit of said account of Albert Sarbach, Grand Treasurer, in said bank."

The trial court made the following conclusions of law:

"(1) The use which Albert Sarbach made of the funds of the Grand Lodge in loaning the same to third parties was wrongful and an unlawful misappropriation thereof.

"(2) The several overdrafts allowed by the National Bank in order to make up the amounts of the several certified checks and certificates of deposit which were given Sarbach for his annual accountings and the overdrafts of January 4, 1907, and January 2, 1908, were personal loans to the amount of such overdrafts for the payment of which the bank had no legal right to appropriate the funds of the Grand Lodge.

"(3) When Sarbach's check for \$13,286.74, certified in February, 1906, and the certificate of deposit, issued in February, 1907, were returned by him and the amounts credited to his account as Grand Treasurer, it was the same as the deposit of such amounts in bank bills, as funds of the Grand Lodge, and could not legally be applied to the payment of the overdraft loans made to Sarbach.

"(4) The bank is presumed to know, in the absence of a showing of special authority, that Sarbach, as Grand Treasurer, had no authority to make loans on account of the Grand Lodge, or to pay loans, which were

personal to himself, out of Grand Lodge moneys.

"(5) The National Bank of Holton, by reason of the payment, out of lodge funds, of the several overdrafts, of February 16, 1907, and January 2, 1908, amounting to \$5,399.85, became liable for the repayment thereof, with interest, to said Grand Lodge.

"(6) The Linscott State Bank, defendant herein, is the legal successor of the National Bank of Holton and is answerable in this case for such liabilities of the National Bank.

"(7) The plaintiff should have judgment for said sum of \$5,399.85 with interest on \$4,465.76 from February 23, 1907, and on \$834.09 (\$934.09) from January 9, 1908, to which conclusions of law and each thereof separately the defendant at the time excepted."

Thereupon the court rendered judgment against the defendants for \$6,760.82, with interest at 6 per cent. per annum, and costs of suit. The Grand Lodge having been reimbursed in full by a surety company, the suit is now being prosecuted in the name of the officers of the Grand Lodge for the benefit of the surety company.

Crane & Woodburn Bros., I. T. Price, and Chas. Hayden, all of Holton, for appellant. Garver & Garver, of Topeka, and M. A. Bender, of Holton, for appellees.

PORTER, J. (after stating the facts as above). [3] The appellant makes the claim that the suit is for the conversion of personal property and was barred by the two-year statute of limitations; and further that, if it be held to be an action for relief on the ground of fraud, it is not assignable, and therefore cannot be maintained by the surety company. But this is not an action in trover to recover the identical moneys converted by appellant to its own use. On the contrary, it is a suit upon an implied contract waiving the tort. When property of another has been converted, there is always an implication of an indebtedness, and the injured party may waive the tort and sue for the value of the property. *Douglas v. Loftus, Adm'x*, 85 Kan. 720, 725, 119 Pac. 74. The petition states the facts which, it is claimed, show the appellant's liability, and it is well settled that, if any doubt exists as to the nature of the action, the courts incline toward holding it an action in contract (*Delaney v. Implement Co.*, 79 Kan. 126, 129, 98 Pac. 781, and cases cited), and will sometimes do this for the declared purpose of avoiding the statute of limitations. *St. Louis, I. M. & S. R. Co. v. Sweet*, 63 Ark. 563, 40 S. W. 463, cited in the opinion in *Douglas v. Loftus, Adm'x*, 85 Kan. 727, 119 Pac. 74; *McCombs v. Guild, Church & Co.*, 9 Lea (Tenn.) 81; *John H. Alsbrook v. M. Hathaway, Ex'r*, 3 Sneed (Tenn.) 454. In

the last case it was held that debt would lie for the value of the chattels converted, "let the consequences as to the statute of limitations be what they may." 3 Sneed (Tenn.) 457.

[1] Of course, the participant in a breach of trust cannot, any more than can the unfaithful trustee himself, invoke the defense of the statute of limitations. *Duckett v. Mechanics' Bank*, 86 Md. 400, 411, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513, 522, and cases cited in note on page 523.

The case of *Guernsey v. Davis*, 67 Kan. 378, 73 Pac. 101, fully answers both of the foregoing contentions of appellant. It was there ruled in the syllabus:

"If an agent of a loan company violate his instructions and misappropriate money sent him for the purpose of closing a loan, the money may be recovered in an action as for money had and received.

"The statute of limitations does not begin to run against such an action until the principal has knowledge of the agent's wrong.

"One who actively participates in an agent's breach of trust, with full knowledge of the agent's duty, and thereby obtains possession of the principal's money, which he misappropriates, incurs the same liability to the principal as does the agent." (Syl. pars. 1, 2, and 3.)

[4] It was said in the opinion that "it was not necessary that the action be regarded as for relief on the ground of fraud," because the petition stated facts sufficient to constitute an action for money had and received. So in the present case the petition contains a statement in ordinary and concise language which would entitle the appellee to recover for money had and received. The statute of limitations applicable to actions for the conversion of personal property therefore furnished no defense. Until Sarbach's death the officers of the Grand Lodge had no knowledge of his embezzlement or of the fact that the bank had wrongfully appropriated its funds. The statute of limitations against a suit such as this would not begin to run until the principal has knowledge of the agent's wrong. *Guernsey v. Davis*, supra. And as held in the case last cited, it is not necessary to regard the suit as an action for relief on the ground of fraud. The surety company, having paid the debt owing by the bank to the Grand Lodge, is in equity subrogated to all the rights of the original plaintiff regardless of any formal assignment. We see no reason, however, why the cause of action, being for money had and received, was not assignable. *Stewart v. Balderston*, 10 Kan. 131.

[2] Upon the facts as stated, the learned judge of the court below rightly held that the bank loaned to Sarbach the amount of the overdraft, and that the certificate of deposit when issued by the bank became the

property of the Grand Lodge. If some other person had been elected treasurer and the certificate turned over to him by Sarbach, there could be no doubt as to the bank's liability to pay to Sarbach's successor or to the Grand Lodge the full amount of the certificate and that it would be obliged to look to Sarbach individually for payment of the overdraft. The fact that Sarbach was chosen to succeed himself did not alter the situation, nor did his re-election change the ownership of the certificate or affect the bank's indebtedness to the Grand Lodge. When Sarbach deposited the certificate in the bank and indorsed it as Grand Treasurer, the officers of the bank knew that the funds belonged to the Grand Lodge and that he had no personal interest in any part of it. *Washbon v. Hixon*, 124 Pac. 366. As a matter of fact the officers had full knowledge of the situation without reference to the character of the indorsement upon the certificate. With knowledge of the trust character of the deposit the bank could not lawfully receive the proceeds of the certificate or any part thereof and apply it in payment of the individual debt which Sarbach owed to it for the overdraft. In *Washbon v. Hixon*, supra, Sarbach gave Mrs. Hixon a check on the bank signed by himself as Grand Treasurer in payment of an individual note he was owing her. It was held that the official signature of the check was notice to her of the trust character of the funds and the Grand Lodge was permitted to recover from her the amount of the check. See, also, *Guernsey v. Davis*, supra; *Bank v. Myers*, 65 Kan. 122, 69 Pac. 164; *Loan Co. v. Essex*, 66 Kan. 100, 71 Pac. 268; *Hier v. Miller*, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. 952; *Gerard et al. v. McCormick*, 130 N. Y. 281, 29 N. E. 115, 14 L. R. A. 234; 21 A. & E. Encycl. of L. 584.

Upon the same principle it is held by an unbroken line of authorities that a purchaser from a trustee with notice takes the property impressed with the trust, and his position is no better than that of his vendor. *Perry on Trusts* (6th Ed.) § 828. In *Union Stockyards Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724, the bank received on deposit from a factor funds which it must have known were the proceeds of property of the factor's principal, and it was held that the bank cannot appropriate the deposit to the payment of a general balance due the bank from the factor, and if it attempts to do so the principal has his remedy in equity.

It cannot be doubted that the credit given to Sarbach as treasurer for the amount of the certificate by the bank which issued it was a payment of the certificate.

"A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment

of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given." *Morse on Banks & Banking* (4th Ed.) § 451; *Bartley v. State*, 53 Neb. 310, 338, 73 N. W. 744; *Oddie v. Nat. City Bank of New York*, 45 N. Y. 735, 6 Am. Rep. 160.

A case cited by appellee which is in point is *Town of East Hartford v. American National Bank*, 49 Conn. 539. There a town treasurer made notes as treasurer without authority of the town, which were discounted by the bank and the proceeds placed to his credit as treasurer. The bank afterwards received his checks as treasurer in payment of the notes. He became a defaulter for the amount drawn by him to pay the notes. Although in that case the bank acted in good faith, supposing that he had authority to make the notes, and the proceeds were used for the town's benefit, it was held that the bank was charged as a matter of law with notice that he had no power to execute the notes or to pay them, that they were to be treated as his individual notes, and that the bank had no right to retain the money against the demand of the town.

Whatever the arrangement was by which the bank surrendered to Sarbach the notes left with it as collateral security for the loan of the overdraft, it cannot be said that the appellee seeks by this suit to rescind an agreement made in its behalf by its agent and at the same time retain the fruits thereof. The bank loaned the overdraft, not for the benefit of Sarbach's principal, but for the purpose of enabling Sarbach to conceal from his principal the defalcation. It said to the Grand Lodge, "We have on deposit to your credit the full amount of this certificate." The Grand Lodge, believing the representation, continued the unfaithful steward in office. The bank's participation in the fraud did not stop there; it entered into a secret arrangement with the defaulter by which the bank's liability for the shortage would not be shown upon its books, and it surrendered the collateral which it held as security for the loan. When it attempted to repay to itself the individual debt which Sarbach owed, out of the funds which it is forever estopped to deny belonged to the Grand Lodge, it became liable to refund the money upon the same principle which obliged Mrs. Hixon to restore to the Grand Lodge the proceeds of the check she received in payment of Sarbach's individual debt. The bank knew that the money it received was a trust fund which Sarbach could not divert to his own use.

The bank's liability in the transaction respecting the overdraft of \$934.09 is governed by the same principles of law. If there were no other facts in evidence save that Sarbach overdraw his account in January,

1908, and afterwards deposited collections which balanced the overdraft and the bank thereafter cashed other checks drawn by him which left his account again overdrawn, there would be left the single question whether the Grand Lodge could recover from the bank the amount of an ordinary overdraft by an agent which on its face had been paid out for the benefit of the principal. But in view of all the evidence as to the course of dealing between the bank and Sarbach, we must hold that the bank is liable for the overdraft of January, 1908, which, it seems, was paid with the bank's knowledge out of moneys received directly from the Grand Secretary.

There is nothing substantial in the claim that the Grand Lodge is estopped. No estoppel was pleaded in the answer. It is argued, however, that the Grand Lodge claims the proceeds of the bank's loan to Sarbach of the overdrafts and ought not to be permitted at the same time to repudiate that part of the agreement between Sarbach and the bank by which the collateral notes deposited by him to secure the overdraft were returned to him when the overdraft was wiped out. This argument is based upon the assumption that the Grand Lodge in some way received the benefit of the collateral notes. The court, in finding No. 14, states that the evidence fails to show what disposition was made of the notes after they were returned to Sarbach. There is a further finding, No. 15, that Sarbach never accounted to the Grand Lodge for interest received on any such loans, and that this use of the funds was unauthorized by and without notice to the Grand Lodge or its officers, and further that the bank from time to time bought several notes of this character from Sarbach. The bank must have known that Sarbach had no authority to loan these trust funds to any person or for any purpose. It participated in the fraudulent use of the moneys for its own profit, and we are at a loss to discover how the bank can urge that the Grand Lodge must return notes which it never received and which were given for unauthorized loans from its funds with the full knowledge and participation of the bank. The loan of the overdrafts was not made for the benefit of the Grand Lodge, but solely for Sarbach's benefit. The Grand Lodge, as the bank well knew, was not in need of any loans, and the bank also knew that the purpose of the loan was to enable Sarbach to perpetrate a fraud upon the Grand Lodge. Where a bank knowingly participates with a depositor in a misappropriation of trust funds and reaps the fruit of the breach of trust, it becomes liable to the beneficiary for whatever wrong is done him.

The judgment is affirmed. All the Justices concurring, except MASON, J., not sitting.

(87 Kan. 714)

HEMBROW v. WINSOR et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

VENUE (§ 26*)—PROCESS (§ 19*)—RESIDENCE OF PARTIES—CODEPENDANTS.

An action may be rightly brought against nonresident defendants in a county where they have property; and in such an action where a resident of the state has been rightly joined as a defendant, and service upon the nonresident defendants has been obtained by publication, or where they have entered an appearance in the action, a summons may lawfully issue to another county for the resident defendant.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 39, 40; Dec. Dig. § 26; Process, Cent. Dig. § 15; Dec. Dig. § 19.*]

Appeal from District Court, Sumner County.

Action by William Hembrow against W. M. Winsor and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

F. A. Dinsmoor, of Caldwell, for appellant.
O. M. Clark, of Peabody, for appellees.

PORTER, J. Appellant sued to recover a commission for the sale of a tract of land in Sumner county of which the appellee and four other defendants were joint owners. The appellee W. M. Winsor is a resident of Marion county, Kan. The other defendants were residents of Illinois and nonresidents of Kansas. At the commencement of the action appellant filed his affidavit in attachment, and caused a writ to be levied upon the undivided four-fifths interest of the nonresidents in the land and obtained service upon the nonresident defendants by publication. At the same time he caused a summons to be issued for W. M. Winsor, the appellee, directed to the sheriff of Marion county, which was duly served and returned. The appellee entered a special appearance, and moved to quash the summons on the ground that the court lacked jurisdiction because the action was not rightly brought in Sumner county. The court sustained the motion to quash. Thereafter, and at the same term, the nonresident defendants entered their voluntary appearance and proceeded to defend the action. The appellant then caused an alias summons for W. M. Winsor to be issued directed to the sheriff of Marion county, which was duly returned showing service. A motion to quash the alias summons was sustained, which is the ruling appealed from.

The sole question is whether the action was rightly commenced in Sumner county. If it was, the court erred in sustaining the motion to quash. The Code provision is: "Where the action is rightly brought in any county, according to the provisions of article 5, a summons shall be issued to any other county, against any one or more of the defendants, on the plaintiff's praecipe." Civ.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Code, § 61 (Gen. St. 1909, § 5654). This section has been construed and held to mean that, where one defendant acknowledges service, the action is rightly brought in that county, and a summons may issue to another county for the other defendant. *Hendrix v. Fuller*, 7 Kan. 331. And in *Reynolds v. Williamson*, 68 Kan. 289, 74 Pac. 1122, it was held that an action against a nonresident may be brought in any county where he has property, and a summons may issue to another county. In that case the summons was for the nonresident defendant who at the time the action was commenced was personally present in the other county. If it could rightly issue to another county to be served upon a nonresident, it could issue for the purpose of being served upon a resident of the state. By their voluntary appearance the court acquired jurisdiction of the nonresident defendants, and from that moment, at least, the cause was rightly brought in Sumner county. The acceptance or acknowledgment of service or the voluntary appearance of a defendant is equivalent to service. Civ. Code, § 68 (Gen. St. 1909, § 5661). Moreover, under the provisions of section 53, Civil Code (Gen. St. 1909, § 5646), it was rightly brought as to the nonresident defendants without their appearance, for the reason that they had property in Sumner county. Where the action is rightly brought in one county and the defendant who has property there or may be summoned there has been rightly joined as defendant—that is, where there has been no collusion or abuse of process—a summons may issue for another defendant to any county where he resides or may be summoned. The action must be rightly brought, and the persons sued must be rightly joined as defendants. These are essential requirements. *Marshall v. Land Co.*, 75 Kan. 445, 447, 448, 89 Pac. 905, and authorities cited in opinion. The action having been rightly brought in Sumner county, either summons was good and neither should have been quashed.

Reversed and remanded for further proceedings. All the Justices concurring.

(87 Kan. 732)

STATE ex rel. FLEMING, Co. Atty., v.
BOARD OF COM'RS OF COWLEY
COUNTY et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. BRIDGES (§ 18*)—LIABILITY OF COUNTY—
PERMANENT MAINTENANCE.

Section 651, General Statutes of 1909, does not require that a bridge, for the construction of which a county has appropriated money, shall be forever thereafter repaired or rebuilt and maintained at the place where it was erected.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. § 6; Dec. Dig. § 18.*]

2. BRIDGES (§ 18*)—RECONSTRUCTION—DUTY
OF COUNTY.

When a bridge, for the construction of which the county appropriated money, has been practically destroyed, the board of county commissioners, after full investigation as to the wants and convenience of citizens to be served, may, in the exercise of their discretion for the public benefit, build a bridge on another site and not rebuild the destroyed bridge.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. § 6; Dec. Dig. § 18.*]

Appeal from District Court, Cowley County.

Action by the State, on the relation of Ed. J. Fleming, County Attorney, against the Board of County Commissioners of Cowley County and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John S. Dawson, Atty. Gen., and Hackney & Lafferty, of Winfield, for appellant. O. P. Fuller and Jackson & Noble, all of Winfield, for appellees.

SMITH, J. Many years after the settlement of Cowley county, and until the year 1889, it appears that there was no bridge across the Arkansas river in Beaver township. In 1889 a contract was made with a Bridge Company to erect a bridge across the river in section 21, Beaver township, for the sum of \$4,800, of which the township and citizens in the locality contributed \$2,800, and the board of county commissioners \$2,000, which was the largest sum the county was then authorized to expend upon a bridge. In January, 1910, the bridge proper was destroyed by a flood. The question soon arose before the board of county commissioners whether the bridge should be rebuilt on its former site, or whether a bridge should be built in the locality. Petitions for the rebuilding of the bridge at the old site and at different locations were presented to the board, and the board made investigation and decided to build a new bridge in section 17 of the same township; the citizens in the locality contributing the building of the approaches thereto.

A petition was also presented to the board to vacate the public road upon which was located the old bridge. This action to enjoin the board from erecting a bridge at the new site was brought in the district court of the county in August, 1910; a temporary injunction was granted, and on the hearing, it appearing that the commissioners had not advertised or otherwise proceeded according to law in contracting for the bridge, the injunction was allowed by reason of the irregularities. Afterwards the commissioners took the necessary legal steps toward building the bridge and let the contract therefor. Thereupon the appellants filed an amended and a supplemental petition and obtained another restraining order. The amended petition charged bad faith on the part of the county commissioners. The supplemental pe-

tion alleged that a road petition had been filed with the defendant commissioners to vacate the public highway, of which the old bridge formed a part, and which extended some distance to the east and west therefrom; that the county commissioners had inspired the proceeding and had appointed themselves viewers to view the same, and, if permitted to proceed, would vacate the road for the purpose of defeating the action. A restraining order was asked for and allowed by the district court to prevent the vacation of the road during the pendency of the action.

On the trial in the district court, much evidence was taken as to which location of the bridge would be of greater utility and convenience to the public; also upon the question of the good faith of the county commissioners in locating the bridge at the new site, which is about $1\frac{1}{2}$ or 2 miles from the old bridge. At the conclusion of the trial, January 25, 1911, the court set aside the temporary orders and refused the injunction prayed for, and rendered judgment against the plaintiff in the action for costs. Thereupon it seems that the contractors proceeded with and completed the construction of the new bridge. An appeal from the judgment was taken to this court by the plaintiff. On the 17th of March, 1911, on the application of the appellant, this court enjoined the board of county commissioners from vacating or otherwise interfering with the portion of the public highway for the vacation of which a petition had been filed, and also enjoined the county treasurer and the board of county commissioners from drawing any order upon the bridge fund or paying out the same as to the sum of \$3,500, which sum should be retained in the bridge fund with which to rebuild the old bridge, called the Johnson County Bridge, in the event such order should be finally made.

The question of fact as to the good faith of the board of county commissioners, and of the utility of the new bridge, indeed, of the greater convenience to the public of a bridge at the new site than the one at the old site, was determined on sufficient evidence in the district court. These questions are involved in the judgment of the court and were necessarily determined in favor of the defendants in the action. Following the usual rule, we shall not reconsider that evidence, but shall regard the finding of the court thereon as determinative. The good faith of the county commissioners in building the new bridge has been determined upon conflicting evidence by the judgment of the court which, in effect, also approves the legality of the proceedings resulting in the erection of the bridge.

The only remaining question is whether the court erred in refusing to order the commissioners to repair or build anew the old bridge. As to the mandatory injunction prayed for to require the board of county

commissioners to rebuild the old bridge, the question turns upon the construction of section 851, Gen. Stats. 1909, which reads: "Whenever it is necessary to repair any public bridge in the county (for which the county has appropriated money for the construction thereof), the county commissioners shall forthwith require the township trustee of the township in which said bridge is erected, to proceed and examine the bridge so needing repairs, and make an accurate estimate of the cost of repairing the same, and in what particular it needs repairing, and without delay make report thereof; and the county commissioners shall thereupon make an appropriation for such repairs, and proceed forthwith to cause said bridge to be repaired in the way they may order and direct." The question turns largely upon the interpretation to be given the first clause of this section, viz., "Whenever it is necessary to repair any public bridge in the county (for which the county has appropriated money for the construction thereof), the county commissioners shall forthwith require, etc." Who is to determine when it is necessary to repair a bridge?

Section 9683, Gen. Stats. 1909, provides: "The said board (the board of highway commissioners, consisting of township trustee, clerk, and treasurer of each township) shall have charge of the roads and bridges of their respective townships, and it shall be their duty to keep the same in repair, and to improve them so far as practicable."

The burden of maintaining repairs to a bridge seems to shift from the township board to the board of county commissioners for the repair of such bridges, for the construction of which the county has appropriated money. In case a board of county commissioners shall neglect or refuse to repair a bridge, there being sufficient money in the bridge fund of the county treasury to meet the expense, a court of competent jurisdiction may by mandamus compel the board to make the repairs. *State ex rel. v. Commissioners of Cloud County*, 39 Kan. 700, 18 Pac. 952. In that case and in other cases cited it is apparent that there was in fact a bridge existing but which needed repairs to conserve its utility and safeguard the public in the use thereof.

The board of county commissioners is the general financial and business agent of its county and is necessarily vested with a large measure of discretion in promoting the public good, and, in case it is the duty of the county to maintain a bridge to accommodate the traveling public, the question must sometimes arise whether an old bridge is worth repairing, or whether it would not be more advantageous to the public to build a new bridge.

[2] And again, if a new bridge is deemed more advantageous, the board may have to consider whether or not changing conditions and change in lines of travel or observed

difficulties in maintaining a bridge at the old site may not have made it more advantageous to place the new bridge in a location somewhat different from the old one. In such cases, of course, the board consults the wishes of the public to be served, but their determination of the questions involves the exercise of judgment and discretion on the part of the board also. Where such judgment and discretion are exercised in good faith, the courts will be reluctant to interfere.

[1] It is not a reasonable construction of section 651, *supra*, that, when a bridge for the construction of which a county has appropriated money is once erected across a stream in the county, the commissioners of the county are forever thereafter in duty bound to maintain it there. Nor is it a reasonable construction of the section that a board of county commissioners is compelled thereby to time and again repair an old bridge when good judgment would dictate that it be torn down and a new one built. A board of county commissioners has discretion for the purpose of meeting the convenience of the public, whom they serve, to remove a bridge from one place to another, if there be no stronger reason for keeping it in its place than that it was built there.

The case of Greeley Township v. Board of County Commissioners, 26 Kan. 510, illustrates one of the limitations upon the power of commissioners to remove a bridge. On the charge of bad faith made in the petition, the district judge restrained the commissioners from vacating the public road which crosses the river at the location of the old bridge. On trial, of the case this order was revoked. No obstacle remains to the vacation of the road in question or any portion thereof in the manner provided by the statute (section 7274, Stat. 1909). So long, however, as such road remains open as public highway, the proper public officers should put it in a reasonable and suitable condition for travel. The restraining order issued by this court has spent its force, and, the only assignment of error being in effect that the appellant was entitled to judgment on the undisputed facts of the case, we have herein considered the law applicable to such facts. We find no error in the judgment of the court.

The judgment is affirmed. All the Justices concurring.

(87 Kan. 597)

HOLMES et al. v. CAMPBELL COLLEGE
et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. WILLS (§ 224*)—REFORMATION—INTENT OF TESTATOR.

The court has no power to reform a will, so as to conform to the intentions of the tes-

tator, shown by external evidence to be different from those expressed in the instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 546; Dec. Dig. § 224.*]

2. WILLS (§ 50*)—TESTAMENTARY CAPACITY—TEST.

The fact that a testator is grossly mistaken as to the extent of his estate does not establish a want of testamentary capacity; the true test in this regard being whether he is capable of comprehending the quantity of his property and its value.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96-100; Dec. Dig. § 50.*]

3. WILLS (§ 81*)—INVALID PROVISIONS—EFFECT.

If a portion of a will may ever be set aside for want of testamentary capacity, while the rest is upheld, it can only be where the testator, being able to transact business generally, and capable of disposing of his property in other respects, is unable, by reason of some specific delusion or mental defect, to comprehend the effect of the provision in question.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202; Dec. Dig. § 81.*]

4. WILLS (§ 50*)—TESTAMENTARY CAPACITY.

Evidence that a testator, who was otherwise competent, made a college, in which he had previously shown no interest, his residuary legatee, under the belief that his estate was practically exhausted by specific bequests, when in fact the residue amounted to more than two-thirds of the whole, is not sufficient to warrant a finding of a want of capacity to make such provision.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96-100; Dec. Dig. § 50.*]

Appeal from District Court, Cowley County.

Action by Belle C. Holmes and others against Campbell College and others. Judgment for plaintiffs, and defendant named appeals. Reversed and remanded.

Crane & Woodburn Bros., of Holton, and F. C. Johnson, of Winfield, for appellants. Jackson & Noble, of Winfield, for appellees.

MASON, J. Nancy V. Shaw executed a will July 24, 1909, making specific bequests, amounting to \$7,715, to some 40 different beneficiaries, in sums ranging from \$5 to \$1,500, and naming Campbell College as residuary legatee. She died October 7, 1909, at the age of 68 years. Her estate was worth \$25,000, consisting mainly of two farms in Cowley county, where she lived, together containing 480 acres. The will having been admitted to probate, some of the heirs brought an action to set it aside because of undue influence and want of testamentary capacity. A demurrer to the evidence was sustained, so far as related to the former ground; but upon the latter the court set aside the residuary clause, sustaining the will in all other respects. The college appeals.

Among other matters, the court found that in 1908, during the trial of a case before a justice of the peace, to which she was a party, the testator was nervous and excited,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

without 'apparent reason,' and fainted and broke down while testifying as a witness, causing some of those present to regard her actions as strange or queer; that she was forgetful, and her talk was disconnected; that she complained that her sisters did not visit her when she was sick, although, in fact, they visited her frequently; that she believed, without any proof, that her relatives wanted her property, and would try to defeat any disposition of it that was not satisfactory to them; that this belief was without foundation in fact, but the evidence did not show that she had no information on which it might be based, or that she persisted in it against evidence and probability, and after argument to the contrary. The findings upon which the judgment mainly rests were as follows:

"Mrs. Shaw never intended to give to this college a sum very much in excess of \$500. She did not know she was giving the college nearly three-fourths of her estate when she signed the will. * * * Mrs. Shaw did not fully comprehend the nature and effect of the disposition of her estate she was making when she signed this will. She intended that her estate, after the payment of the specific bequests to those who lived in her family, and those for charity and church purposes and the bequest to the college, should be divided among her relatives and the relatives of her husband, named in the will. She made the will under the belief that the specific bequests would dispose of practically all of her estate.

"Mrs. Shaw's mind, at the time this will was signed, was impaired by old age, by worry over her property and the fancied conduct of some of her relatives, and by disease, so that, while she was able to transact the business of renting her land and looking after collecting the rents, and having her pension looked after and her will made, she was not able to fully comprehend the nature and effect of the disposition of her property made by this will, and that the college would receive nearly three-fourths of her estate.

"The evidence does not show that Mrs. Shaw was of unsound mind, in the sense that she did not know what she was doing when she signed the will, or was unable to attend to her ordinary business. She knew to whom she wanted the property to go, and that the will gave it to the persons and institutions to whom she wanted to leave it, so far as the specific bequests are concerned."

[3] The last finding quoted must be regarded as definitely establishing the fact that, so far as general capacity was concerned, the testator was competent to make a will. It necessarily disposes of the evidence of her eccentric conduct by determining that she had the capacity to attend to ordinary business, and intelligently to plan a distribution of her property among a large

number of persons, with appropriate special provisions as to each. Whether a part of a will can ever be set aside for want of testamentary capacity, while the rest of it is upheld, appears to be a novel question. A portion of a will may be refused probate, because of undue influence, while the remainder is admitted. In *re Welsh*, 1 Redf. Sur. (N. Y.) 238; note, 81 Am. St. Rep. 691. An insane delusion of a testator will not invalidate his will, unless it affects the disposition of his property (note, 37 L. R. A. 265, first column; 20 Am. Dig. Dec. Ed. p. 901, § 38-2); and, possibly, the provisions resulting from it might be eliminated and the remainder enforced, although authority on the subject seems to be lacking. Perhaps, if a finding had been made, upon sufficient evidence, that Mrs. Shaw was under an insane delusion regarding Campbell College, which caused her to name it as her residuary legatee, the judgment rendered might be upheld. But there was neither finding nor evidence to that effect.

[1] We think that, fairly interpreted, the findings may be thus summarized: Mrs. Shaw had capacity to make her will. She believed the specific bequests practically exhausted her property; and it was only because of such belief that she allowed the provision to stand, giving the residue to the college. If she had known its real value, she would have left it to her heirs. The provision cannot be stricken from the will, however, merely because it was the result of a mistake of fact on her part. This would be in effect to reform the will, and the court possesses no such power. "Neither the will, nor any part of it, is affected by any mistake of law or fact which induced the testator to make it; and the court cannot amend or modify it, so as to conform to what they imagine the testator would have done but for such mistake. For example, the will cannot be denied probate, nor any of its provisions limited or enlarged in effect, because the testator did not understand their legal effect, nor truly appreciate the proportions in which his property would be thereby distributed; nor because he would or might have made a different will." *Rood on Wills*, § 165. See, also, 2 *Pomeroy's Equity Jurisprudence* (3d Ed.) § 871; note, 65 Am. St. Rep. 521; note, 6 L. R. A. (N. S.) 944; note, 15 Ann. Cas. 141.

[2] A knowledge by the testator of the extent of his estate is sometimes spoken of as necessary to give validity to his will (20 Am. Dig. Dec. Ed. p. 906, § 50); but the true test is whether he is capable of understanding it. "Actual comprehension of the nature and extent of one's property is not an essential element of testamentary capacity. The capacity to know is what the law regards." 28 A. & E. Encycl. of L. 73, 74; *Roller et al. v. Kling et al.*, 150 Ind. 159, 164, 49 N. E. 948; *Reichenbach v. Ruddach*,

127 Pa. 564, 590, 18 Atl. 432. It is true that here the trial court found in terms that Mrs. Shaw "was not able to fully comprehend the nature and effect of the disposition of the property made by this will, and that the college would receive nearly three-fourths of her estate." If this is to be interpreted literally, rather than as a statement that she did not in fact know the extent to which the college would profit by the will, we feel constrained to hold that it must be disregarded for want of evidence to support it. The testimony regarding her eccentric conduct does not answer the purpose; for it is disposed of by the finding that she had capacity to manage her business, and to execute every part of the will, excepting the residuary clause. There is nothing in the record to indicate that she was incapable of comprehending the value of her lands, or was under any insane delusion on that subject, or on any other. The court found, in effect, that her belief that her relations contemplated contesting her will, although without foundation in fact, was based upon information she had received, and was not maintained against evidence and probability, and after argument to the contrary. It therefore did not amount to a delusion. 28 A. & E. Encycl. of L. 80; note, 37 L. R. A. 261.

[4] An earlier will was executed April 17, 1909. It was prepared by a lawyer from a memorandum, including a specific bequest of \$1,000 to the local United Brethren Church and one of \$500 to Campbell College, which was omitted from the first, but was inserted in the second, will. In sending to her the form for this first will, the lawyer wrote: "I noted that you had no provision for any balance that remained after paying off all the gifts. But I remembered that you said that whatever balance remained you wanted to go to the U. B. Church, so I stated it, as you will see in section 19." In a letter directing the preparation of a new draught making various changes, she wrote: "If there is any money left of my estate it may go to Campbell College in place of the United B. Church." One witness testified that she had heard Mrs. Shaw, after referring to what she intended giving her heirs and the heirs of her deceased husband, say that she was going to give the remainder of her property to the church. A witness, who testified that, from a writing made by Mrs. Shaw, he prepared the memorandum from which the first will was drawn, said that after the copy was made she spoke of giving something to some college—he didn't remember what one. The draughtsman of the will testified that Mrs. Shaw and her husband had talked with him about the preparation of a joint will, and in the course of the conversation said that they intended to leave most of their property "to church or educational purposes, for what they would consider bene-

fitting young people." The court found that she had not taken any particular interest in church work—not more than the ordinary member of a country church; that she had only a limited education, and never manifested any particular interest in education; that there was no evidence that she had ever talked with any one about colleges or college work or school work; that she told two neighbors that she was going to leave \$500 to the church; that she never talked with any one about leaving any of her property to Campbell College, or had in mind leaving anything to it until writing the letter already referred to; that there was no evidence that prior thereto she knew of the college, or took any interest in it, or had heard of it, except that there had been a picture of it hanging in the church, which she might have seen. Upon a motion for a new trial, an affidavit of the draughtsman of the will was presented, to the effect that in a number of conversations Mrs. Shaw had discussed the value of the estate, and in June, 1909, had told him that if she died as soon as she expected the residue to be willed to Campbell College would exceed \$15,000. Upon this record the decision of the trial court that Mrs. Shaw did not know the value of her property is not subject to review; but, as already stated, it does not warrant the setting aside of any part of the will. The findings as to her intentions would also be unassailable, if that matter were to be arrived at otherwise than by the interpretation of the instrument itself. But we find nothing to support the view that, being of sound mind in other respects, she was incapable of comprehending the value of her estate and the effect of the legacy to the college.

A finding was made that the evidence did not show that Mrs. Shaw read the will, or that it was read to her, before its execution. This cannot affect the matter, in view of the fact that the will was upheld, except as to the residuary clause; and that was in accordance with her direction.

The judgment is reversed and the cause remanded, with directions to render judgment for the defendants. All the Justices concurring.

(37 Kan. 665)

REA v. KANSAS CITY LONG DISTANCE TELEPHONE CO.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. MANDAMUS (§ 141*)—COURTS—DISTRICT COURTS—JURISDICTION.

Section 6310, General Statutes 1909 (Code Civ. Proc. § 714), confers upon a district court at chambers, and upon the judge thereof at chambers, as plenary powers to issue either an

alternative or a peremptory writ of mandamus as is thereby conferred upon the district court.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 276-278; Dec. Dig. § 141.*]

2. MANDAMUS (§ 133*)—TELEPHONE COMPANIES—ENFORCEMENT OF OPERATION.

A telephone company operating under the authority of the state and under a franchise granted by a city of the state is a public service corporation. Its duty to the public results from a trust and station, and the performance thereof may be compelled by a writ of mandamus issued by a judge of the district court at chambers.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 268; Dec. Dig. § 133.*]

Appeal from District Court, Montgomery County.

Action by Charles Rea against the Kansas City Long Distance Telephone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward H. Chandler, of Independence, for appellant. Banks & Bertenshaw, of Independence, for appellee.

SMITH, J. This was an action for peremptory mandamus brought by the appellee against the appellant and another defendant to compel the appellant and its codefendant to furnish to appellee a telephone and telephone service in his dwelling house in the city of Independence, Kan., and to furnish appellee with the same telephone service and upon the same terms as it was giving such service to the general public in the city, and also for the recovery of damages. The petition was verified by the plaintiff, but no summons was issued in the action. A notice, with a copy of the motion for the writ, and a copy of the affidavit and petition, was served upon the appellant. The application was presented to the district judge at chambers. The appellant appeared and objected to the jurisdiction of the judge to grant a peremptory writ of mandamus. After the objection was overruled, the appellant made a general appearance, and introduced evidence as did also the appellee, and the judge allowed the writ, reserving the question of damages for the court. A motion for a new trial presented to the judge was overruled, and, after the court had rendered judgment for attorney's fees in favor of the appellee, motion for a new trial was filed in court and overruled. Thereupon the appeal was taken.

Five assignments of error are presented, the first of which is that the district court at chambers had no jurisdiction to grant peremptory writ of mandamus. Section 6310, Gen. St. 1909 (Code Civ. Proc. § 714), relating thereto, reads: "A writ of mandamus may be issued by the Supreme Court or the district court, or any justice or judge thereof, during term time or at chambers, to

any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust or station.

* * * Section 6313, Id. (Code Civ. Proc. § 717), reads: "When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases, the alternative writ must be first issued."

From the language used in the statute, no distinction seems possible between the powers conferred upon the district court during term and the power conferred upon the judge at chambers. Indeed, the distinction between the district court during term and the court or judge at chambers in proceedings of this nature is very narrow, and is a matter largely of form. The court sits usually in the courtroom in the presence of the clerk of the court and a sheriff, and generally a stenographer, and such members of the bar and others as see fit to attend. At chambers the judge may sit anywhere within his territorial jurisdiction, and no other officers of the court are necessarily present; but may be present. The case and the evidence is presented to the same man in either instance, and the result depends solely upon his individual judgment; in a proceeding of this kind no jury being permissible. Such being the case, we conclude that the Legislature in enacting the statute above quoted meant exactly what it said, and conferred power to issue a peremptory or an alternative writ of mandamus on the district court, and upon the judge thereof, at chambers, without distinction. Of course, no final judgment can be entered in such action without a hearing of respondent or an opportunity therefor.

It is contended that section 2391 of the General Statutes of 1909 provides and governs the powers granted to judge at chambers. This is true in regard to procedure generally, but in proceedings for a mandamus the special provision above quoted is applicable to the exclusion of the general provision in section 2391. As provided in section 6313, supra, the alternative writ must be first allowed, except when the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it. In any case the remedy of mandamus should be exercised with caution, and only in furtherance of justice. To this end its exercise is not bound by any hard and fast rules, but always largely in the discretion of the court. See *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 158. In this case the petition in effect shows that the appellant was a public service corporation, and was chartered by the city of Independence to furnish the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

inhabitants of the city with telephone service, and it appeared from the showing that the appellee was entitled to the service, and tendered payment therefor in advance; that his dwelling was already connected by wires with the appellant's telephone lines, and that all that was required was for appellant to place a telephone instrument in the dwelling where such an instrument had before been installed and connecting the existing lines therewith. We think the court did not err in finding that the right of the appellee to the performance of the service was clear, and that it was prima facie apparent that no valid excuse could be given for not performing it. It follows that no error was committed in granting the peremptory writ in the first instance, although in case of any considerable doubt it is safer to issue the alternative writ first, and have a hearing thereon before the peremptory writ is issued.

It is also said that the duty which the court found the appellant was required to perform did not arise from any office, trust, or station, but merely from the fact that the appellant was operating a telephone exchange in the city as a public corporation for hire. The appellant is a public service corporation, operating under a charter, presumably procured from the state, and under a franchise for that purpose granted by the city of Independence. All its rights and powers are conferred upon it not merely for the benefit of the corporation itself, but also in trust for the benefit of the public. The duty resting upon it to perform whatever has been legally enjoined upon it by legal and proper authority is a duty resulting from a public trust and station, and the public may enforce the performance of such duty by mandamus, whenever "no other plain and adequate remedy exists." *State v. Mo. Pac. Ry. Co.*, 33 Kan. 185, 5 Pac. 772. See, also, *City v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; *State v. Railway Co.*, 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564; *Topeka v. Water Co.*, 58 Kan. 349, 49 Pac. 79; 20 Cyc. 487.

The second objection is that the judge of the district court at chambers erred in granting a peremptory writ of mandamus when an action was pending in the federal court involving the same matter in litigation. The abstract does not disclose that any evidence was called to the attention of the district court or judge of any action pending in the federal court. In appellant's brief, there are some statements in regard to such an action pending in the federal court and in reference to the ruling of that court. The action is not brought as an original action in this court, but is here on appeal to determine whether the district court or judge committed error on trial prejudicial to the rights of the appellant. If, however, the action were an original proceeding

brought first in this court, sufficient evidence is not set forth even in the brief to determine whether there is "identity of the thing sued for; identity of the cause of action; identity of the parties to the action; and identity in the appearance, for or against whom the claims are made." These are each essential requisites to constitute *res adjudicata*, as stated by Mr. Justice Brewer, in *Atchison, T. & S. F. R. Co. v. Commissioners of Jefferson County*, 12 Kan. 135.

There is no merit in the next objection, that the court at chambers erred in hearing the application over the objection and special appearance of the appellant. Even if it had been error in the first instance, the general appearance of the appellant and the offering of testimony and the full hearing of the questions involved, in which the appellant participated, would have constituted a waiver of the objection.

The appellant objects that the hearing was without any pleading on its part. It made no application, however, for any pleading and offered evidence as fully as it desired, for the purpose of contesting every question which is here presented.

In argument before this court counsel for appellant expressly stated that the amount of the allowance as attorney's fees made by the court for appellee's attorneys was not questioned, if any allowance therefor was proper, but that appellant contended that the court had no right in such action to grant attorney's fees. This objection is fully answered in *Nolte v. Telephone Co.*, 86 Kan. 770, 121 Pac. 1111, and cases there cited. The allowance of attorney's fees was proper.

We find no error in the judgment; and it is affirmed. All the Justices concurring.

(37 Kan. 523)

READICKER v. DENNING et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 835*)—REVIEW—SCOPE AND EXTENT—CONFORMITY TO THEORY OF TRIAL COURT.

Upon a suggestion, which appears to be well founded, that a judgment had been affirmed upon a different theory of the facts from that entertained by the trial court, the affirmation is set aside and a new trial ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3243; Dec. Dig. § 835.*]

2. SPECIFIC PERFORMANCE (§ 39*)—CONTRACTS ENFORCEABLE—REQUIREMENTS OF STATUTE OF FRAUDS.

The evidence is held not to warrant the enforcement of a contract for the sale of real estate, in the absence of any memorandum signed by the owner.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 114-119; Dec. Dig. § 39.*]

On rehearing. Former decision and judgment below reversed, and cause remanded for further proceedings.

For former decision, see 86 Kan. 617, 122 Pac. 103.

A. M. Bennett, of Iola, for appellants.
Ewing, Gard & Gard, of Iola, for appellee.

MASON, J. [1] This case turns upon whether the statute of frauds prevents the enforcement against Mrs. Denning of a contract for the sale of real estate to Joseph Readicker. The plaintiff introduced in evidence an instrument which had been deposited in escrow, which was apparently a fully executed and acknowledged deed from Mrs. Denning and her husband to Readicker. This was enough to make a prima facie case on this proposition. The judgment awarding specific performance was affirmed, on the ground that the trial court must be deemed to have discredited the testimony that the name of the grantee was blank when the deed was signed. 86 Kan. 617, 122 Pac. 103. We did not for a moment suppose that the trial court doubted the veracity of the witness, but thought that, in the course of a somewhat involved transaction, there was room for an error of recollection. A rehearing was granted because of the representation of the appellants that in fact there was no real controversy on this point, and that the trial court had accepted the statement that the deed was made in pursuance of a deal with Harkins; the grantee being left blank, and Readicker's name having been inserted after its execution. This representation was strongly urged at the rehearing, and was not controverted by the appellee, for whom no additional argument was made. In this situation we will regard it as conceded that the trial court did not find that Mrs. Denning executed the deed while it contained Readicker's name, or in connection with the transaction with him. This treatment of the matter can result in no substantial injustice; for the trial court can still apply the law as declared in the original opinion, if it takes the view of the evidence there attributed to it.

[2] A new trial will be ordered, as we are of the opinion that, except upon the theory already indicated, the statute of frauds prevents a recovery against Mrs. Denning, who gave no written authority to her husband to represent her, and who signed no memorandum, other than the deed referred to. So far as she is concerned, we find no evidence of any such contract as to take the case out of the statute.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

(87 Kan. 719)

COBLENTZ v. PUTIFER et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. EVIDENCE (§ 510*)—SUBJECTS OF EXPERT TESTIMONY—MENTAL CAPACITY.

While medical experts may properly answer whether in their opinion, from the conditions shown by a proper hypothetical question, a person was of unsound mind, it is not competent for them to give an opinion as to whether such person had sufficient mental capacity to make a deed in controversy. Capacity to make a deed is a mixed question of law and fact for the jury to determine on proper evidence and instructions and not for witnesses to decide.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2314; Dec. Dig. § 510.*]

2. WITNESSES (§ 159*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.

When it is alleged that a deed was procured by the undue influence of a son upon his mother, he may state whether at any time he asked or requested her to make such deed, when the manifest object of the question is to show that he did not. To state that he did not ask or request such deed is the very opposite of testifying concerning a transaction or communication with the deceased grantor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 664, 666-669, 671-682; Dec. Dig. § 159.*]

3. TRIAL (§ 219*)—INSTRUCTIONS—REASONABLENESS.

It is not for the jury to say whether a deed was reasonable or unreasonable, and, unless they are properly instructed as to the meaning of "reasonable," it is error to charge that they may consider reasonableness as a basis for setting it aside.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 489; Dec. Dig. § 219.*]

4. DEEDS (§ 77*)—VALIDITY—REASONABLENESS.

A property owner free from undue influence, of sufficient mental capacity to convey property, has the right to decide for himself whether a deed made by him is reasonable.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 209; Dec. Dig. § 77.*]

5. TRIAL (§ 351*)—VERDICT—SPECIAL INTERROGATORIES.

When only seven special questions fairly covering the vital questions raised by the pleadings in a cause are requested, the court should submit them all, and not select three from the number to the exclusion of the others.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 834-839; Dec. Dig. § 351.*]

Appeal from District Court, Reno County.

Action by Kate Belle Coblentz against David Putifer and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

See, also, 81 Kan. 905, 106 Pac. 1011.

F. F. Prigg and C. M. Williams, both of Hutchinson, for appellants. F. L. Martin, of Hutchinson, for appellee.

WEST, J. The plaintiff brought this action to set aside three deeds to her three brothers on the ground that they were procured by the defendants acting together

jointly by the exercise of undue influence on her mother at a time when she was not of sound mind and when by reason of her physical and mental condition she was not capable of making deeds of conveyance and contracts and did not know and realize the contents of the deeds or the purport thereof. Plaintiff also prayed for partition, alleging that she was the owner of one-fourth of the estate involved, and for rents and profits and an accounting for personal property alleged to have been converted by the defendants. Trial was had by jury, resulting in a verdict and judgment for plaintiff; findings being made that at the time the deeds were executed the grantor did not understand the nature and effect thereof, that she executed them by reason of undue influence exercised by David Putifer. Complaint is made that the court erroneously permitted a jury to sit in the case, and improperly admitted certain testimony, and erroneously excluded certain testimony offered by the defendants, that error was committed in giving and refusing instructions and in refusing to grant a new trial.

It appears that the father of the parties died in 1895 leaving his widow, Lucy Putifer, and the parties hereto, living upon a small rented farm in Reno county with very little personal property; that shortly after his death the plaintiff, having reached her majority, went out to work for herself, and after remaining around the neighborhood about one year went away, her whereabouts being unknown to her mother and brothers for a number of years. She never afterwards lived at home, and visited there but once during her mother's lifetime, when upon the occasion of her marriage she remained there about two weeks, never returning again except to attend the funeral of her mother. The three sons continued to live with their mother and remained unmarried until her death in November, 1906. They were all younger than the plaintiff, and at the death of their mother David was 27, Robert 22, and Solomon's age was between that of his two brothers. Some time after the father's death, these boys rented a section of land and put in a large crop and continued to farm this and other land until about 1890, when they and their mother purchased a quarter section for \$750, borrowing \$550 of the money, and shortly afterwards purchased another quarter for \$1,000, going in debt for a portion of the purchase price. On this land they continued to reside until the mother's death. The title was taken in her name. The land appears to have been worked and managed in common, and treated as the joint property; the mutual earnings and accumulations going to pay mortgages for personal property, stock, and farm machinery accumulated upon the land. In the spring of 1906 the mother had pneumonia, from which she re-

covered, leaving a bronchial affection and cough which continued. In November, 1906, about the first of the month she became sick and after about six days died. About five days prior to her death she procured an attorney to come to her place and write two deeds and a bill of sale of the personal property, deeding to David 100 acres of land upon which the home and improvements were located and to Robert and Solomon each an undivided one-half of the remaining land, also a bill of sale of all the personal property to the three sons jointly. On the 8th of the following November this action was begun, resulting in a verdict for the plaintiff which was by this court reversed (81 Kan. 905, 106 Pac. 1011), after which an amended answer was filed specifically denying incapacity and undue influence and alleging that the property had been acquired through the joint earnings, industry, and perseverance of the defendants, and that the title was taken in the name of the mother for convenience only, and that the conveyances were made by her in order to place the title where it properly belonged.

The question of mental capacity was vital in the case, and it is contended by the defendants that the verdict and the findings of the jury are unsupported by the evidence and contrary thereto. But whatever our views might be concerning the weight and credibility of the evidence, there was sufficient conflict to remove from us the possibility of holding that the result was entirely unsupported.

As there was an allegation of conversion of personal property, it cannot be said that the court erred in granting plaintiff's request for a jury. Complaint is made about the form of the hypothetical question propounded by the plaintiff to some of her witnesses, but we are unable to find that it contained elements not indicated by the evidence in the case so as to render it incompetent.

[1] Two physicians were asked to give their opinions, as to the effect the supposed sickness indicated by the testimony would have upon the mind of the patient, and they answered that her mind would be cloudy; one that she would not be herself at all, and the other that it would surely disturb the mind very materially. The further question was then asked whether, considering the conditions stated in the hypothetical question, she would be competent to make deeds of conveyance and dispose of her property and transact other important business affairs of life, to which one of the physicians answered: "In my judgment she would not be." The other was asked whether the patient would be competent to make deeds of conveyance and bills of sale conveying and disposing of all of her property; to which he answered: "I would think not."

The defendants insist that these questions invaded the province of the jury and called upon the witnesses to decide the very question at issue, and that, while it was proper to take their opinions as to the effect the alleged sickness would have upon the mental capacity of the patient, their opinions as to her capacity to make the conveyances in question was clearly incompetent. Numerous authorities are cited which hold that it is not competent for witnesses in cases of this kind to give their opinion as to the mental capacity of the person in question to execute instruments in controversy, for the reason that the mental capacity of the maker of a deed is a question of fact to be passed upon by the jury, while the legal effect of an instrument is a question of law for the court, and that no witness should be permitted to give an opinion which would have the effect, if followed by the jury, of determining matters of law as well as matters of fact. When, however, a witness has been permitted to give his opinion concerning the effect of certain mental and physical conditions upon the mind of the patient, and has stated that it would be impaired, it would seem a natural thing to then inquire whether, in his opinion, it would be impaired sufficiently to incapacitate the person for making the conveyances in question, because what the jury is supposed to need by way of expert opinion or information is not only the fact whether the mind was impaired, but, if so, the degree of impairment also as applied to the case in hand. In fact, the very purpose of expert testimony is to advise the jury concerning a matter which may not be determined by the concrete facts of the case or from such facts in connection with their own knowledge in common with the rest of mankind. In condemnation cases experts are called to give their opinions as to the value of the land, and, while they are not permitted to advise the jury what sum they should award by way of damages, they are always permitted to advise the jury what they believe the land was worth, which is exactly the same thing in effect, notwithstanding all of the refinements and attempted distinctions found in the reported cases.

In Wigmore on Evidence, § 1921, we find the following: "Another erroneous test, prevalent in some regions, and nearly allied to the preceding one, if not merely another form of it, is that an opinion can never be received when it touches 'the very issue before the jury.' * * * The fallacy of this doctrine is, of course, that it is both too narrow and too broad, measured by the principle. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. * * *

When all is said, it remains simply one of those impossible and misconceived utterances which lack any justification in principle." In section 1958, the author, after observing that testamentary capacity is a matter of law depending somewhat upon the nature of the business and that questions should be framed so as to require the expert to state the measure of the testator's capacity in his own language, says that a difficulty arises; that it is desirable to obtain a compact statement of the general mental condition, and that it is a better indication for the witness to say whether he would or not trust him to buy property intelligently than to say he once did this or that wise or foolish act; that the general statement often conveys a more accurate understanding than a rehearsal of many single acts. Nevertheless, in distinguishing between the proper and improper forms of statement, an easy opportunity is offered for judicial quibbling. In the dilemma thus presented, the solution seems often to depend merely on whether the court is disposed to stick at trifles and the forms of things, or to follow practical good sense." But he closes the section with these words: "By all courts a mere abstract statement that the person was or was not 'capable' of making a will or a contract or deed seems to be held improper; but there is a great variety of ruling upon other forms of statement." The essential difficulty with the question is that it involves not only an opinion as to mental capacity, but the views of the witness as to what kind and degree of mentality is necessary to make an instrument valid or binding—and this must be a question of law and not one of fact. The objection to these questions should have been sustained.

[2] Complaint is made that the court refused to permit each of the defendants to answer whether at any time he had asked or requested his mother to make the deed to him. An objection to this question was sustained because calling for a transaction and communication with a deceased person. We think the very opposite was the purpose of the question; that is, to show that there had been no transaction or communication of the kind and that the testimony was competent. In fact, practically this identical question was settled in *Murphy v. Hindman*, 58 Kan. 184, 186, 48 Pac. 850, 851, where it was said: "The testimony given was not with respect to a transaction, but was simply a denial that a transaction was had." See, also, *Gaston v. Gaston*, 83 Kan. 215, 109 Pac. 777; *Kerr v. Kerr*, 85 Kan. 460, 461, 116 Pac. 880. This evidence was material, and its exclusion was prejudicial error.

[3, 4] Complaint is made of the eighth instruction, in which the jury were charged that, in determining whether Lucy A. Putifer had sufficient mental capacity to execute the deeds in controversy or whether she was acting as the result of undue influence, they

had a right to take into consideration her physical and mental condition, her relations to her children and the grantees in the deeds, "the nature of the transaction of executing said deeds, the reasonableness or unreasonableness of such deeds, and every fact and circumstance in evidence touching upon the question." In *Blodgett v. Yocum*, 80 Kan. 644, 646, 103 Pac. 128, 129, a somewhat similar instruction had been given, and this was held error. It was said: "This instruction was erroneous. It practically told the jury that, if they regarded the disposition which the deceased made of her property as unreasonable, they might infer that at the time she executed the deeds she was of unsound mind or unduly influenced, or both. * * * A person of sound mind who is not unduly influenced may make disposition of his property by deed or will as he desires, without regard to its fairness or unfairness. * * * The instruction, however, authorized the jury to consider whether they would have made the same disposition of their property under the same circumstances; and, if they concluded that the disposition she made was unfair and unreasonable, it authorized them to infer from that fact alone that she was unduly influenced when she executed the deeds. This is not the law." While the instruction given was not as broad as the one in the *Blodgett* Case, it did, nevertheless, without defining reasonableness, authorize the jury to decide for themselves the reasonableness of the contract and use their own judgment thereon as a basis for setting it aside. It will not do to say that a person of sound mind may make any sort of conveyance he desires, but that, if he makes a conveyance which appears to the jury unreasonable, they may infer therefrom that he was of unsound mind, or unduly influenced. Such a rule would put wills and conveyances not within the control of the person who had accumulated the property, but within the control of strangers, whose experiences and ideas might differ widely from those of the person who had exercised the *ius disponendi*. This action seems to have been reversed for a similar error on the authority of *Blodgett v. Yocum*, *Coblentz v. Putifer*, 81 Kan. 905, 106 Pac. 1011.

[5] While the court submitted to the jury the three questions already referred to, it refused to submit interrogatories 5, 6, and 7, which inquired whether the property conveyed was accumulated by the labor and management of the defendants, whether the plaintiff contributed anything towards procuring the same, and whether a portion of the labor and industry of the defendants which went to procure the property was furnished after they arrived at majority. We do not see why these questions were refused. They were certainly as competent as those submitted, and while such matters are largely

within the discretion of the trial court, which discretion is often sought to be abused, we think the defendants may rightfully complain of the refusal in this instance.

Other alleged errors are urged which do not require comment, but, for those already indicated, the judgment is reversed, and the cause remanded for a new trial. All the Justices concurring.

(87 Kan. 692)

THOMPSON v. BARBER.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. ARBITRATION AND AWARD (§ 84*)—JUDGMENT—AUTHORITY TO ENTER.

An action for the recovery of money was pending between parties, and they agreed to submit it to the arbitration of certain designated arbitrators. Their agreement provided that the action in court should be continued, and that any award made in pursuance of their submission might, at the instance of either party and without notice to the other, be made a rule of the district court. Held, that the submission was a statutory arbitration, and that the court had power, upon application, to enter judgment on the award, if valid, or to set it aside upon any of the statutory grounds if it was found to be invalid.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 466-483; Dec. Dig. § 84.*]

2. ARBITRATION AND AWARD (§ 76*)—SETTING ASIDE THE AWARD.

The fact that considerable time elapsed after the award was made before the court acted in setting it aside did not deprive the court of power to take such action. Nor was the successful party precluded from asking for that remedy because he had taken down a part of the fund which had been deposited as a guaranty that he would perform the award when made and to secure the payment of costs.

[Ed. Note.—For other cases, see *Arbitration and Award*, Cent. Dig. §§ 396-402; Dec. Dig. § 76.*]

Appeal from District Court, Jackson County.

Actions by E. M. E. Thompson against Joseph Barber, and by Joseph Barber against E. M. E. Thompson. The actions were consolidated. Judgment for Barber, and Thompson appeals. Affirmed.

A. B. Crockett, of Horton, and T. F. Garver, of Topeka, for appellant. Charles T. Gundy, of Atchison, for appellee.

JOHNSTON, C. J. On the 8th day of November, 1899, two actions were pending in the district court of Brown county, in one of which Thompson was plaintiff and Barber defendant, and in the other Barber was plaintiff and Thompson was defendant, and on that date they entered into an arbitration agreement with respect to the two actions. The agreement provided: That all proceedings in the above-mentioned actions should be continued pending the arbitration. Arbitrators were named and given full power

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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to settle the disputed matters and award the costs incident to the reference to be borne and paid as they should deem just. That the arbitrator's decision should be final and binding on the parties and their heirs and assigns. That the death of either party should not abate the proceedings, but that the heirs or representatives of the party so dying should become parties to the arbitration without the necessity of further action. That any award made might, at the instance of either party and without notice to the other, be made a rule of the district court of Brown county, and a bond of \$1,000 was given by each party to secure costs and a submission to the award of arbitrators. In pursuance of the agreement \$1,000 was deposited by Joseph Barber in the First National Bank of Horton to the credit of the arbitrators to be applied on the award subject to the check of the arbitrators. A hearing was had and the arbitrators made an award in favor of Thompson. After paying him the amount thereof, and the costs which had accrued, as well as the fees of the arbitrators out of the \$1,000 deposit made by Barber there remained the amount of \$395.72 which was repaid to Barber on November 28, 1899, the date the award was filed. On December 1, 1899, Barber went to the clerk of the district court of Brown county, and secured a refund of the \$15, which had been deposited for costs in his case against Thompson. In their award the arbitrators authorized the dismissal of the two cases. On May 5, 1901, one year and five months after the filing of the award, Barber filed a motion to set aside the award, and, upon a hearing thereof by the court, an order was made setting it aside, but the grounds upon which it was done are not stated. Time was taken by Thompson to make a case and bring the ruling up for review, but no proceeding in error was brought. Thompson filed a motion in the district court for judgment on the award of the arbitrators and also one to have the causes dismissed, as the arbitrators had directed, but, after the ruling of the court setting aside the award, both of these motions were withdrawn. Barber made a motion to require the return of the moneys taken by the arbitrators out of the fund deposited by him as security, but no action on this motion appears to have been taken. Instead, a change of venue was granted, and the cases sent to Jackson county for trial. In the district court of that county a motion was made to dismiss the action on the ground that it had been finally disposed of by a common-law arbitration, and that the award made had been paid and the controversy closed, and therefore that there was no jurisdiction in the district court of Brown county to set aside the award nor for the retrial of the case in the district court of Jackson county, where a judgment in the consolidated cases was rendered in favor of Barber for \$667.45.

[1] The principal question in controversy here is whether there was power in the district court of Brown county to set aside the award of the arbitrators. This, it is said, depends on whether it was a statutory or common-law submission. There was a real controversy between the parties. They had capacity to make a submission, and there was an agreement to submit which named the arbitrators and set forth at length the rules for governing the arbitration. From this agreement the intention of the parties and the kind of arbitration to which this submission belongs must be determined. The statute provides "that all persons who shall have any controversy or controversies may submit such controversy or controversies to the arbitration of any person or persons, to be mutually agreed upon by the parties, and they may make such submission a rule of any court of record in this state." Gen. Stat. § 359. The statute further provides for arbitration bonds, the issuance of process, and the making of an award. It also provides for the filing of the award in court, and, if it is made to appear that the award was obtained by fraud, corruption, or undue means, or that the arbitrators misbehaved, the court may set it aside. Gen. Stat. 1909, § 369. The agreement made by the parties expressly stipulated "that this submission to reference and any award made in pursuance thereof may at the instance of either of the parties to the reference and without any notice to the other of them be made a rule or order of the district court of Brown county, state of Kansas." This stipulation fairly indicates that the parties intended to avail themselves of the statutory provisions, and that a judgment might be entered on the award that should be made. Under a common-law arbitration, the award is enforced by an independent action upon it or upon the bond of submission, while a statutory award may be made a rule of court, and an execution is then issued on the judgment entered. In this case the parties agreed that either party to the submission might have the award made a rule of court, and the arbitrators were given authority to direct the kind of judgment that should be entered. There are stipulations in the agreement indicating an intention to make the arbitration and award a final disposition, and it is contended that these provisions argue against the power of the court to act on this award, but these relate to a finality of the issues in controversy rather than to the manner of enforcing the award, and cannot prevail over the specific agreement that the award might be made a rule of the court. Both parties apparently proceeded on the theory that the submission was a quasi-judicial proceeding which did not remove the cases from the court or its jurisdiction as they stipulated that the pending actions should be continued and proceedings therein stayed, except such

as might be necessary to carry out the arbitration agreement. And later a formal order was entered by the court continuing the cases. Then, after the award was made, Thompson himself moved for judgment on the award, thus recognizing that it was a statutory arbitration, and that the court had jurisdiction to enforce the award. Barber also acted on the same theory, and asked the court to set aside the award. However, when the award was set aside, the motion of Thompson for judgment was withdrawn. Whether the award was set aside for fraud, misbehavior of the arbitrators, or for legal defects, was not shown, but presumably the grounds upon which the court set it aside warranted the action taken.

[2] Considerable is said about the time which elapsed between the award and the action of the court on it, but the statute does not prescribe how soon after an award is made that a party must ask to have it made a rule of court. It should, of course, be done within a reasonable time, and there is a provision that the court, at the next term after the award is filed, shall enter the judgment on it if no legal exceptions are taken to the award or other proceedings. Gen. Stat. 1909, § 367. As both parties came into court, and asked that action be taken on the award and submitted themselves to its jurisdiction, no question can well arise as to the power of the court at the time its action was taken. The action of Barber in taking down what remained of the fund which he had deposited as a guaranty that he would perform the award did not prevent him from challenging the validity of the award. If it was void for fraud, or upon any other ground, he was entitled to all of it. There was no voluntary payment of the award as the arbitrators, to whose credit it was deposited, immediately after the decision checked out as much of the fund as was necessary to pay their own fees, as well as other costs, and they turned over to Thompson the amount they had awarded to him. The fact that more than \$600 of the fund had been appropriated before he had an opportunity to except to the award or to challenge its validity may have suggested the cautionary step to take down as much as was left of the fund. In no event can his action in that respect, or the acceptance of the cost deposit, estop him from contesting the validity of the award, and especially after the district court had taken cognizance of the case and found sufficient grounds for setting the award aside.

It may also be fairly presumed, in the absence of a contrary showing, that all questions like this one, which might affect the right of Barber to a hearing of his motion to set aside the award, were correctly determined.

The judgment of the district court is affirmed. All the Justices concurring.

FUNK v. SHAWNEE FIRE INS. CO.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. DEPOSITIONS (§ 90*)—RIGHT TO USE—PERSONAL ATTENDANCE OF WITNESS.

A party still has the right to use the deposition of a witness who resides in another county, notwithstanding that, under the present statute, he might require his personal attendance at the trial.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 248-255, 258-260; Dec. Dig. § 90.*]

2. APPEAL AND ERROR (§ 1047*)—ADMISSION OF EVIDENCE—HARMLESS ERROR.

A judgment will not be reversed, merely because of the refusal of the trial court to strike out evidence which was competent when admitted, but was afterwards shown to be secondary, when no actual prejudice appears. *Clements v. Oil Co.*, 87 Kan. 418, 124 Pac. 423, followed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.*]

3. TRIAL (§ 397*)—FINDINGS—PRESUMPTIONS.

The rule that a special verdict, in order to support a judgment, must include a finding upon every fact essential thereto has no application where the court, upon request, states the conclusions of fact found separately from the conclusions of law. In that case, in the absence of a request for further findings, the judgment implies a finding favorable to the prevailing party upon any issue not specifically covered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*]

Appeal from District Court, Marion County.

Action by John D. Funk against the Shawnee Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mulvane & Gault, of Topeka, and D. R. Hite, of Topeka, for appellant. H. S. Martin, of Marion, for appellee.

MASON, J. Fred Nuss, the owner of a mortgaged farm, insured the buildings in the Shawnee Fire Insurance Company; the loss being made payable to the mortgagee, who held the policy. Except as to the mortgagee, the insurance was to be rendered void if a change took place in the title of the property, or if it should be assigned, unless an agreement thereto was indorsed on the policy. Nuss sold the farm to John D. Funk. A loss occurred, which was paid to the mortgagee; the company taking an assignment of the mortgage. Funk paid the amount due in excess of the insurance and brought an action against the company to compel it to release the remainder. The company defended, upon the ground that no assignment of the policy had been made from Nuss to Funk with its consent. Upon the first trial, a demurrer to the plaintiff's evidence was sustained. This ruling was reversed on appeal. 82 Kan. 525, 108 Pac. 832. A second trial resulted in a judgment for the plaintiff, and the defendant appeals.

[1] Complaint is made of the admission of

the official transcript of the testimony given at the former trial by a witness who was a resident of the state, but not of the county. The suggestion is made that since, under the present Code (Civ. Code, § 326 [Gen. St. 1909, § 5920]), the attendance of the witness could have been required, the transcript of his former testimony should not have been admitted. Such a transcript may be used "under like circumstances and with like effect as the deposition of such witness." Gen. Stat. 1909, § 2407. Section 358 of the Code (Gen. St. 1909, § 5953) provides that, "when a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that * * * the attendance of the witness cannot be procured;" but the qualification is added, "for any cause specified in section 337." And section 337 (Gen. St. 1909, § 5931) reads: "The deposition of any witness may be used only in the following cases: First, when the witness does not reside in the county where the action or proceeding is pending." It is true that when these sections were originally enacted a witness could not be required to attend a trial outside the county of his residence; but we do not think the Legislature intended, in permitting a litigant to require the resident of another county to attend a trial, to compel him to do so, if he preferred to make use of a deposition. This seems especially obvious in view of the provision that "the costs of witnesses attending from outside the county shall not be taxed against the opposing party unless by order of the court." Civ. Code, § 326.

[2] The plaintiff was permitted to testify, in substance, that he orally agreed to purchase the property from Nuss on certain terms, which included the transfer to him of the insurance; that they together went to J. O. Fast, the agent of the insurance company, and told him of their agreement; that he reduced it to writing, making two copies, which they signed, each retaining one. The defendant moved to strike out the testimony as to the oral agreement, on the ground that presumptively all their negotiations were merged in the written instrument, which became the primary evidence. The overruling of this motion is relied upon as error. The argument may be disposed of in the language used of a similar contention in *Clements v. Oil Co.*, 87 Kan. 418, 124 Pac. 423, decided June 8, 1912: "No assurance is offered the court that the plaintiff's evidence was untrue; that the memorandum is different from his testimony; or that the result would be changed if the memorandum were produced. The defendant simply stands upon a rule of evidence and asks that the verdict and judgment be upset, in order that the plaintiff may be compelled to prove a fact in a better way. The statute limits the court's power of reversal to cases in which prejudice to substantial rights is made to appear. Prejudice is not presumed; and a judg-

ment based upon uncontradicted evidence, competent when admitted, but which afterwards turns out to be of secondary quality, will not be reversed, unless it can be said from the record that the result would probably be different if the primary evidence were produced."

[3] The court, upon request, made separate findings of fact and conclusions of law. We are asked to set aside the judgment, on the ground that no finding was made that the policy was transferred from Nuss to Funk. No specific finding was made to that effect, although a part of the evidence on the subject was set out in detail. Such omission, however, is not fatal to the judgment; the general finding for the plaintiff covering the matter. "Where the court attempts to make special findings, as requested by a party, and inadvertently fails to make a special finding upon some particular matter in controversy, or makes such finding in too general terms, the court does not thereby commit substantial error, unless its attention is first called to the omission to find, or to the defective finding, and it then fails or refuses to correct the same." *Briggs v. Egan*, 17 Kan. 589, 591. The rule which requires a special verdict to cover every issue of fact (Civ. Code, § 294 [Gen. St. 1909, § 5888]) has no application. *Hazard Powder Co. v. Viergutz*, 6 Kan. 471, 486; note, 24 L. R. A. (N. S.) 2. In the absence of a request for further findings, the judgment implies a finding favorable to the prevailing party upon any issue not specifically covered. *Christisen v. Bartlett*, 78 Kan. 118, 95 Pac. 1130; *Gas Co. v. Fletcher*, 81 Kan. 76, 85, 105 Pac. 34.

The judgment is affirmed. All the Justices concurring.

(87 Kan. 652)

KENNETT v. KIDD et al.
(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. WILLS (§ 712*)—VALIDITY—ATTESTATION—COMPETENCY OF WITNESSES.

A provision in a will giving property to a local camp of Modern Woodmen is not void because the will was witnessed by members of such camp.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1693, 1694; Dec. Dig. § 712.*]

2. WILLS (§ 10*)—NATURE OF TESTAMENTARY POWER—CAPACITY TO TAKE BY DEVISE OR BEQUEST.

Fraternal insurance orders being under the rules and restrictions of the statute, such local camp is not competent to take and hold property given to it by will; its legal source of income being dues, premiums, and assessments.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 18-25; Dec. Dig. § 10.*]

3. INSURANCE (§ 696*)—MUTUAL BENEFIT INSURANCE—ASSOCIATIONS—AUTHORITY TO HOLD PROPERTY.

Under sections 1832-1834, Gen. Stat. 1909, such camp is authorized to hold only such real

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

estate, including buildings, as may be necessary to provide suitable accommodations for holding meetings and transacting business, although such necessary buildings may be used in part for other purposes.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1837; Dec. Dig. § 696.*]

4. WILLS (§ 229*)—VALIDITY—RIGHT TO QUESTION VALIDITY.

When a testator has attempted to devise and bequeath to such camp real and personal property, his heirs may affirmatively or defensively assert the invalidity of such provision and the inability of the camp to take thereunder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 550-554; Dec. Dig. § 229.*]

Appeal from District Court, Geary County.

Action by Mary E. Kennett against Mrs. Howard Kidd and others. From a judgment for defendants, plaintiff appeals. Modified.

W. S. Roark, Lee Monroe, and Carr W. Taylor, all of Topeka, for appellant. J. V. Humphrey, of Junction City, F. L. Williams, of Clay Center, and Simon & McClure, of Topeka, for appellees.

WEST, J. This action was brought by Mary E. Kennett to set aside the will of her father, John C. Kennett, who departed this life March 30, 1910, having executed the instrument six days before. The plaintiff testified that she lived with her father as a member of the family until about 30 years of age. Her mother died when she was 4, and when she was 19 her father remarried. After a son of the second marriage became about 10 years old, her father appears to have separated from the family, and the plaintiff continued to prepare his meals and take them to him. The half-brother lived with the brother and sister for about 12 years. Plaintiff had the care of the half-brother; the stepmother having left the home when the boy was about 3½ years of age. When about 16 the boy left home and afterwards returned and stayed for a time. Plaintiff continued to keep house and lived with him up to the time of his death. The father and daughter had nothing to do with each other and did not speak for about 15 years until after the elder brother went away, when they became friendly. It appears that for many years Mr. Kennett kept a store at Milford and some time before his death had a stroke of paralysis which greatly disabled him so that he was unable to attend to the store without help. He appeared greatly attached to his son William, whose death seemed greatly to affect him. William belonged to the Woodman Order, members of which officiated at his funeral. He left some property and life insurance of which the plaintiff received quite an amount. After Mr. Kennett had become partially paralyzed, a membership was applied for in a local Woodman camp, and certain officers, upon the occasion of a meeting, went over to his

store where he was initiated into the order as a social member, but he never attended any of its meetings. The testimony, while doubtful and conflicting on many points, is very clear that he possessed none of the qualifications which would naturally lead to his selection as a social member. A neighbor, Linscott, who had lived in the vicinity 42 years and had been postmaster a great many years and had known Mr. Kennett since 1869, called on him in March, 1910, having been sent for with reference to a will. A paper which the testator said was his will was presented to Mr. Linscott for examination to see if he thought it correct. He informed Mr. Kennett that he thought it was correct with the exception of some change in the final execution. The old gentleman spoke about Mrs. Cornwell, his nurse, who would receive \$1,000. He also spoke of Mrs. Taylor, and said he wanted to make some provision for her, as she had been kind to him in cooking and caring for him. He made some remarks regarding the provision for the Woodmen and for the Kansas Orphans' Home. He said he had appreciated the latter institution and thought it was very worthy, and he wanted to do something for it, and he had made provision in his will accordingly; that he had connected himself with the Woodmen in order to have somebody to care for him when he got past caring for himself and had made a provision for the order. He said that Mary, the plaintiff, had ignored him, and he would give her only \$5. He asked no advice as to the disposition of the property, but only as to the form of the will. Later he sent for the witness again, who read the will over. The attestation having been changed as suggested, Mrs. Cornwell was called in, and the will was read in her presence and in the presence of the testator. Some two weeks before this he had drawn up a deed for certain lots to the Woodmen and given it to the witness, telling him to hold it until ordered to turn it over. Nothing further was said concerning this deed. The will, after providing for a monument and inscription, devised to the plaintiff \$5, to the son by the second wife \$5, to Mrs. Kidd two lots in Milford, to Mrs. Taylor \$500; to Mrs. Cornwell \$1,000, to the Kansas Children's Home Society \$1,000, and then gave and bequeathed to camp No. 1,704 of the Modern Woodmen of America of Milford, Kan., "to be used as said camp may see fit," all the remainder of his property, real and personal; certain restrictions being specified against the use of it for certain purposes and respecting the cutting of growing timber. Plaintiff, in her petition, alleged that her father was of unsound mind and had no testamentary capacity at the time of executing the instrument, and that he was induced by undue influence exercised over him by officers and members of the Woodmen Camp.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

While the testimony shows that Mr. Kennett was about 80 years of age and very feeble, and while there is an abundance of testimony, pro and con, as to his mental capacity, the court found against the plaintiff, and, whatever our opinion might be as to the correctness of such finding, it could not be disturbed, although the testimony fairly shows that Mr. Kennett had a clear comprehension of property matters and the way in which he desired his estate to go.

The court also found against the plaintiff on the question of undue influence, and while the circumstances surrounding the peculiar reception of the testator as a social member and the peculiar conduct of members of the local lodge and the gossip occasioned thereby might well justify the conclusion that the object sought was far more financial than social, it is not necessary to determine that question.

[1] It is also argued that, as the will was witnessed by members of the local camp who were in reality beneficiaries, they were incompetent as witnesses, and for that reason the will should be held for naught. This presents a question on both sides of which much might be said, but the weight of authority is to the effect that members of a corporation are competent to witness a will which bequeathes or devises property to the corporation itself.

It is strenuously insisted that leaving the only daughter a bequest of only \$5 renders the will so manifestly unreasonable as to make it a very decided object of suspicion. Two things may be said concerning this: One, that the trial court having found the testator to have possessed sufficient testamentary capacity, it must follow that he had the full and complete right to determine for himself the reasonableness or unreasonableness of any devise or bequest made by him. *Underhill on Wills*, § 135; *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; *Kerr v. Kerr*, 85 Kan. 460, 116 Pac. 880. Second, that while plaintiff was the only daughter, the testimony shows conduct and assertions concerning her father which he might have deemed a sufficient excuse for making no provision whatever for her, in view of the fact that she was a woman of mature years and already fairly well provided for.

[2] It is finally contended that the devise and bequest made to the local camp are void for the reason that the camp is not competent to take under the will, or rather, to hold the real estate devised.

[3] It is argued that the statute (Gen. St. 1909, § 1832) restricts the camp in its holding of real estate to such as may be necessary to provide suitable accommodations for the holding of its meetings and the transaction of its business. Chapter 164 of the Laws of 1899 provided that any council or camp "may purchase, own, manage, control, improve and dispose of such real estate, in-

cluding a suitable building as may be necessary to provide suitable accommodations for the holding of its meetings and transacting its business; provided, that any such building may be used in part for other purposes." Sections 2 and 3 of the act provided that the title to property mentioned should be vested in the lodge or other subordinate organization, and that transfers might be made by the trustees or managers thereof, and that such subordinate organization might contract, sue and be sued through its trustees or managers in any matter affecting such real estate or buildings, but that no judgment rendered against such organization should have any force or effect except as against the property owned as provided in the act. The first provision was amended in 1909 so that the camp "may purchase, own, manage, control, improve, mortgage and dispose of such real estate, including such suitable building or buildings as may be necessary to provide suitable accommodations for the holding of its meetings and transacting of its business, and may purchase, own, manage, control and dispose of stock in a corporation which has for its purpose the building, erection, control, management or ownership of such suitable building or buildings as may be necessary to provide suitable accommodations for the holding of meetings and transacting of business of any organization or organizations as are provided for herein: Provided, that any such building or buildings as are provided for herein may be used in part for other purposes." Gen. Stat. 1909, § 1832. The other features of the act of 1899 remain as they were. It is manifest from this legislation that the camp in question cannot lawfully hold real estate except such as may be necessary to provide suitable accommodations for holding its meetings and transacting its business, including such buildings upon the real estate as may be necessary for such purposes. When, and only when, such buildings and real estate are necessary for these purposes, can the lodge lawfully hold the same, but in that case the buildings themselves need not be confined exclusively to lodge purposes, but if used in part therefor they may be used in part for other purposes; the evident intention being that, when a camp needs and erects a lodge building, it may make it large enough so that a portion of it may be rented and thus furnish an income as a partial return upon the expenditure. With these provisions thus construed, it is absurd to claim that a small local lodge could need a farm or body of land such as is covered by the will in question to provide suitable accommodations for holding its meetings and transacting its business.

Somewhat strangely, neither the records nor the briefs advise us as to what the property sought to be given to the camp consists of, except what appears upon the face of the will, and a statement in the brief of the plaintiff's counsel that the residue going

to the camp amounts to over \$9,000. From the fact that Mr. Kennett was engaged in conducting a store it may be assumed that the bequest covered the stock of goods, although its value or the number of acres contained in the land devised does not appear. Somewhat strangely, also, able counsel on both sides have failed to suggest whether or not the camp can lawfully hold the personality, and the matter has been presented and argued very much as if the entire property sought to be given to the lodge consists of real estate; but, as the question of personality necessarily arises, it must be considered and determined. Article 11 of chapter 55, General Statutes of 1909, sections 4303 to 4318, provide for fraternal beneficiary societies. Section 4310 provides that a fraternal assessment order shall have certain powers and they and their successors in their corporate name shall, in law, be capable of taking, purchasing, holding, and disposing of real and personal estate for the purpose of their corporation. This, of course, must be construed with the provision referred to touching the power of a camp to hold real estate. Section 4308 provides that "the fund from which the payment of the benefits of such association shall be made, and the fund from which the expenses of such association shall be defrayed, shall be derived from assessments, premiums or dues collected from its members, and interest accumulations thereon." This language would seem to indicate strongly an intention that fraternal beneficiary orders should have but the one source of income, that arising from dues, premiums, and assessments. See *State v. Vandiver*, 213 Mo. 187, 111 S. W. 911, 15 Ann. Cas. 283, where the Supreme Court of Missouri construed this language. The local camp composed of a number of individuals is an entity of itself, and the gift does not go to the members, but to the camp, "to be used as said camp may see fit." There is no trust for charitable uses; there is no charity. There is simply a gift outright to the local camp of a fraternal order of a large amount of property, real and personal, to be used, not as the law provides, but as the camp may see fit. While corporations usually are not prohibited from accepting devises and bequests, and while one of sound mind may give his property to whatsoever persons he desires, it appears to be the legislative policy of the state that fraternal beneficiary societies are to be governed by rules and restrictions applying specifically to them, and indeed this may well be, because such societies are not corporations of the ordinary kind or in the usual acceptation of the term. They are associations of men who voluntarily combine for mutual benefit, but who can do so only under the terms and provisions prescribed by the Legislature. It might well be argued that the court cannot assume or know judicially that the property in question is not needed for a lodge room or build-

ing; but we cannot be called upon to indulge in the absurdity of assuming or supposing that a small local camp, like the one in question, could by any reasonable possibility need for such purpose property of the value of \$9,000 or more. Further, if the camp does need a building, the law prescribes the source of its income which is entirely different from that sought to be drawn upon in this case. We think, therefore, as a matter of proper statutory construction and of everyday common sense that the attempted gift of this property was something of which the camp may not lawfully avail itself.

[4] The question remains whether any one but the state can call in question the right to hold this property. As a general rule, when corporations do acts or attempt to hold property ultra vires, private parties may not be heard to complain for the reason that corporations, being the creatures of the state and subject to its sovereign will, are to be corrected only by the state. The rule more frequently applies when the assumed powers render the conveyance voidable and not absolutely void. Approaching the matter from the point of reason and logic, we have this situation: The law directs how property undisposed of according to law shall descend at the death of the owner. The law prohibits the devisee in question from taking and holding the property sought to be devised by the testator. Such conveyance is not voidable but void; therefore the persons whom the law has selected as the proper heirs to this property have a right to object to being deprived thereof, and have the right to assert their statutory claim in opposition to that of the camp which has no legal basis whatever.

A proposition which seems so consonant with the dictates of reason is fortunately supported by respectable authorities. Underhill on the Law of Wills, § 841, says: "Where the amount of the property which a charitable corporation may own is thus expressly limited by statute, every devise or bequest is void so far as it attempts to convey to it the title to property which in value exceeds the limitation mentioned in the statute. The title to the property in excess of the statutory limit does not vest in the corporation, for the statute has deprived the corporate beneficiary of all capacity to take by will so far as the devise exceeds the limitation imposed by statute. The property thus invalidly disposed of passes to the residuary devisee, in case there is a residuary clause, or, if there be none, then to the heirs or the next of kin of the testator, as intestate property."

If this be true respecting charitable corporations, by so much the more must it be true in regard to fraternal beneficiary associations. In the *Matter of McGraw*, 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, the statute limited the amount of property which incorporated colleges might take and hold by gift, grant, or devise, and it was held that such limitation was a prohibition upon its

taking and holding property beyond the amount limited, and that the heirs or next of kin of the testatrix could raise the question. The opinion was by Judge Peckham, who went into an exhaustive examination of the questions presented and the cases cited in the voluminous briefs of counsel. He quoted with approval from *De Camp v. Dobbins*, 31 N. J. Eq. 690, where it was said: "Nor can I assent to the other principle that if, as the condition assumes, this bequest is violative of the law if carried into effect, then no one but the state can intervene. I find no warrant for such a doctrine, either in the legal principles belonging to the subject or in the adjudications. * * * A grantor making title to a corporation might be estopped from questioning the effect of his own conveyance. So a mere stranger could not question such a corporate title. But I have not observed any decision that asserts, where a title is created by devise which vests in a corporation for its own use a larger quantity of property than the laws authorized, that the heir at law has no right to make objection." 111 N. Y. 109, 19 N. E. 254, 2 L. R. A. 387. After quoting this and other expressions of the doctrine it was said: "The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee; but it vests instantly in the heir or next of kin, and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take."

In *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, the Supreme Court of Rhode Island held that "the question of the corporation's power to take the whole legacy may be raised by other persons interested under the will, and the right to object is not limited to the state." It was there said: "The same argument was presented with great ingenuity and in various forms in *Re McGraw*, and the court, after patiently examining the argument in all its phases, held it to be unsound. * * * It follows that the property given to the society beyond its capacity to hold became immediately subject to the other dispositions of the will." Counsel for the defendant cite *Investment Co. v. Trust Co.*, 65 Kan. 50, 68 Pac. 1089, holding that under the alien land act the state was the only party who could insist upon a forfeiture, but a different question was there involved, and the decision is not applicable. *Madden v. State*, 68 Kan. 658, 75 Pac. 1023, is also cited; but this involved the question under the same alien land act. Also, *Harris v. Gas Co.*, 76 Kan. 750, 750, 92 Pac. 1123, 1126 (13 L. R. A. [N. S.] 1171), which held that the question of the character of business a corporation is authorized to engage in is ordinarily a matter between it and the state and

not open to collateral inquiry. But the opinion cites from *Pape v. Capitol Bank*, 20 Kan. 440, 27 Am. Rep. 183, which held that if the state remains silent during an open and notorious assertion and exercise of corporate powers, an individual will not be permitted to raise the inquiry, "unless there be some powerful equity on his side." In *Kelley v. Forney*, 80 Kan. 145, 101 Pac. 1020, also cited, it was said: "It is true that Forney appears not only to have been a stockholder in the corporation, but to have owned a majority of the stock. If his rights in that capacity were invaded by the lease, he might have attacked its validity in an appropriate proceeding. But an action of forcible entry and detainer is not of that character." "If then the corporation is not capable of taking land, but nevertheless a devise of land is made directly to it, the devise will be void, and the land will revert to the heirs of the grantor, under the theory of his having died intestate as to it; or will pass under other theories to other devisees under other provisions of the will." 10 Cyc. 1130. See, also, *Barton et al. v. King et al.*, 41 Miss. 288.

It is also claimed that the testator was unconscious of the attestation of the will, but we think the general finding of the court against the appellant in this respect was justified by the evidence.

No reason appears why the will, except the portion relating to camp No. 1,704, should not be carried out.

The judgment is modified, and the property sought to be given to the Woodmen Camp must go to the heirs as the law directs. All the Justices concurring.

(87 Kan. 781)

STATE ex rel. SIMON, Co. Atty., v. FAIR-CHILD et al., State Text-Book Commission.
(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 167*)—ADOPTION OF SCHOOL BOOKS—"UNIFORM SERIES."

The words "a uniform series," as used in section 4, c. 179, Laws of 1897 (Gen. Stat. 1909, § 7813), which authorizes the school Text-Book Commission to select and adopt "a uniform series" of school text-books for use in the public schools of the state, have reference to the whole series of text-books adopted for use in the public schools. The use must be uniform in all schools of the same grade. The text-books adopted upon any subject may be made up of books prepared by different authors, provided the same text-book is adopted for use in the same grade in all the public schools. It is for the Text-Book Commission, in its discretion and judgment, to determine whether or not text-books by different authors upon the same subject are so arranged as to permit them to be used connectedly.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 338; Dec. Dig. § 167.*

For other definitions, see *Words and Phrases*, vol. 8, p. 7176.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Application by the State, on the relation of Ernest R. Simon, County Attorney, for writ of mandamus against E. T. Fairchild and others. Demurrer sustained, and writ denied.

E. R. Simon, T. F. Garver, and Hugh T. Fisher, for the application. John S. Dawson, Atty. Gen., opposed.

PORTER, J. Original proceedings in mandamus. The state, on the relation of the county attorney of Shawnee county, has brought this action asking for a writ to compel the defendants to reconvene as the State Text-Book Commission, and to let contracts for readers and geographies for use in the public schools of Kansas.

It is alleged in the petition that the commission recently awarded the contract for first, second, and third readers to the Wooster Publishing Company, and the contract for the fourth and fifth readers to the University Publishing Company. In letting contracts for geographies, it adopted for use in the schools King's Elementary Geography, published by Scribner's, and selected as the advanced text on geography a book published by the McMillan Company, called Tarr & McMurray's Advanced Geography. The defendants have demurred to the petition.

The only question involved is the right and authority of the State Text-Book Commission to select and adopt what the plaintiff terms "split" series of text-books. It appears that the Wooster Publishing Company publishes a series of readers of which Miss Wooster is the author, and that she has a complete series of readers, entitled first, second, third, fourth, and fifth, which were offered to the Commission for adoption as a series; that the University Publishing Company likewise publishes an entire set of readers from first to fifth; and that there were offered to the Commission King's Elementary and Advanced Geographies, both by the same author, and that the McMillan Company publishes an elementary and an advanced geography, which were offered for adoption. It is the contention of the plaintiff that the Commission had no authority to adopt part of a series of text-books by one author and part of another series by a different author.

The state text-book law is chapter 179 of the Laws of 1897 (sections 7810-7832, Gen. Stat. 1909). Section 4 provides, among other things, as follows: "The school Text-Book Commission herein provided for shall be empowered and it is hereby authorized to select and adopt a uniform series of school text-books for use in the public schools of the state of Kansas, in the following named branches, to wit: Spelling, reading, arithmetic, geography: * * * Provided, that the matter contained in the subject of reading shall consist of lessons commencing with the simplest expressions of English, through

the regular gradations of lessons up to and including the highest style of both poetry and prose: Providing, that no text-book shall be adopted by this Commission that does not equal in quality of matter, material, binding and mechanical execution and approximately equal in size the following text-books in general use, namely: The speller to McGuffey's new speller, the readers to McGuffey's readers, the arithmetics to White's series of arithmetic, the geographies to Rand & McNally's geography. * * *

The question to be determined turns upon the meaning of the words "uniform series of school text-books." The plaintiff concedes that the word "uniform" refers to the use of the books, and that one of the purposes of the Legislature is that the different schools in the same grade shall use the same books. They insist, however, that if this were the only purpose of the Legislature the word "series" would not have been used in the statute. The word "series" was employed, they say, because one of the main objects in the preparation of a set or series of school text-books is that there shall be logical arrangement in the contents of the several books upon any particular subject, and that each book shall have a definite and proper relation to the book preceding it upon the same subject; that this was in the legislative mind when it required the selection and adoption of a series of readers equal in quality of matter to McGuffey's readers. It is insisted that it will tend to put into the hands of the school children a better arranged series of school books, if the books upon any particular subject are prepared under the same supervision, than would result from a selection of books which overlap, or where one in a series does not properly and connectedly succeed another.

The plaintiff has not been able to find any authorities directly in point, and obviously the question is one which must be determined from a consideration of the statute itself. We have no difficulty in arriving at the conclusion that the demurrer must be sustained. This follows from a consideration of the entire statute creating the Text-Book Commission. It is a matter of common knowledge that the principal mischief sought to be avoided by the statute was the lack of uniformity in the books in the same grades of the public schools, which necessitated the purchase of new books for school children when a family moved from one town to another, or from one school district to another. Identity of authorship in a series of readers or geographies or grammars was not in the legislative mind. It is unreasonable to assume that it could have been. The intention manifestly was to give to the Text-Book Commission a wide discretion in selecting a series, thus insuring not only uniformity in use in the same grade of schools throughout the state, but providing what the Commission should consider to be the best

text-book upon a given subject for each grade of school. It will doubtless be found that in many instances one author of a series has produced a text-book for use in one of the elementary grades which, in the judgment of the Commission, is superior to that of all other authors; while the book by the same author for use in one of the more advanced grades may be, in the judgment of the Commission, inferior in quality of matter to the book of the other author. The Legislature was not concerned as to what might prove the most advantageous to publishers or authors of text-books. In case the Commission should find it impracticable or impossible to secure from publishers bids for a text-book upon any subject for use in any grade of the schools, which the Commission should deem suitable in quality or price, the Legislature gave it authority to purchase the manuscript and copyright of any text-book, and to cause the same to be published and supplied to the schools of the state. Laws 1897, c. 179, § 8; Gen. Stat. 1909, § 7817. We construe the words "uniform series" to mean the whole series adopted for use in the schools. Their use must be uniform in all the schools of the grade where the particular book is used. The intent of the Legislature was not to provide a set of books on one subject necessarily by the same author. When a series of readers has been adopted, it may be made up of books prepared by different authors. It is no less a uniform series of readers, if the reader adapted for use in each grade is by a different author. The Legislature gave the Commission full power and discretion to use their judgment in selecting the kind of text-books, subject to certain standards. This is manifest by a reference to section 7815, which limits the price at which text-books are to be sold to the people of the state for use in the public schools. The same section further provides that the bids are to be taken on single books, and the maximum price of each book is designated, beyond which the Commission has no power to make a contract. Section 7815 also provides as follows: "And said Commission shall have the right to reject any and all bids, and at their option shall have the right to reject any bid as to part of such books and to except (accept) the same as to the residue thereof."

If there were the slightest doubt about the meaning of the words "uniform series" in the other section, it disappears by reference to the latter section, since the Commission is expressly given the right to adopt part of the books on any subject written by one author, and reject others by the same author on the same subject. As before observed, there are few authorities from other states which can furnish any aid in construing our statute; but the Supreme Court of Michigan, in *Attorney General v. Detroit Bd. of Education*, 133 Mich. 681, 95 N. W. 746,

placed the same construction on the statute there, although the language of the statute was not exactly the same. In *Campana v. Calderhead*, 17 Mont. 548, 48 Pac. 83, 36 L. R. A. 277, there is a note, at page 279, which reads as follows: "Under the Pennsylvania law, there is no authority to adopt more than one series of books covering the same studies. But where there are several grades in the subject the books in the several sets need not all be by the same author. The different sets of the series may be by different authors, if they are so arranged as to be uniform in the sets in which they are used throughout the district. *Francis v. Allegheny School Dist.*, 24 Pittsb. L. J. (N. S.) 19."

The question as to whether the books by different authors upon the same subject are so arranged as to permit them to be used connectedly is a question to be determined, not by the courts, but by the State Text-Book Commission, which the Legislature has created for that purpose, giving to the Commission the power to use their discretion in the selection of the series.

The demurrer is sustained, and the writ denied. All the Justices concurring.

(87 Kan. 647)

TRIMMER v. SELLS.

(Supreme Court of Kansas. July 6, 1912.)

1. CONTRACTS (§ 186*)—BUILDING CONTRACTS—LIABILITY OF OWNER.

To entitle one employed by a building contractor to a personal judgment against the owner for labor performed, he must show an express or implied contract of the owner to pay therefor.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 790-797; Dec. Dig. § 186.*]

2. MECHANICS' LIENS (§ 118*)—CREATION OF LIEN—STATUTES.

To entitle one employed by a building contractor to a lien on the property of the owner for labor performed, he must, as required by Gen. St. 1909, § 6246 (Code Civ. Proc. § 851), serve on the owner a written notice of the filing of the lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 161; Dec. Dig. § 118.*]

Appeal from District Court, Wabaunsee County.

Action by C. C. Trimmer against William Sells. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Oscar Schmitz, of Alma, and Wheeler & Switzer, of Topeka, for appellant. Wm. Bowes and C. E. Carroll, both of Alma, for appellee.

PER CURIAM. The appellee brought this action claiming personal judgment against appellant, and a mechanic's lien on certain real estate owned by appellant. One cause of action was for labor performed by the appellee. The other was on an assignment of

an account from one who had performed labor under the same circumstances.

The allegation of the petition is in substance: That one M. C. Plank was erecting a house for the appellant under contract, and employed the appellee and his assignor to labor; that the amount due for appellee's services was \$79.80, and for the services of the assignor \$57.25. The filing of a claim for a mechanic's lien by both the appellee and his assignor is alleged in the form, and within the time, required by law, but no notice to appellant of the filing of such liens is alleged as required by section 6246, Gen. St. 1909 (Code Civ. Proc. § 651). The petition alleged no contractual relation between the appellee and the appellant, or between the assignor and the appellant. On the trial there was no evidence to establish the personal liability of appellant, or that notice had been given him of the filing of the claim for a lien. The court rendered a judgment in favor of appellee for the amount of both accounts, and adjudged him to have a mechanic's lien on the property as prayed for.

[1, 2] Under the petition and the evidence, the appellee was neither entitled to a personal judgment nor to a lien upon the property. To entitle him to a personal judgment against the appellant, it devolved upon him to show an express or implied contract on the part of the appellant to pay his labor bill and the labor bill of his assignor; and, to entitle him to a mechanic's lien, it was as material for him, under the provisions of section 6246, Gen. St. 1909 (Code Civ. Proc. § 651), to serve notice in writing of the filing of such lien upon the owner of the land as it was for him to file the affidavit setting forth the facts as to the services rendered, and the value thereof.

The judgment is reversed, and the case is remanded, with instructions to render judgment in favor of the appellant as to both causes of action.

(87 Kan. 617)

DAY et al. v. KANSAS CITY PIPE LINE CO.

(Supreme Court of Kansas. July 5, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 369*)—APPEAL AND ERROR (§ 1039*)—ELECTION BETWEEN COUNTS—TIME FOR MOTION—HARMLESS ERROR.

If a defendant objects to the inclusion of inconsistent counts in a petition and intends to ask the court to require the plaintiff to elect on which count he will rely, the objection and motion should be made before answer, and, if he fails to make them until after the issues are joined, it is no abuse of discretion if the court denies a motion to compel an election made at the beginning of the trial, and, in no event, could the rights of the defendant have been prejudiced, as the court, after hearing

the evidence, eliminated one of the counts from consideration.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369;* Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

2. MINES AND MINERALS (§ 78*)—GAS LEASES—CONSTRUCTION.

A gas lease for a term of 10 years, for a stated consideration, provided that if gas was found the lessor was to have sufficient gas for domestic purposes; that the lessee was to drill four wells within 6 months and to continue drilling as long as paying wells were found or royalties paid, and for the gas sold or marketed from producing wells the lessee was to pay to the lessor \$100 per year on each well, such payment to be made on each well within 60 days after commencing to sell gas and annually thereafter while gas was so sold. *Held*, that the lease contemplated that the land should be developed with due diligence, and upon a failure to do so the lessor was entitled to a cancellation of the lease as to the undeveloped land.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

3. MINES AND MINERALS (§ 78*)—GAS LEASES—QUESTION OF FACT.

What was due diligence in the case was a question of fact for the trier of the facts, and upon a consideration of the evidence it is held to be sufficient to sustain the finding of the trial court that due diligence in the development of the whole tract had not been exercised by the lessee.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

Appeal from District Court, Wilson County.

Action by Clyde Day and another against the Kansas City Pipe Line Company. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

See, also, 82 Kan. 861, 109 Pac. 186.

John J. Jones, of Chanute, and Eugene Mackey, of Pittsburg, Pa., for appellant. Farrelly & Evans, of Chanute, for appellees.

JOHNSTON, C. J. In this case a judgment was entered canceling a gas lease. On April 20, 1903, Smith Day and his wife were the owners of a 600-acre farm in Wilson county, and on that date leased it to I. N. Knapp for oil and gas mining purposes. The interests of the Days in this farm and lease became vested in the appellees, the heirs of Smith Day, deceased, and that of Knapp in the appellant. The lease was in the usual form, reciting a consideration of \$600, ran for a term of ten years, and, as to the finding of gas, provided that if gas was found the lessors were to have therefrom sufficient gas for domestic purposes and the lessee was to have the remainder for his own use; but, if he should sell or market it from any well producing gas only, he was to pay the lessors \$100 per year for the time the gas was sold or marketed, such payments to be made on each well within 60 days after commencing to sell the gas therefrom and annually thereafter while gas was so sold. The lease also

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

required the lessee to drill four wells within six months and to continue drilling as long as paying wells were found or royalties were paid. Before Knapp assigned the lease to the appellant, he drilled four wells, as required by the terms of the lease, completing them within six months after the date of the lease. These four wells were all located on 80 acres of the leased land, were all producing, and on them the specified royalties were paid, and the 80-acre tract on which they were sunk is not specifically involved in this controversy. After the completion of the fourth well on August 31, 1903, no further drilling was done either by Knapp or his assignee until August, 1909. In the meantime, and on February 27, 1907, the appellees commenced the present action asking for a cancellation of the lease as to all of the undrilled portions of the premises by reason of the failure of the appellant to drill more than the four wells above referred to. It was a petition for equitable relief for failure to properly develop. Issues were joined, a trial had, and a judgment rendered in favor of the pipe line company from which an appeal was taken to this court, and, on consideration here, the case was reversed (*Day et al. v. Kansas City Pipe Line Co.*, 82 Kan. 861, 109 Pac. 186), on the authority of *Howerton v. Gas Co.*, 82 Kan. 367, 108 Pac. 813, 34 L. R. A. (N. S.) 46, and remanded for further proceedings below in order to determine whether adequate relief could be obtained in damages.

Following the filing of the original petition on February 27, 1907, and during the year 1909, the pipe line company drilled four more wells, all producing, on another 80 acres of the lease, and later a dry hole on the same 80, making, in all, nine wells, all located on two separate 80's of the 600-acre lease. No other wells were or have been drilled on the premises. Upon the remanding of the cause to the lower court an amended petition was filed setting up a cause of action for damages as well as one for the cancellation of the lease. An answer was duly filed and issues joined. When the cause came on for the second trial, the appellant moved that appellees be required to elect upon which of the two causes of action they would stand; but the court denied the motion. A jury was then impaneled to try the matter of damages; but, upon the closing of the evidence, the court withdrew the cause from the jury and discharged it from consideration of the case for the following reasons, as set out in the journal entry: "Whereupon the court discharged the jury from further consideration of the cause for the reason that it appeared from the evidence that there was no case made out as to the question of damages alleged in the plaintiff's first cause of action, with any reasonable certainty, or that could afford plaintiff any adequate relief; and the court re-

serves to itself all questions presented in the trial of the case." The judgment of the court was that the lease should be canceled as to all of the undrilled portion of the premises, except the 80 acres upon which the first four wells were drilled. As to the latter 80, it was decreed that if the appellant elected, within 30 days after the rendition of the judgment, to pay the rental or royalty provided by the terms of the lease from April 20, 1905, to the date of the judgment, the lease would be deemed to be valid; otherwise it should stand canceled. In effect, the court held that the four wells last drilled should, in the exercise of reasonable diligence, have been drilled in the year 1904 instead of in 1909. The appellant was allowed one year after the wells should have been drilled within which to market the gas and begin the paying of royalties, or from April 20, 1905, as above stated. It is from this judgment that the present appeal is taken by the pipe line company.

[1] The appellant contends that the amended petition of the appellees contained two inconsistent causes of action and that the court erred in not requiring an election. Parties may, by consent, try cases in which inconsistent causes of action are joined. The nature of each cause of action set out in the petition of appellees was clearly stated, and, if the appellant was unwilling to enter upon the trial of them, objection should have been made before answer was filed. Without challenging the right of the appellees to unite the two causes of action, appellant recognized the propriety of the pleading and answered as to both counts. Afterwards a motion to require an election was made, but the court concluded to hear the testimony and overruled the motion. In a sense the causes of action are inconsistent, as one of them proceeds on the theory that the lease is to continue as a binding obligation, while the other is that there has been a forfeiture and it is to be canceled as to part of the land. Assuming that there is an inconsistency, it was apparent on the face of the petition, and, as the appellant did not raise the question until after answer, it was a matter of discretion with the court whether an election should then be ordered. *Tuthill et al. v. Skidmore et al.*, 124 N. Y. 148, 26 N. E. 348.

After hearing the testimony, the court took the question of damages out of the case, which left only the single cause of forfeiture for trial and judgment. The appellees explain that the claim of damages was added to the petition in order to comply with the ruling of this court in the *Howerton* Case. According to that ruling, before the appellees could secure a cancellation of the lease, it devolved on them to show that damages could not be ascertained with reasonable certainty, and that therefore that remedy was inadequate. When appellees were

offering proof under the count for damages, they were then demonstrating, as they were required to do, that the damages sustained could not be measured with certainty. About the same character of evidence was required as to each, and it was not very important whether it was received under the count for damages or under the count as a prerequisite to a forfeiture. In no event can the fact that an election was not required when it was asked for have operated to the prejudice of appellant.

[2] It is contended that the evidence did not warrant the cancellation that was adjudged. Appellant says that the lease does not expressly provide how many wells shall be sunk on the land; that, in the development, two dry holes were drilled; and that it had reason to believe that further drilling would be attended with great risk and many dry holes be found and, as each costs a large sum of money, it was not required to run that risk. It is also said that the number of wells which shall be sunk on land is not to be determined by the landowners, nor yet by the courts; but it is to be determined by the operator so long as he acts in good faith. The lease contains a stipulation that the lessee was to drill four wells within six months and to "continue drilling so long as paying wells are found or royalties paid." The lease contemplates that the land shall be developed with reasonable diligence, and what is due diligence is a question of fact which has been decided adversely to the contention of appellant. *Gas Co. v. Jones*, 75 Kan. 18, 88 Pac. 537; *Mills v. Hartz*, 77 Kan. 218, 94 Pac. 142; *Howerton v. Gas Co.*, 81 Kan. 553, 106 Pac. 47, 34 L. R. A. (N. S.) 34; *Collins v. Oil & Gas Co.*, 85 Kan. 483, 118 Pac. 54.

[3] It was the manifest intention that the tract leased was to be developed for the mutual benefit of both parties, and the only substantial benefit to be derived by the lessor was the royalties to be paid from drilled and operated wells. (It was not enough that exploration should be made and gas found and allowed to remain in place on the land.) It was not enough that four wells should be drilled within six months or any limited number on a part of the tract, but it was specifically required that drilling should continue with reasonable diligence so long as paying wells could be found. The appellant was, of course, not required to develop land that had been tested and found to be unprofitable for operation; but, if paying wells could not be found on the land or any part of it, there is no reason why appellees' title should be longer clouded with a barren incumbrance, nor any reason why appellant should resist a cancellation. If paying wells may be found, and appellant does not continue to drill and develop with reasonable diligence, there is a violation of the agree-

ment, and the appellees are entitled to a cancellation. Only 160 acres of the 600-acre tract had been developed to any extent. For a period of about six years before the action was brought there was no development of any of the land except upon one 80-acre tract. The commencement of the action appears to have spurred appellant to activity, and since that time five wells have been drilled on another 80-acre tract, and all but one of these were productive. This cannot be regarded as a compliance with the terms of the agreement, and there was therefore a good basis for the finding that appellant had not developed the land with reasonable diligence.

Although there is complaint, the court carefully protected the rights of appellant as to the 80-acre tract that was developed after the litigation was instituted. In effect the court held that, if reasonable diligence had been used, this tract would have been developed in 1904, and that a reasonable time thereafter in which to find a market for the gas was one year, and so the court gave appellant the alternative of paying the royalties which would have accrued after April 2, 1905, and if it did so within a stated time after the decree the lease, as to this 80-acre tract, would be upheld, but if the royalties were not so paid the lease, as to this tract, would stand canceled. This was an equitable disposition of the case and was, in fact, suggested in the answer of appellant, where it stated that, if the court ultimately determined that rentals or royalties should be paid on any of the land, it was able and willing to pay them and therein tendered such payment. Now that it has been ultimately determined that payment is due, and necessary to the validity of the lease on this tract, the trial court will doubtless accept the payments so tendered, although the time given in the judgment for payment has expired.

No error is found in the rulings, and therefore the judgment is affirmed. All the Justices concurring.

(37 Kan. 750)

MURRAY v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. July 6, 1912.)

APPEAL AND ERROR (§ 979*)—REVIEW—ORDER FOR NEW TRIAL.

Where it cannot be said that the evidence compelled a verdict for defendant as a matter of law, irrespective of the credit to be given the testimony, the sustaining, without giving the ground therefor, of plaintiff's motion for a new trial, one of the grounds of which was that the verdict was contrary to the evidence, cannot be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873; Dec. Dig. § 979.*]

Appeal from District Court, Montgomery County.

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key No. Series & Rep'r Indexes

Action by Z. P. Murray against the Missouri Pacific Railway Company. Plaintiff was granted a new trial, and defendant appeals. Affirmed.

W. P. Dillard and O. E. Benton, both of Ft. Scott, for appellant. Chas. D. Welch, of Coffeyville, for appellee.

PER CURIAM. Z. P. Murray sued the Missouri Pacific Railway Company to recover damages for personal injuries. His petition alleged that he signaled an approaching passenger train to stop at a station by standing upon the track and swinging a lantern; that the train did not stop, and, as he stepped from the track, his foot struck a piece of coal lying upon the platform, causing him to lose his balance and to be struck by the engine. The jury returned a verdict for the defendant. The court granted a new trial, and the defendant appeals.

The motion for a new trial included various grounds, one of them being that the verdict was contrary to the evidence. The record does not show upon what ground the court sustained the motion. Therefore a reversal cannot be ordered unless this court can say that it was necessarily error to have sustained the motion on any ground presented. An issue of fact was involved, and, for anything shown to the contrary, the trial court may have believed the verdict unjust, because of impressions derived from the appearance of witnesses. We cannot say that the evidence compelled a verdict for the defendant, as a matter of law, irrespective of the credit to be given the testimony, and the judgment is therefore affirmed. "Unless the Supreme Court can see, beyond all reasonable doubt, that the trial court has manifestly and materially erred with reference to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made, the Supreme Court will not reverse the order of the trial court granting the new trial." *City of Sedan v. Church*, 29 Kan. 190, 192. "It has been the unvarying decision of this court to permit no verdict to stand unless both the jury and the court trying the cause could, within the rules prescribed, approve the same." *K. C., W. & N. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108.

The judgment is affirmed.

(87 Kan. 710)

MONGER v. EFFLAND et al.

(Supreme Court of Kansas. July 6, 1912.)

1. EVIDENCE (§ 264*)—DECLARATION—OPINION.

Statement of one to a third person, indicating that he had forfeited a deposit he had made to be delivered as a first payment on the purchase price of land, may be regarded as his

opinion of the law, rather than a statement of fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1028; Dec. Dig. § 264.*]

2. VENDOR AND PURCHASER (§§ 17, 334*)—CONTRACT—RIGHT TO REJECT—DEPOSITS.

E. negotiated with H., agent of M., for the purchase of land of M., and they prepared a form of contract which E. signed; he at the same time depositing in a bank money to be delivered as a first payment on the purchase price. The contract was sent to M. who, after making changes in it, signed it and returned it with directions to have the abstract brought down if E. agreed to the changes. Held, that the contract was not completed, so that E. could reject it, and, doing so, was entitled to withdraw the deposit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 21, 959-980; Dec. Dig. §§ 17, 334.*]

Appeal from District Court, Sumner County.

Submission of controversy on agreed case by J. A. Monger and Carl Effland and another. From an adverse judgment, Monger appeals. Affirmed.

F. A. Dinsmoor, of Caldwell, for appellant. James V. Humphrey, of Junction City, for appellees.

PER CURIAM. This was an agreed case submitted under the provisions of section 6144, Gen. St. 1909 (Code Civ. Proc. § 549), without any pleadings and without the introduction of any evidence other than the agreed statement of facts. The purpose of the action was to determine which of the parties was entitled to withdraw the sum of \$400 deposited by appellee in the Stock Exchange Bank of Caldwell, Kan., in escrow, to be delivered as a first payment on the purchase price of the land belonging to appellant, of which one Hembrow negotiated a sale from appellant to appellee. At the time of the deposit, Hembrow and the appellee prepared a form of contract purporting to set forth the terms of the sale of the land from appellant to appellee, and the terms of the payment therefor, and forwarded the same by mail to appellant in the state of Illinois; the contract being prepared in duplicate and signed by the appellee before mailing to appellant.

The contract was received by appellant and signed and acknowledged in duplicate after he had made changes therein. The appellant did not then claim that the contract was completed, but returned it in duplicate to his agent Hembrow, with a letter which, among other things, contained the following: "You will note that I have made a little change in the contract and made it to read, 'the remaining \$5,700.00,' instead of 'the above specified \$5,600.00.' I return both agreements for him to sanction, and also have the one at the bank changed also. If this receives his indorsement return one to me by return mail. Now if he accepts this, have the abstract brought down, but I think it is already. * * * Let me know as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes.

soon as you can, for I wrote Mr. Nelson to rent the corn ground, and he should know if it is sold." On receipt of the duplicate contracts, Hembrow mailed them to the Farmer's State Bank at White City, Kan., near which place the appellee resided, and inclosed this letter: "Gentlemen: Inclosed please find the abstract to the land which Carl Effland bought. If he accepts the contract with the alterations hand him the abstract, but do not until he does." About the same time Hembrow wrote the appellee a letter in part as follows: "The party accepted the contract which I sent him, and pays me the commission. I am mailing the contract to the Farmer's State Bank of White City for you to go and get one of them if it is all satisfactory to you. * * * Go to the bank at once, and look the contract over, and if you are satisfied it is all right, they will deliver you one contract and return the other one to me, if not, tell them and both contracts will be returned to me." About 10 days thereafter the appellee delivered to the Farmer's State Bank a letter as follows: "Gentlemen: Concerning matter of my agreement with J. A. Monger of McDonald county, Illinois, I cannot consent to any modifications of that agreement, nor waive any of the conditions or provisions therein contained, as he has not furnished me the abstract of title called for in the agreement as specified therein, and it was necessary for me to act promptly in this matter in order to make this agreement valuable, the same is now declared rescinded by me. Kindly notify Mr. Monger of this decision."

Previously to sending the contracts to the White City bank, Hembrow notified the appellee by letter that the appellant had accepted the contract. No intimation was given as to any change therein. In reply to said letter, the appellee stated that he would put the land in the hands of Hembrow for sale at a price stated.

[1] Shortly after the appellee refused to accept the contract, in a conversation with a witness not interested in the proceeding he used language to indicate that he had forfeited the \$400 in question, but this may be regarded as his opinion of the law applicable to the case rather than to a statement of fact.

[2] The evidence also shows that an abstract of the land was forwarded to the bank at White City at the time the contracts were forwarded to the bank by Hembrow, and that the appellee called at the bank and asked for the abstract, and, in accordance with the letter from Hembrow to the bank, the bank refused to deliver the abstract to the appellee until he accepted the contracts.

The alleged contract specified that appellant was to furnish appellee or his attorney an abstract of title to the land brought

down to date, showing a good and clear title vested in him, within 10 days from date of the contract, which was January 28, 1909. It appears that this was never done, and it is one of the grounds upon which the appellee refused to accept or complete a contract. The evidence is all in writing, and this court has the same opportunity to consider and weigh it as had the district court. We think under all the evidence that the contract was never consummated or completed; that the appellee had a right, and appellant conceded to him the right, to accept or reject the contract after the changes had been made therein. He rejected the contract and was entitled to withdraw the \$400, deposited in escrow.

The judgment is affirmed.

(87 Kan. 485)

SARTIN v. SNELL.

(Supreme Court of Kansas. June 8, 1912.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 74*)—APPOINTMENT—STATUTORY PROVISIONS.

Article 13, c. 25, General Statutes of 1909, creating the office of county auditor in certain counties, and conferring upon the district court the power of appointing a suitable person to such office, is a valid exercise of legislative authority.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124; Dec. Dig. § 74.*]

2. COUNTIES (§ 62*)—OFFICERS—AUDITOR—APPOINTMENT—"DISTRICT COURT"—"COURT"—"JUDGE."

The Legislature often uses the words "court" and "judge," "district court" and "district judge," without discrimination. "Court" will be construed to mean "judge," and "judge" will be construed to mean "court," wherever either construction is necessary to carry into effect the obvious intent of the Legislature. It is held, therefore, that by the words "district court," as used in section 1 of the act in question (Gen. Stat. 1909, § 2282), the Legislature meant to confer upon the judge of the district court, in certain counties, authority to appoint a county auditor.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87-90; Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 2, p. 1678; vol. 8, p. 7622; vol. 4, pp. 3823, 3826; vol. 8, p. 7695.]

3. COUNTIES (§ 62*)—OFFICERS—APPOINTMENT—AUDITOR.

Under the statute as amended by section 1, c. 67, Laws of 1876, and subsequent amendments thereto, confirmation by the board of county commissioners of the appointment of a county auditor is not necessary.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87-90; Dec. Dig. § 62.*]

4. COUNTIES (§ 62*)—OFFICERS—APPOINTMENT—AUDITOR.

Where the district court consists of two or more divisions, the appointment of a county auditor, in order to be valid, must be made by the judges of the divisions, or a majority thereof acting jointly.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87-90; Dec. Dig. § 62.*]

Original proceeding in quo warranto by U. S. Sarlin against W. D. Snell to oust defendant from the office of county auditor of Wyandotte county. Judgment of ouster ordered.

James F. Getty and Nathan Cree, both of Kansas City, for plaintiff. Keplinger & Trickett, of Kansas City, for defendant.

PORTER, J. This is a proceeding in quo warranto, in which the plaintiff seeks to oust the defendant from the office of county auditor of Wyandotte county. The cause has been submitted upon plaintiff's motion for judgment on the pleadings. The facts, as shown by the petition and answer, are that on the 20th day of November, 1911, the defendant was appointed to the office of county auditor by Hon. E. L. Fischer, judge of the first division of the district court of Wyandotte county, and filed his oath and bond, and claims the right to the office under such appointment. The plaintiff was appointed to the same office on February 8, 1912, by the Honorable E. L. Fischer, judge of the first division, and the Honorable F. D. Hutchings, judge of the second division of the district court, acting jointly. The plaintiff, after taking the oath of office, and after the approval of his bond, demanded of the defendant the office and the books and documents pertaining thereto. The defendant refuses the demand, and in his answer contends that, his appointment having been made by the district court and confirmed by the board of county commissioners, he is entitled to hold the office; that there is no authority in law for either a judge of the district court, or the judges of the divisions thereof, to make the appointment; and, further, that the plaintiff's alleged appointment to the office has never been confirmed by the board of county commissioners, and that without such confirmation his appointment is invalid. He further contends that he has been employed by the board of county commissioners to perform services of auditing bills and accounts against the board, and in this connection he questions the constitutionality of the statute creating the office and providing for the appointment of a county auditor by the district court. His main contention, however, is that the statute creating the office and providing for the method of filling it expressly confers the power of appointment upon the district court, and not upon a judge or judges of the court. The act creating the divisions of the district court in counties having a population of 100,000 inhabitants contains a provision that all power of appointment formerly delegated by law to the judge of the district court shall be exercised jointly by the judges of the divisions. The defendant claims that this provision does not apply to the appointment of a county auditor, for the reason that such power was never delegated to a dis-

trict judge, but was conferred only upon the district court.

[1] The first question to be considered is whether the act conflicts with the Constitution. If it be found invalid, that disposes of the case, and renders unnecessary the determination of the other questions. It is assailed on the ground that the Legislature has no power to delegate to or impose upon the courts the authority to appoint an auditor. It is conceded that courts may be given authority to appoint such officers as are necessary to the existence of a court, as a clerk, or reporter, or bailiff, or an officer necessary to enable the court to transact business, such as a prosecuting attorney. But it is contended that, as the duties performed by a county auditor have no connection with the functions of the district court, the Legislature cannot, without mingling the powers of the different branches of government, impose upon the court the authority to appoint such an officer. The law creating the office of county auditor, and authorizing the district court to appoint auditors in certain classes of counties has been in existence since 1872, and a serious burden rests upon him who, at this late day, seeks to establish its invalidity. In 1872 the Legislature passed an act creating the office of county auditor in all counties containing over 30,000 inhabitants. Laws 1872, c. 67. The first section required that the auditor be appointed by the district court and confirmed by the board of county commissioners. In 1874 this section was amended (Laws 1874, c. 56), so as to provide that the auditor be appointed by the district court "in conjunction with the probate court, the county attorney of such county, and confirmed by the board of county commissioners." The Legislature of 1876 passed two acts amending section 1. The first changed the whole plan of appointment, and provided that in all counties having over 25,000 inhabitants a county auditor should be appointed "by the probate court of the judicial district" in which the county was embraced. Laws 1876, c. 66. There was evidently a mistake in the description of the court, and at the same session this chapter was repealed, and chapter 67, Laws 1876, enacted, by which the power of appointment was placed upon "the district court"; nothing being said as to confirmation by the county board. Section 1 of the act has been amended at various times since 1876, and the classification of counties to which the act applies changed, as in chapter 87, Laws of 1891, which makes the act apply to counties having over 45,000 inhabitants; but the language of the section remains the same, and directs the appointment by the district court, and no longer requires confirmation by the county board. During all the time the law has been in operation, county auditors have been appointed in the counties embraced in the

class defined by the various acts, except, we believe, in two instances. Mr. Justice Benson, when judge of the Fourth judicial district, refused to appoint an auditor for Douglas county, and Judge Spilman, of the Twenty-First district, refused to appoint one for Osage county; the judge, in each instance, holding that the duty is one which the Legislature lacked the power to compel a court or judge thereof to perform.

A strong argument can be adduced against the fitness and propriety of making the courts the dispensers of public patronage, which, in the language of Judge Spilman, in the opinion in the Matter of the Appointment of a County Auditor for Osage County, reported in the Kansas Law Journal (volume 2, p. 57), "does violence to all our ideas of judicial propriety, and confers a power upon the courts which must always prove embarrassing, and, even if wisely exercised, must inevitably tend to lessen the respect felt by the people for the purity and dignity of the judiciary." Page 58.

However we may disagree with the Legislature as to the propriety of the law, we must, if possible, uphold its validity. The fact that it has remained upon the statute books for 40 years, receiving from time to time further legislative consideration and sanction, adds to the requirement that urgent reasons be found, before it shall be declared unconstitutional. The mere fact that a judge of the district court could not be compelled to comply with its provisions, or be held to have forfeited his office by a failure or refusal to obey the statute, is of no importance in determining whether or not the statute is a valid exercise of legislative authority. In *State ex rel. v. Brown*, Probate Judge, 35 Kan. 167, 10 Pac. 594, which was an action in quo warranto to forfeit the right of Brown to exercise the office of probate judge of Coffey county, because of an alleged failure to perform certain duties imposed by section 3, c. 8, Special Session Laws of 1874, requiring the probate judge once in each quarter to examine and count the funds in the hands of the county treasurer, it was held that in the performance of the duty of examining the accounts of the county treasurer the probate judge is not acting either as a judge or as a court, and that his failure to comply with the statute imposing such new duty furnished no ground of forfeiture of his office as probate judge.

In *State v. Durein*, 70 Kan. 13, 80 Pac. 987, involving the provisions of the statute imposing upon the probate judge authority to grant permits for the sale of intoxicating liquors, it was said in the opinion: "The duties to be discharged are cast upon the person at the time holding the office of probate judge, and not upon him as probate judge, or upon the probate court." 70 Kan. 41, 80 Pac. 996.

[2] Conceding that the Legislature has no authority to compel the district court, or the district judge, to perform duties which are not judicial in their nature, the refusal or neglect to perform which would constitute a dereliction of official duty, or subject the judge to forfeiture of his judicial office, may it not be a valid exercise of legislative authority to impose upon the district judge the power to appoint an officer whose duties have no relation to or connection with the court or judge, leaving it to the judge to decide for himself whether he will exercise or refuse to exercise the power? It may be conceded that the duties of a county auditor, as prescribed by the statute, have no relation to any of the functions of the district court, and that a judge of such court could not, by mandamus, be compelled to perform the duty imposed by the statute, and that his refusal would not be subject to review, and would not work a forfeiture of his office as judge. We construe the act as imposing the power, not upon the court, but upon the judge, notwithstanding the statute declares that the appointment shall be made by the district court. The Legislature often uses the words "court" and "judge of the court," "district court" and "judge of the district court," without discrimination. Whenever the power or duty imposed is found, from a consideration of the object and purposes of the act, to be one which is more properly the function of the court, it will be so construed; and whenever it is manifest that the Legislature meant the judge, and not the court, that meaning will be applied to the words, in order to carry out the legislative intent. "Court" will always be interpreted to mean "judge," when necessary to carry into effect the intention of the Legislature. *Railroad Co. v. McDonald*, 79 Miss. 641, 31 South. 417, 418; *Porter v. Flick*, 60 Neb. 773, 84 N. W. 262; *Von Schmidt v. Wilder*, 99 Cal. 511, 34 Pac. 109; *Michigan Central Railroad Co. v. Northern Indiana Railroad Co.*, 3 Ind. 239; *Rogers v. Beauchamp et al.*, 102 Ind. 33, 1 N. E. 185; *Lee v. Nelson*, 4 G. Greene (Iowa) 348 (where it was said they are convertible terms); 11 Cyc. 655, 656; 2 Words and Ph. Jud. Def. p. 1678.

Obviously the Legislature had no thought of having the appointment made by the court, but, reposing confidence in the integrity and discretion of the person who happened to hold the office of judge of the district court, intended that he personally should name the auditor. The power conferred is not in any sense judicial, because the office in no manner affects the business or functions of the court. One argument made by the defendant in support of his contention that the power was intended to be imposed upon the court, and not upon the judge, is based upon the fact that the Legislature, at an earlier session, expressly conferred the power of appointment upon the district judge, in providing for filling vacancies in the office of coun-

ty attorney. But it is manifest that in both instances the legislative intent was to impose the power upon the judge, and not upon the court.

There is, after all, nothing very anomalous in the plan devised for the selection of a county auditor, when we consider that in Kansas various ways are employed for the selection of public officers. Some must be chosen at a general election, in obedience to constitutional requirements; others may be appointed; and the Legislature has by no means restricted the power of appointment in all cases to the executive branch of government. On the contrary, by a rather anomalous arrangement, which, so far as we are aware, does not obtain in any other state, several important state officers are chosen neither at an election by the people at large, nor by the executive power. For instance, the secretary of agriculture, recognized by the Legislature as a state officer, with powers and duties imposed upon him, and with an annual salary of \$3,500, is chosen by the members of the State Agricultural Society at its annual meeting. The membership of this society is composed of delegates from county or district agricultural societies. Usually less than 100 persons attend the annual meeting and participate in the election of the secretary. The Legislature, in fact, has simply adopted the voluntary association, known as the State Agricultural Society, and annually makes appropriations to provide salaries for the secretary and assistants appointed by him, and for the publication and distribution of his reports and pamphlets. The State Historical Society is a voluntary association, of which any person in the state may become an active member on the payment of a fee of \$1 annually, or, by payment of \$10, may become a life member. There are 160 life members and 300 active members, people of both sexes, from infancy to old age. The annual meeting in January is usually attended by less than 100 persons, a majority of whom elect a secretary for one year. The Legislature some years ago adopted this association as one of the departments of state government, and each successive Legislature has appropriated funds to pay the salaries of the secretary of the society and assistants and employees appointed by him, and has made provision for the publication of the secretary's reports, and for securing and caring for objects of historical interest, and for gathering historical data.

Another instance is the office of commissioner of labor. He is chosen, at an annual meeting of delegates to the Society of Labor and Industry, as secretary of the society, and, by an act of the Legislature, is made state labor commissioner. Whenever seven or more laborers, workmen, miners, railway employees, or mechanics, or other wage-earners, shall organize as a labor organization for the improvement of labor conditions,

the society is entitled to send to the annual meeting a delegate for each 50 members or fraction thereof; and this meeting selects the officer who is to become an officer of the state. The Legislature appropriates money for his salary, and provides for the performance of his duties. *Titus v. Sherwood*, 81 Kan. 870, 106 Pac. 1070.

The secretary of the State Horticultural Society is chosen by the members of that voluntary association, and becomes thereby a state officer, whose duties, power, and emoluments are prescribed by the Legislature. The state mine inspector is chosen in the same manner at an annual meeting of the State Association of Miners, made up of delegates from voluntary associations of persons engaged in the occupation of mining coal, for wages. The person chosen by the annual meeting as secretary of the association thereby becomes state mine inspector.

Whether these voluntary associations, which are all incorporated under the laws of the state, could be compelled to hold elections and exercise the power thus conferred upon them, in case of neglect or refusal so to do, is a question which has never been raised. So long as the power is exercised and the offices are filled in the manner prescribed by the Legislature, no one will doubt the right of the persons so chosen to hold their offices. The Constitution contains no inhibition upon the power of the Legislature to provide, as it may deem best, the method for the appointment of officers whose election or appointment is not otherwise provided for. On the other hand, the Constitution (article 15, § 1) expressly declares that, "all officers whose election or appointment is not otherwise provided for shall be chosen or appointed as may be prescribed by law." It will thus be seen that the Constitution has placed in the Legislature the power to regulate the mode of appointing officers, not otherwise provided for. In view of the power thus expressly conferred upon the Legislature, it seems unnecessary to refer specially to cases from other states, though numerous decisions might be cited where, under Constitutions similar to ours, the authority of the Legislature to confer upon judges and courts the power to appoint inferior officers, whose duties have no connection with the functions of courts, is recognized. *People ex rel. v. Hoffman et al.*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; *People v. Board of Supervisors*, 223 Ill. 187, 79 N. E. 123; *People v. Evans*, 247 Ill. 547, 93 N. E. 388; *City of Indianapolis v. State ex rel.*, 172 Ind. 472, 88 N. E. 687; *In re Appointment of Revisor*, 141 Wis. 592, 124 N. W. 670, 18 Ann. Cas. 1176.

Upon the question whether the power to appoint to office is a legislative, executive, or judicial function, the late Mr. Freeman, in a monographic note to *People v. Free-*

man, 80 Cal. 233, 22 Pac. 178, 13 Am. St. Rep. 122, used the following language: "The truth is that the power of appointing or electing to office does not necessarily or ordinarily belong to either the legislative, the executive, or the judicial department. It is commonly exercised by the people; but the Legislature may, as the lawmaking power, when not restrained by the Constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the Legislature, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary." 13 Am. St. Rep. 122, 180. It is apparent, therefore, that it is a valid exercise of legislative authority to impose upon the judge of the district court the power of appointing a county auditor.

[4] The law being constitutional, there remains the question as to who shall make the appointment in counties where there are two or more judges of the district court. In 1909 an act relating to district courts and courts of common pleas was passed, by which provision was made for two divisions of the district court until 1918, when the act creating the court of common pleas should expire by limitation, at which time the act provides that the district court in such counties shall consist of three divisions. The act (Laws 1909, c. 112; Gen. Stat. 1909, §§ 2445-2458) applied to counties having 100,000 inhabitants, and at present affects Wyandotte county alone. Section 4 of the act provides as follows: "All powers of appointment, not herein provided for, which are delegated by law to the judge of the district court, shall be exercised jointly by the judges of the divisions, or a majority thereof."

[3] The appointment of the defendant by the judge of the first division is therefore void, and the appointment of the plaintiff by the joint act of the judges of both divisions is valid. Section 1 of the act of 1872, as we observed, required the appointment to be confirmed by the board of county commissioners. The section was afterwards amended at various times, and the provision requiring confirmation stricken out. The Legislature, however, never saw fit to change the language of section 2, which still reads, "and after his confirmation by the county board as herein provided." Since the amendment of section 1, there is nothing for these words to operate upon. All provision for confirmation was repealed by the change in section 1; and, obviously, the Legislature overlooked the presence of the words in section 2 which refer to confirma-

tion. No confirmation being necessary, it follows that plaintiff is entitled to the office, and judgment of ouster against the defendant will be ordered. All the Justices concurring.

(87 Kan. 604)

BIDDLE v. LEAVENWORTH LIGHT, HEAT & POWER CO. et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. ELECTRICITY (§ 19*)—ACTION FOR INJURIES—NEGLIGENCE.

Under the circumstances proven in this case, the building and maintaining by two corporations of a line of telephone wires and a line of light, heat, and power wires, the latter charged with 2,200 volts of electricity, parallel and within 10 or 12 inches of each other, is sufficient, prima facie, to justify a jury in finding each of such corporations negligent in so maintaining such wires and responsible for such damages as they find resulted therefrom.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. MASTER AND SERVANT (§§ 288, 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.

The mere fact that a workman, employed by a telephone company, in the discharge of his duty ascends one of the telephone poles in obedience to the orders of a superior officer to make a certain adjustment of the telephone wires, in the performance of which his hand came in contact with the highly charged wire and he was thereby instantly killed, does not, under all the evidence in this case, compel the inference that he was guilty of contributory negligence or that he assumed the risk of injury in performing such labor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1006, 1088-1088, 1089, 1090, 1092-1182; Dec. Dig. §§ 288, 289.*]

Appeal from District Court, Leavenworth County.

Action by Isabella Biddle against the Leavenworth Light, Heat & Power Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Floyd E. Harper, of Leavenworth, and Gleed, Hunt, Palmer & Gleed, of Topeka, for appellants. A. E. Dempsey, of Leavenworth, for appellee.

SMITH, J. The appellee brought this action against the appellants to recover damages for the death of her husband. In her petition she alleged: That the appellants had sunk poles and maintained wires thereon for their respective uses along a certain public alley in the city of Leavenworth. That the poles of the appellants alternate, and that the wires of the respective companies were by them negligently and carelessly strung and maintained parallel and in close proximity with each other. That the electric wires of the Light, Heat & Power Company were charged with about 2,200 volts of electricity and were defectively and insufficiently insulated, and that at a certain point on the line where "Can pole 3" of the Telephone

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No, Series & Rep't Indexes

Company was located, and where the death occurred, the insulation on the wires of the Light, Heat & Power Company had been negligently permitted to deteriorate, become defective, abraded, and worn off—all of which facts were known to the appellants, or could have been known to them with the exercise of proper care. That while the appellee's husband was in the employ of the Telephone Company, and while in the line of his duty as such employé at the place described, and while he was exercising due care on his part, he came in contact with the wires of the appellants so maintained and charged with electricity and received therefrom a fatal shock from the effects of which he instantly died.

The appellants each attacked the petition by motion to make it more definite and certain, and, upon the overruling of such motions, each filed a general demurrer to the petition which was also overruled. Each appellant thereupon separately answered. A jury trial was had, special findings were made, and a general verdict against each of the appellants jointly for \$10,000 damages was rendered. Separate motions for new trial were made and overruled, and judgment was rendered according to the verdict.

The appellants make 74 separate assignments of error. The number is confusing, but we will attempt, without following the numbers consecutively, to consider all of the substantial questions involved.

The petition might have been made more elaborate and definite as to certain facts to which the motions of the appellants are directed, but there was no error in overruling the motions for the reason that it is evident from the situation of the parties that the facts claimed to be omitted were within the knowledge of the appellants rather than of the appellee. The appellants did not see fit to stand upon the adverse ruling upon the demurrers to the petition, and we think the petition, liberally construed as it should be, states a cause of action.

[1] The evidence and findings of the jury show that the respective wires of the Telephone Company and the Light, Heat & Power Company were strung in the same line upon alternate poles in such manner that, when taut, the wires were only 10 to 12 inches apart, and that the wires of the Light, Heat & Power Company were constantly charged with about 2,200 volts of electricity.

It also appears that the Telephone Company had men constantly employed to remedy interruptions, called "troubles" in the operation of its wires, and it is apparent that such "troubles" could generally only be remedied by ascending the telephone poles, and that in so doing the men would be brought in close proximity to the charged wires of the Light, Heat & Power Company; that in damp weather, such as existed at the time of the accident in question, it appears that no known insulation of a highly charg-

ed wire is a sufficient protection from injury to any person coming in contact therewith. The evidence shows that the wires of the Light, Heat & Power Company were insulated by a rubber covering which is as perfect insulation as science and experience has developed, but that one wire, which had sagged about five inches and caught upon a glass upon the telephone pole, had the insulation burned or rubbed off for a space of about an inch or an inch and a half.

It is agreed that the deceased came to his death by his hand coming in contact with the wire of the Light, Heat & Power Company, but whether it was at the point where the wire was denuded was not shown. There is evidence that, in the condition of weather which existed at the time, if a person's body were "grounded"—that is, brought in contact with a wet pole or wire extending into the ground—that contact with the charged wire, even if the insulation covered the wire, would be extremely dangerous.

If the jury regarded these facts, of which there was at least some evidence, as established, as from the verdict they evidently did, they were justified in finding that each of the appellants was negligent in constructing and maintaining the wires in the relative position described; that some such accident should have been anticipated from the situation and guarded against.

The proven fact that the wires of the Light, Heat & Power Company were, soon after the accident, stretched upon poles five feet higher than at the time of the accident, and that the telephone wires remained upon the same poles as before, is some evidence that the companies knew how to avoid the danger and knew that the previous position of the wires was dangerous.

The answer set up the defense of contributory negligence, and, if there was a *prima facie* case of negligence on the part of the appellants, the burden of proving contributory negligence on the part of the deceased devolved upon them.

How the hand of the deceased happened to come in contact with the charged wire is not disclosed by the evidence. No one saw him at the moment of the accident. The contact and death were instantaneous. At the time of the accident the deceased stood with one foot upon a bolt inserted in the telephone pole and the other leg thrown over a guy wire extending from near the top of the pole to the ground, thus making his body "grounded," as it is called, both through the guy wire and the wet telephone pole; there having been a heavy rain the night previous to the accident.

The evidence shows that the deceased was an experienced man in the business in which he was engaged; that he had been in the employ of the Telephone Company eleven years, four years of which he was foreman of the linemen; and had also been one year

in the employ of the Light, Heat & Power Company, though in what capacity he served the latter company is not shown.

[2] Both instinct and reason impel every human being to self-preservation and to the avoidance of danger, and these well-known facts compel the presumption that the deceased used reasonable care to avoid injury to himself. And, in the absence of evidence to the contrary, this presumption was sufficient to justify the jury in finding that the deceased was not guilty of contributory negligence. It is agreed that the accident resulted from the hand of the deceased coming in contact with a wire of the Light, Heat & Power Company. The wire sagged about five inches, thus bringing it within five to seven inches of the telephone wire. When the sagging occurred is not shown otherwise than inferentially, in this, that the service on the telephone wires was interrupted only on the morning of the accident, and efforts had been made by employees of the telephone company to discover the cause of the interruption without success. The trouble was located in the vicinity where the accident afterwards occurred.

By the direction of the city manager the deceased had been sent early in the afternoon to wire around the interruption so as to resume the service. Very shortly before the accident, he discovered that a wire of the Light, Heat & Power Company was caught under a glass on a telephone pole and he had released it. Immediately thereupon communication over the telephone wire could be resumed. He had telephoned to the office of the Telephone Company of the discovery of the interruption and almost immediately thereafter the shock occurred. It was primarily the duty of the Light, Heat & Power Company to have discovered and removed this interruption. Neither the Telephone Company nor the deceased knew what the trouble was nor the danger of discovering and removing it until about the moment the accident occurred. It cannot be said, therefore, that the deceased knew and assumed the risk of the danger that resulted fatally to him. The cause of the injury, therefore, must be, as alleged in the petition, and as directly or inferentially found in the verdict, that the appellants were both guilty of negligence in stringing and maintaining their respective wires in such close proximity.

It is said that the Telephone Company erected the poles and stretched their wires first, and that the Light, Heat & Power Company afterwards erected their poles and stretched their wires, and that therefore the Telephone Company is not responsible for the proximity of the wires. Each of the companies was equally entitled to the use of the alley for the purpose of setting its poles and stretching its wires, yet, on the principle

that one should so use his own property as not unnecessarily to injure the rights of others, it could hardly be contended that the Telephone Company, in view of the evident danger to its employees in the discharge of their duties, could not have prevented the Light, Heat & Power Company from stringing and maintaining its wires in such close proximity to the telephone wires. And from the fact that it was not done, the jury may have rightly inferred that the stringing and maintaining of the wires of the Light, Heat & Power Company in the manner in which it was done was with the acquiescence and consent of the Telephone Company, and it was equally the fault and negligence of each that the wires were so maintained, and each was equally responsible for the injury that resulted therefrom.

The special findings of the jury and the general verdict were all in favor of the appellee, and, without adverting to each objection separately, we have considered them all and believe that such special findings and verdict were justified by the evidence and that the court was justified in overruling the motions to set aside any of such findings and in refusing to grant a new trial.

The judgment is affirmed. All the Justices concurring.

(7 Kan. 536)

HAMPE v. SAGE.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 110*)—SUFFICIENCY OF MEMORANDUM—DESCRIPTION OF LAND.

Hampe v. Sage, 82 Kan. 728, 109 Pac. 408, followed, and *held*, that the amendment to the petition alleging that the land described in the memorandum which evidenced the contract between the parties was the only land in Pottawatomie county, Okl., which the defendant owned or claimed to own or have an interest in, was sufficient to satisfy the provision of the statute of frauds which requires contracts for the conveyance of lands to be in writing.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 225-236; Dec. Dig. § 110.*]

2. EVIDENCE (§ 273*)—ADMISSIONS—OWNERSHIP OF LAND.

Held, further, that evidence of statements and admissions of the defendant made shortly before the memorandum was executed, to the effect that he owned the land described therein and that he owned no other land in that county, was competent for the purpose of showing that in fact he owned and claimed to own no other tract of land in that county.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

3. VENDOR AND PURCHASER (§ 6*)—LANDS—CONVEYANCE—RIGHTS OF PARTIES.

The fact that the lands described in the memorandum were Indian lands held in trust for the allottees, who were members of the tribe of Pottawatomie Indians, and that under an act of Congress (Act Feb. 8, 1887, c. 119, 24 Stat. 388), and the terms of the trust patents issued for said lands, any conveyance

or contract with reference thereto is declared to be absolutely null and void, will furnish no defense to an action for damages for breach of a contract by the defendant to sell and convey such lands.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 4, 5; Dec. Dig. § 6.*]

Johnston, C. J., and Benson and Smith, JJ., dissenting.

(Additional Syllabus by Editorial Staff.)

4. EVIDENCE (§ 413*)—PAROL EVIDENCE AFFECTING WRITINGS — VALIDITY OF CONTRACT.

In an action for breach of a contract to sell land, testimony that the written contract did not express the agreement of the parties, and that both parties intended merely to make a proposition which either might accept or refuse, was properly excluded as varying the written contract by parol.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1855-1857, 1859, 1860; Dec. Dig. § 413.*]

5. VENDOR AND PURCHASER (§ 351*)—BREACH OF CONTRACT — DAMAGES — TIME FROM WHICH INTEREST RUNS.

In an action for breach of a contract to sell land, interest on the amount of damages was properly allowed from the time the contract was breached, which would ordinarily be when plaintiff tendered performance.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 1017, 1047-1058; Dec. Dig. § 851.*]

Appeal from District Court, Shawnee County.

Action by George Hampe against Aaron Sage. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 82 Kan. 728, 109 Pac. 406.

Edwin A. Austin, of Topeka, and C. E. Carroll, of Alma, for appellant. J. B. Larimer and A. M. Harvey, both of Topeka, for appellee.

PORTER, J. Action for damages for the breach of a contract for the exchange of lands. The jury, in answer to special questions, found the value of the Oklahoma lands which the defendant agreed to convey to plaintiff, the value of plaintiff's land in Shawnee county, Kan., which he was to convey to the defendant, and returned a general verdict in plaintiff's favor for the difference, amounting to \$2,647.66. Judgment was rendered thereon for the plaintiff, and the defendant appeals.

A former judgment for the plaintiff was reversed on the ground that the petition was demurrable under the statute of frauds because the contract for the sale and exchange of the land was evidenced by a memorandum which failed to describe the Oklahoma land or to state any fact, beyond its acreage and the county of its location, which might help to identify it. *Hampe v. Sage*, 82 Kan. 728, 109 Pac. 406. In the opinion it was intimated that the petition would not have been demurrable if it had contained an allegation that the land referred to in the memorandum was the only land in that county own-

ed by the defendant. After the cause was remanded, the plaintiff amended his petition as follows: "Said tract of land was the only land in Pottawatomie county, Okl., which said defendant then owned or claimed to own or have dominion over or control of or in which he had or claimed to have any interest."

The defendant's answer, besides a general denial, alleged that, at the time the memorandum was executed, the land described therein was, as plaintiff well knew, Indian land allotted and patented to members of the tribe of the Pottawatomie Indians and not to the defendant; and further pleaded an act of Congress approved February 8, 1887 (chapter 119, 24 Stat. 388), providing that any conveyance or contract made touching the said land before the expiration of the period of 25 years mentioned in said patents and said act of Congress shall be absolutely null and void. The answer set out copies of the patents to the lands in question, and alleged that the 25-year period from the date of the allotment and issue of the trust patents had not expired or been abrogated at the date of the alleged contract with defendant. The reply was an unverified general denial.

[1] On the trial plaintiff proved by two real estate agents of Topeka that defendant listed the Oklahoma land with them for sale. They produced the original entries in their books showing the description of the lands with Sage marked as the owner, and testified that he dictated the description, read over the same, and approved it; that he stated to them that he owned the land and would sell it at \$20 an acre; and that it was the only land he owned or controlled in Oklahoma. The plaintiff proved that the defendant made similar statements to him on different occasions, and also to witness Hewins, who went to see the land a short time before the contract in question was entered into. The first claim of error is that this testimony should have been excluded, that it was an attempt by parol evidence to establish an essential element of a contract required to be in writing. It is argued that the memorandum does not say that the land referred to was that listed with these real estate agents, or that referred to in the conversations to which the witnesses were permitted to testify. In support of this contention, the former opinion is relied upon wherein it was held that, to allow the land to be identified by proof that the defendant had showed to plaintiff a certain tract of land in Pottawatomie county, Okl., containing 760 acres, and that this was the land referred to in the memorandum, would be the same as to permit an essential element of the contract to be supplied by parol; that, while it is always competent to offer parol evidence to identify the description, it is never admissible for the purpose of supplying a description which the parties have omitted from the writing. This state-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment of the law was made in answer to plaintiff's contention on the former hearing that the defect in the petition was cured by alleging and proving that defendant, previous to the execution of the memorandum, had showed him a certain tract in Pottawatomie county, Okl., containing the acreage mentioned, and that this was the land referred to in the memorandum. It was held that proof of this character would have been admissible and sufficient to render the contract definite, provided the memorandum itself, after the reference to the Oklahoma land, had contained the words "being the tract recently showed by Sage to Hampe." *Hampe v. Sage*, 82 Kan. 731, 109 Pac. 407.

The contention that the court erred in the admission of testimony showing statements and admissions made by Sage to the effect that he owned this tract of land, and that it was the only land in Pottawatomie county, Okl., that he did own or claim to own or control, the contention that the court erred in refusing to sustain the demurrer to plaintiff's evidence, as well as most of the other contentions raised by the defendant, are met and fully answered in the former opinion. It was there said: "Under the authorities cited, a recital that Sage owned the land which he undertook to convey can be found in the contract itself, by a liberal interpretation of its terms. Proof that he owned no other land in that county would then render the description, as so interpreted, absolutely definite." *Hampe v. Sage*, *supra*, 82 Kan. 733, 109 Pac. 408.

That Sage owned the land he undertook to convey may by a liberal interpretation of the terms of the memorandum be found in the writing itself. All that was necessary to make the petition good as against a demurrer was to plead the fact that he owned or claimed to own only the stated number of acres in that county. The plaintiff amended his petition by so alleging. On the trial, proof that defendant owned or claimed to own that number of acres and no more, in Pottawatomie county, Okl., was all that was necessary to render the description of the land which the parties had in mind, and about which they negotiated, absolutely definite.

[2] The defendant's statements, made at or about the time the contract was entered into, were admissible as proof that he claimed to own land of that acreage so situated and that he owned no other land in that county. Proof of his statements that in fact he owned this land could not hurt him because the memorandum itself is to be interpreted as so stating.

[3] Another contention of the defendant is that, since the unverified reply admitted the issue of trust patents for these lands and the provision of the act of Congress declaring any conveyance or contract with reference to such lands absolutely void, there was

an utter failure of proof showing that Sage owned the lands, and, on the contrary, an admission that he could not possibly own or convey them. In the brief it was said that: "This clause in the act of Congress, of course, does not directly apply to any contract made with George Hampe by Aaron Sage, but it does apply to any conveyance or contract made by the allottee members of the Pottawatomie Tribe to whom this land was patented, and by disqualifying them from conveying or contracting to convey to another, renders it apparent that Aaron Sage was not the owner of any of this particular land, and not only nullifies any conveyance and contract he may have obtained from the Indian allottees, but nullifies, as against them, any contract he may have made with George Hampe."

The defendant argues that it was incumbent upon plaintiff to offer some proof to show that the 25-year period during which these lands were not subject to sale or contract had expired; that, for the purpose of satisfying that provision of the statute of frauds which requires contracts in reference to the sale of lands to be in writing, it was competent for the plaintiff to prove that the defendant in fact owned this land and in fact owned no other land in that county, but that plaintiff failed to satisfy the statute of frauds for the reason that he failed to prove that defendant in fact owned this land, while, on the contrary, the pleadings as they stood showed conclusively that he never did own it. But it has been repeatedly held that a person may contract to sell and convey lands of which he is not the owner and may become liable for damages for the breach of such contract. *Trust Co. v. McIntosh*, 88 Kan. 452, 462, 75 Pac. 498; *Krnut v. Phares*, 80 Kan. 515, 103 Pac. 117; *Robertson v. Talley*, 84 Kan. 817, 820, 115 Pac. 640. In the last case it was ruled in the syllabus that: "One may bind himself personally by an agreement to furnish a deed to land owned by another, even when he had no present interest therein and no means of compelling a conveyance." Par. 1. In the opinion it was said: "No reason is apparent why he may not bind himself personally by a contract that he will procure a deed to land, although he is not certain that he will be able to do so, thereby incurring liability for damages if he shall fail, and for loss by the bargain if he shall be compelled to pay more for the property than he is to receive." 84 Kan. 820, 115 Pac. 641.

The answer alleges that the lands referred to in the petition were patented to Indians of the "Citizen Pottawatomie Tribe or Band," under an act of Congress approved February 8, 1887, which declares that any conveyance or contract made touching the said lands before the expiration of the period of 25 years mentioned in said patents shall be absolutely null and void, that the

25-year period from the date of the allotment and trust patent had not expired and had not been abrogated at the date of the alleged contract sued upon. The appellee calls attention to two subsequent acts of Congress which, it is claimed, gave to the Citizen Pottawatomie Indians the right to sell their lands under certain conditions. The first of the later acts provides: "That any member of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma, to whom a trust patent has been issued under the provisions of the act approved February eight, eighteen hundred and eighty-seven (Twenty-Fourth Statutes, three hundred and eighty-eight), and being over twenty-one years of age, may sell and convey any portion of the land covered by such patent in excess of eighty acres, the deed of conveyance to be subject to approval by the Secretary of the Interior under such rules and regulations as he may prescribe, and that any Citizen Pottawatomie not residing upon his allotment, but being a legal resident of another state or territory, may in like manner sell and convey all the land covered by said patent, and that upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named." Act Aug. 15, 1894, c. 290, 28 Stat. 295. The second of the later acts provides: "That the proviso to the act approved August fifteenth, eighteen hundred and ninety-four, permitting the sale of allotted lands by members of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma is hereby extended so as to permit the adult heirs of a deceased allottee to sell and convey the lands inherited from such decedent; and if there be both adult and minor owners of such inherited lands, then such minors may join in a sale thereof by a guardian, duly appointed by the proper court, upon an order of such court made upon petition filed by such guardian, all conveyances made under this provision to be subject to the approval of the Secretary of the Interior; and any Citizen Pottawatomie or Absentee Shawnee not residing upon his allotment, but being an actual resident of another state or territory, may in like manner sell and convey all the land allotted to him." Act May 31, 1900, c. 598, § 7, 31 Stat. 247.

It is apparent from these subsequent statutes that the Citizen Pottawatomie Indians were given the right under certain conditions to dispose of their lands; and, while the subsequent acts of Congress do not in terms abrogate the inhibition against the validity of contracts for the sale of such lands declared in the act of 1887, it seems obvious that, when the allottee was permitted to sell his lands, any contract made by others in relation thereto would not be void. There was no allegation in the answer nor any

proof offered that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later acts of Congress. We do not rest our decision, however, upon the effect of the acts of 1894 and 1900. Under the authorities cited, *supra*, we hold that the defendant is liable in an action for damages for the breach of his contract to sell and convey the lands in question, although he may have had no present interest therein and no means of compelling a conveyance at the time he entered into the contract.

It was not incumbent upon the plaintiff to offer proof that the defendant in fact owned the lands referred to in the contract, or that the 25-year period in which they were not subject to sale had expired. All that was required was to offer proof for the purpose of identifying the land that was attempted to be described in the memorandum in order to show what land the parties intended and thus to satisfy the statute of frauds. This does not mean that the plaintiff would be permitted to state what his understanding was as to the land intended, or that oral testimony in such cases is admissible for that purpose. Where the petition alleges that the tract of land attempted to be described is all the land in the county mentioned which the person who agreed to convey the land at that time owned or claimed to own, and that there was no other land in that county which he owned or claimed to own, except that attempted to be described in the contract or memorandum, the statute of frauds is satisfied by proof of these facts. *Bacon v. Leslie*, 50 Kan. 491, 31 Pac. 1066, 34 Am. St. Rep. 134; *Hampe v. Sage*, *supra*, and authorities cited. The evidence of defendant's admissions was competent, and the demurrer to the evidence was rightly overruled. For the same reason the court properly refused to permit the defendant to show that in fact he had no title to the lands in question.

[4] Complaint is made that the court should have permitted the defendant to offer oral testimony to the effect that the written contract did not express the agreement of the parties; that both parties intended merely to make a proposition which either had the option to accept or refuse. It hardly seems necessary to cite authorities to show that the admission of evidence of this character would have been to vary and contradict a written contract by parol, and that the court rightly rejected it and refused the instructions and special questions in respect thereto.

[5] Interest on the amount of damages was properly allowed from the time when the contract was breached, which would ordinarily be in cases of this character when plaintiff tendered performance. In this case the deed was tendered by plaintiff at the time the action was commenced. *Craft v.*

Bent, 8 Kan. 328; Stebbins v. Wolf, 33 Kan. 765, 771, 7 Pac. 542.

The judgment is affirmed.

BURCH, MASON, and WEST, JJ., concurring.

BENSON, J. (dissenting). It was held in the former opinion that, in the absence of an allegation that the tract referred to in the contract was the only land of the vendor in the designated county, an averment that it was so in fact was insufficient. It was said that to allow proof that the land had been so identified would be to permit an essential element of the contract to be proved by parol evidence. For the same reason proof that the vendor had stated to the agents that it was the only land he owned in the county was insufficient, for there was no allegation in the petition that he had made such statements. Besides, no connection was shown between the agency and the contract in question. The statements to the same effect made to the vendee were parts of conversations occurring three or four weeks before the contract, and they were not referred to in any manner when the contract was executed.

It has been held that parol evidence of a previous oral agreement which is the only means of identification referred to in the memorandum cannot be taken into consideration to complete it. Whelan v. Sullivan, 102 Mass. 204. If an actual agreement is insufficient, it cannot be that mere conversations referring to a possible or even contemplated agreement are sufficient to identify the subject-matter in a contract afterwards made, especially in the absence of any reference thereto, either in the contract, or at the time of its execution.

In the same conversation between the parties relied upon to prove the necessary identification, the vendee was informed that the tract was Indian land for which a patent had not been issued. Ownership in the government and the absolute restriction upon alienation were matters of public law. At the time, therefore, when the vendee was informed that this tract was the only land of the vendor in the county, he had notice of the fact that it could not be conveyed by any one—that it was not the subject of private ownership. Parol proof of this nature is allowed to identify the land only because it may be presumed that a person intends to convey that which he owns. In view of the mischiefs to be avoided by the statute of frauds, proof strictly within the rule is hazardous enough. It should not be stretched to include that which the vendor only claims, but which the other party knows he cannot convey.

The contract was void because so declared by paramount law. The government owned the land and prescribed the conditions. It

stipulated with the Indian to hold the title in trust for him for 25 years and declared that any previous contract to convey should be void. Damages cannot be recovered for breach of a void contract. It is contrary to public policy to attempt to obtain that which the government as guardian for the Indian is holding for his benefit, and no court should directly or indirectly lend its aid to a connivance to that end.

The provision made by a subsequent statute for the issuance of patents in fee simple afterwards upon certain conditions emphasizes the original restrictions. The act of 1906 (Act June 21, 1906, c. 3504, 34 Stat. 365) declares: "And thereafter (after patents in fee simple are issued on the conditions prescribed) * * * all restrictions as to sale * * * shall be removed. * * *". It is difficult to understand how this language can be interpreted to make a contract—declared by the former act to be void—to be nevertheless valid and enforceable.

While preliminary patents were authorized to be issued to allottees of these trust lands, they were only certificates of the trust entirely in harmony with and intended to give effect to the declaration of the statute that any conveyance of the land or any contract touching the same before the expiration of the time mentioned shall be absolutely null and void. United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532. Subsequent legislation does not assume to give life to that which never had life. Lewis et al. v. Clements, 21 Okl. 167, 93 Pac. 769; Simmons et al. v. Whittington, 27 Okl. 356, 112 Pac. 1018; United States v. Dooley (C. C.) 151 Fed. 697.

Contracts which provide for anything directly prohibited by law or public policy are void. 2 Parsons on Con. (9th Ed.) 907.

This is not a new doctrine in this court. In Vickroy v. Pratt, 7 Kan. 238, in an action by one citizen against another on a promissory note given for Indian land, it was held that "a note given by one citizen of the United States to another, for the sale and delivery of possession of a tract of land to which the Indian title has not been extinguished, is void."

It was held in Brake v. Ballou, 19 Kan. 397, that a parol contract concerning the purchase and conveyance of lands belonging to the United States, made in violation of the spirit of the federal laws and in fraud thereof, cannot be enforced specifically or otherwise. It was said in substance that, although no fraud upon the government was intended, it was nevertheless fraudulent to attempt to procure the title from the government in violation of its laws.

In an action to foreclose a mortgage upon Indian land, it was said: "And it really makes no difference whether the land in controversy, at the time it was mortgaged, belonged absolutely to the Indians, or was held

in trust by the government of the United States for the Indians. In either case the mortgagor had no interest in the land at the time he mortgaged it, and therefore the mortgage was void." *Lucas v. Sturr*, 21 Kan. 480.

In an action upon a note given for a tract of Osage ceded land, this court said: "The contract between the plaintiff and defendant was illegal and void, and the note was given without any sufficient consideration. After the defendant purchased the land, or the claim thereto, from the plaintiff, he had no right to go upon it, and, if he had done so, he would have been a trespasser." *Jarvis v. Campbell*, 23 Kan. 370.

JOHNSTON, C. J., and SMITH, J., concur in this dissent.

(37 Kan. 549)

**MILLS et al. v. RESSLER.
SAME v. CLEVELAND.**

(Supreme Court of Kansas. July 6, 1912.)

(*Syllabus by the Court.*)

1. CONTRACTS (§ 115*)—RESTRAINT OF TRADE.

While contracts in general restraint of trade or business are void, contracts less restrictive are invalid only when inimical to the public welfare, and they are to be judged, not by the arbitrary measure of extent in time or extent in space, but by their reasonableness under all the circumstances, having regard both for the liberty of a person to make beneficial use of his own and the public consequences of such use.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 542-569; Dec. Dig. § 115.*]

2. CONTRACTS (§ 115*)—VALIDITY—RESTRAINT OF TRADE.

The contract involved in this case, limiting the right of a physician to practice a specialty and limiting his right to sell or disclose certain formulas used in such practice, is held to be valid.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 542-569; Dec. Dig. § 115.*]

3. GOOD WILL (§ 5*)—INJUNCTION (§ 61*)—SALE—VIOLATION OF CONTRACT—INJUNCTION.

A physician, who is a member of a firm practicing a specialty and making use of certain remedies and formulas in such practice, may on retiring sell his influence and good will to the firm or its successors, and, having done so, he and any one in collusion with him may be enjoined from doing any act which prevents the vendees from enjoying the benefits of such influence and good will to the same extent as they were enjoyed before the sale.

[Ed. Note.—For other cases, see *Good Will*, Cent. Dig. § 2; Dec. Dig. § 5; *Injunction*, Cent. Dig. §§ 120-123; Dec. Dig. § 61.*]

Appeal from District Court, Harper County. Actions by H. L. Mills and others against C. E. Ressler and O. B. Cleveland. From the judgment, defendants appeal. Affirmed.

T. A. Noftger, of Anthony, Geo. Gardner, of Wichita, and Andrew G. Washbon, of Anthony, for appellants. Geo. E. McMahon and R. P. McColloch, both of Anthony, for appellees.

BURCH, J. The defendants, Cleveland and Ressler, appeal from a judgment enjoining them from conduct destructive of the benefits and advantages flowing from a contract entered into between Cleveland and the plaintiffs, Mills & Thompson.

O. B. Cleveland was a practicing physician at Anthony, Kan., and a specialist in the treatment of particular diseases. In his specialty he employed remedies prepared and used according to formulas of his own. In 1908 Dr. H. L. Mills purchased an interest in the business for the sum of \$5,000. The Cleveland remedy and treatment were uniformly effective, and through judicious advertising the business prospered and became very valuable. On January 1, 1910, Dr. Cleveland sold his interest in the business and in the formulas and his influence and good will to Thompson & Thompson, who associated themselves with Dr. Mills under the firm name of Mills & Thompson. The contract follows:

"Know all men by these presents: That for and in consideration of the sum of five thousand dollars (\$5,000.00) to me in hand paid, the receipt of which is hereby acknowledged, I have, this 1st day of January, 1910, sold and delivered to Mrs. Allie Thompson and H. E. Thompson an undivided one-half interest in my business and specialty of proctology, together with each and every formula by me used in the practice of said specialty, Mrs. Allie Thompson acquiring by this sale an undivided one-fourth interest in said business and H. E. Thompson acquiring an undivided one-fourth interest in the same.

"I hereby promise and agree that I will not practice or attempt to practice proctology at any time hereafter in any part of the United States of America, unless expressly authorized by the said Allie Thompson, H. E. Thompson or the firm of Thompson & Mills, consisting of Dr. H. L. Mills, the said Allie Thompson, and the said H. E. Thompson. And in addition to the delivery of said business and of said formulas to said Allie Thompson and H. E. Thompson and the agreement not to practice or attempt to practice proctology as aforesaid, I further promise and agree that I will, whenever an occasion arises, give to said parties and to the firm of Mills & Thompson the benefit of my good will and influence for the promotion of the interests of said parties and of said firm in the practice of said business and specialty of proctology.

"It is understood and agreed that the said O. B. Cleveland reserves the right to sell at any time and only to persons residing in good faith beyond a radius of 500 miles around the city of Anthony, Kan., any or all of the formulas used by him or by said Dr. Mills in the practice of proctology, and that the net proceeds of all such sales shall immediately upon the collection of the same be equally divided between the said O. B. Cleve-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

land and the firm of Mills & Thompson, or their legal successors in said business.

"It is also understood and agreed that the said firm of Mills & Thompson, or their successors in the said business, shall have the right to sell at any time any or all of the formulas used by Dr. Mills in the practice of said business, without any restriction as to residence of purchaser, but, with the understanding and agreement that the net proceeds of the sale of any such formula or formulas shall, immediately upon the collection of the same, be equally divided between said firm and the said O. B. Cleveland, one-half to the former and one-half to the latter.

"It is also agreed that the firm of Mills & Thompson may use the name of Dr. O. B. Cleveland for advertising purposes only, and that in all cases which the said O. B. Cleveland shall attend or take charge of personally at the request and in the employment of said firm said O. B. Cleveland shall assume equal responsibility, and for his personal services and the assumption of such responsibility shall receive as compensation one-half of the net fees in each and every such case.

"The said O. B. Cleveland promises and agrees that he will at no time and to no person reveal, intimate or suggest the whole or part of the ingredients of any of the formulas used by him or by said firm or any of the members thereof in the practice of said specialty of proctology, excepting only to such persons as may purchase and pay for the same when sold by the said O. B. Cleveland in accordance with the provisions of this agreement.

"The said O. B. Cleveland promises and agrees that if he shall at any time violate any of the provisions of this agreement, either by practicing proctology or by selling or disclosing said formulas, or any of them, except as hereinbefore provided, he will forfeit and pay to said firm of Mills & Thompson the sum of three thousand dollars as and for liquidated damages for the breach of this agreement.

"It is further understood that the said Dr. H. L. Mills had formerly acquired by purchase from the said O. B. Cleveland an undivided one-half interest in said business and in said formulas, and that the said Dr. H. L. Mills is the legal owner of an undivided one-half interest in said business and of said formulas.

"Dr. Mills hereby promises and agrees that, except in cases of bona fide sales made for reasonable consideration, he will never reveal, intimate or suggest any or all of the ingredients in said formulas, or any of them, to any person or persons whomsoever; and that if he shall at any time violate this agreement he will forfeit and pay to Dr. O. B. Cleveland, Allie Thompson and H. E. Thompson the sum of three thousand dollars (\$3,000.00) as liquidated damages for such

breach of agreement, to be divided equally among said parties.

"The said H. E. Thompson hereby promises and agrees that he will never at any time, except in case of bona fide sales for reasonable consideration, reveal, intimate or suggest to any person or persons any or all of the ingredients of said formulas, or any of them, and that in case of any violation of this agreement he will at once forfeit and pay to the said Dr. H. L. Mills, Allie Thompson and Dr. O. B. Cleveland the sum of three thousand dollars as and for liquidated damages for such breach of agreement, such sum to be equally divided among said parties when so paid.

"The said Allie Thompson hereby promises and agrees that she will at no time reveal, intimate or suggest to any person or persons whomsoever, unless in case of bona fide sale for a reasonable consideration, any or all of the ingredients in said formulas, or any of them, and that in case of any breach of this agreement on her part she will at once forfeit and pay to the said Dr. Mills, Dr. Cleveland and H. E. Thompson the sum of three thousand dollars as and for liquidated damages for breach of this agreement, such sum to be equally divided among said parties.

"While this agreement contemplates a continuance of the practice of proctology as formerly carried on by Dr. O. B. Cleveland and by his former partner, Dr. H. L. Mills, it is distinctly understood that it does not contemplate the practice of proctology or of medicine or surgery in any form by the said H. E. Thompson or Allie Thompson, and that their relation to the said business and to the sanitarium to be maintained in connection with the practice of the same is to be in all respects in conformity with the laws governing the practice of medicine and surgery in Kansas and in other states, and that the practice of such specialty is to be carried on by the said Dr. Mills and by such other legally qualified persons as said firm may from time to time employ or associate with them for that purpose."

The proof amply warranted a finding that Dr. Cleveland and Dr. Ressler were in collusion to deprive the plaintiffs of the benefits of their contract by promoting a rival business conducted by Dr. Ressler, with whom Dr. Cleveland maintains offices ostensibly for the treatment of chronic diseases not included in the specialty. There was proof that Dr. Cleveland desired to dispose of his business, formulas, influence, and good will, because of his purpose to retire from the practice of his specialty, and that this purpose was induced by advanced age, increasing physical infirmities, and his comfortable financial condition.

[1] This court has taken the view that contracts in general restraint of that natural rivalry which ordinarily exists in trade and other business pursuits are inimical to the

public welfare, and that the decisive test of the validity of less restrictive contracts is the resulting injury to the public. *Keene v. Gas Co.*, 69 Kan. 284, 76 Pac. 834, 67 L. R. A. 61, 105 Am. St. Rep. 164, 2 Ann. Cas. 949.

[2] The opinion in this case refers to none but the more conservative decisions, but it accords with the modern doctrine, born of modern social and business conditions, that the validity of a contract in partial restraint of trade or business is not to be determined by the arbitrary measures of extent in time, extent in space, and the like, but by its reasonableness, under all the circumstances, having regard both for the liberty of a person to make beneficial use of his own, and for the public consequences of such use. Considered in this manner, the contract in question is valid. The formulas which were the foundation of the specialty were essentially secret. Perhaps others than Dr. Cleveland and Dr. Mills had some knowledge of them. Perhaps Dr. Ressler, from previous association with Dr. Cleveland, knew the ingredients of the remedies, but no common or general competency to administer them existed. Therefore the subject of the contract belongs to a different class from those which involve competition between public service corporations like gas and electric light companies, or which involve natural competition in ordinary branches of trade. The law would be very unjust if it refused to permit one in Dr. Cleveland's situation, who desired to retire from the arduous practice of one branch of his profession, to do so upon advantageous terms by guarantying the genuineness of his retirement. Under even the narrower rules the sale of the formulas was not unreasonably restricted.

[3] A retiring partner may sell his influence and good will to the firm or its successors. This is true of professional men and firms. 20 Cyc. 1277. In this case the good will of the business was one of its most important assets, and good faith required that Dr. Cleveland do nothing which would deprive Mills & Thompson of its benefits and advantages.

"By the sale of the 'good will,' he could not use the old name, and relinquished any benefit or advantage which might result from its previously established character; nor could he do any other act that would prevent his vendee from enjoying that good will, as well against himself as others, to the same extent and in the same way that the defendant had himself a previous right to the unmolested enjoyment of them." *Drake v. Dodsworth*, 4 Kan. 159, 172.

The contract is not in violation of any statute of this state. The right to an injunction is not affected by the provisions of the contract relating to the amount of dam-

ages recoverable for its breach. The injunction properly runs against Dr. Ressler. The judgment of the district court is affirmed. All the Justices concurring.

(87 Kan. 649)

WILLIAMS v. CITY OF PARSONS.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 821*)—INJURIES TO PEDESTRIAN—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

A telephone guy wire had long been maintained near the curb line of a city street over or quite close to a pathway on the side of an intersecting street. A woman crossed the first-named street at this point, and, stepping upon the curb, encountered the wire and was thrown down and injured. The accident occurred in the evening. Although the woman had passed near the place often, she had not noticed the wire. It is held, that the evidence was sufficient to warrant the submission of the questions of negligence and contributory negligence to the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

Appeal from District Court, Labette County.

Action by Ida E. Williams against the City of Parsons. Judgment for plaintiff, and defendant appeals. Affirmed.

F. M. Brady, of Oswego, A. A. Osgood, of Parsons, and Paul H. Kimball, of Parsons, for appellant. Glasse & Burton, of Parsons, for appellee.

BENSON, J. This is an action to recover damages for personal injuries resulting from the alleged negligence of the city. The appellee resides upon Corning avenue near the place of the accident. In returning from a park in the evening, she walked west on the south side of the avenue to and across Fifteenth street extending north and south. There she turned north across the avenue, and in stepping from the surface to the curb encountered a guy wire stretched from a telephone pole to the ground, and was thrown down and injured by the collision. The wire was about five feet above the ground over or quite close to a path which extended along the west side of Fifteenth street. There was no sidewalk on that side of Fifteenth street, but the path was in or near the place where a walk, if constructed, would be located. The appellee had often passed by the place in traveling on Corning avenue, but had not noticed the wire. The accident occurred on a moonlit evening, but there was a tree near the telephone pole causing a shadow over the wire. Two other persons had recently fallen by reason of the same obstruction.

It is insisted that contributory negligence appears, and that it should be so held as matter of law; also, that a demurrer to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

evidence should have been sustained. Neither of these contentions can be upheld. Whether the appellant exercised reasonable care was a question for the jury. *Osage City v. Brown*, 27 Kan. 74; *McCoy v. City of Wichita*, 86 Kan. 943, 122 Pac. 894.

While a city is not bound as a matter of law to grade or improve the entire width of its streets or to construct sidewalks upon all of them, it is its duty to keep them in a reasonably safe condition for public travel in the ordinary modes. *City of Wellington v. Gregson*, 81 Kan. 90, 1 Pac. 253, 47 Am. Rep. 482; *Atchison v. Mayhood*, 69 Kan. 672, 77 Pac. 549; note 20 L. R. A. (N. S.) 565.

The appellee was crossing the avenue when injured, and the crossing was obstructed by the wire stretched over the point at the side of the avenue where the pathway on Fifteenth street connected with the curb. Negligence ought not to be imputed to the appellee in crossing the avenue at the west instead of the east side of the street, merely because there was a connecting sidewalk on one side and not at the other.

"A pedestrian is not confined to a crosswalk, but has a right to assume that all parts of the street intended for travel are reasonably safe; and, if he knows of no dangerous excavations or obstructions, he may cross the street at any point that suits his convenience without being liable to the imputation of negligence." *City of Olathe v. Mizze*, 48 Kan. 435, syl. 2, 29 Pac. 754, 30 Am. St. Rep. 308.

The wire had been in the same position for about four years, and notice to the city authorities of the apparent danger could be inferred from the length of time this condition had continued. The evidence presented a case proper for the consideration of a jury, and there was no error in overruling the demurrer. *Brusso v. City of Buffalo*, 90 N. Y. 679; *City Council of Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389; *Stack v. Portsmouth*, 52 N. H. 221; *Coffey v. City of Carthage*, 186 Mo. 573, 85 S. W. 532.

Complaint is made of an order striking out a part of the answer. No prejudice would have resulted to the appellee had her motion been overruled. Neither was the appellant's defense prejudiced by sustaining it. Evidence of the matters stricken out was freely admitted, and there is no substantial dispute as to the facts.

It is contended that the verdict was excessive, but the extent of the injuries, including resulting pain and consequent damages, was properly submitted to a jury, and the amount of recovery is not so large as to suggest passion or prejudice, or to appear unreasonable.

On a motion for a new trial the appellant offered affidavits of several jurors regarding conversations in the jury room, concerning the liability of the telephone company to re-

imburse the city for the damages that might be recovered in the action. Some of these affidavits were rejected upon the ground that the notary before whom they were verified was disqualified because he was an attorney for the defendant. Without examining that question, it is sufficient to say that the alleged misconduct of the jury, if it should be held that the affidavits ought to have been received, is not of that serious character necessary to disturb a verdict. If the deliberations of juries are to be searched and the discussion of such matters allowed to set aside verdicts, litigation would be uselessly prolonged and justice defeated by delay. While carefully guarding the rights of litigants, courts should proceed cautiously in trying the jurors after trying the cause.

No error is found in the record, and the judgment is affirmed. All the Justices concurring.

FISHER v. MONTGOMERY et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. TOWNS (§ 81*)—VACATION—GROUNDS.

A landowner, claiming that he had been damaged by overflow caused by a certain ditch, sued the township, the trustee, the road overseer, and an adjoining landowner, to recover damages and for prohibitory and mandatory injunctions. Thereafter the parties agreed upon a settlement of the entire controversy, and embodied their agreement in a written stipulation providing, among other things, that the action should be dismissed. In pursuance of such stipulation the court entered a judgment of dismissal; the journal entry being approved by counsel. Thereafter the defendants presented a motion to set aside the judgment; the grounds being that the stipulation was made without the knowledge of the township board, and was made improvidently and was highly prejudicial to the interests of the township and the highway involved. Over the objections of the plaintiff and without evidence or showing, the judgment was set aside. *Held*, error.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 126; Dec. Dig. § 81.*]

2. JUDGMENT (§ 342*)—VACATION—GROUNDS.

The Civil Code, § 596 (Gen. St. 1909, § 6191), authorizes the vacation of a judgment at or after the term, but only upon grounds therein expressly mentioned.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 668-671; Dec. Dig. § 342.*]

Appeal from District Court, Harper County.

Action by H. E. Fisher against Leu Montgomery and others. From an order setting aside a judgment for plaintiff, he appeals. Reversed.

E. C. Wilcox, of Anthony, for appellant. George E. McMahon, of Anthony, for appellees.

WEST, J. On March 21, 1910, plaintiff sued the defendants to recover \$1,000 damages and to enjoin them from maintaining a

certain ditch, embankment, and obstruction to an alleged natural water course. The defendant Drauhard was township trustee, Montgomery was road overseer and had charge of the roads in controversy, and Horton was the owner of certain lands involved. It was alleged: That the plaintiff was owner of the southwest quarter of section 1, that Horton was the owner of the land south thereof, a highway running east and west between the two tracts, and also another along the west boundaries of both, making four corners at the southwest corner of plaintiff's land. That a certain stream or channel crossed the north and south highway last mentioned, and that a culvert had been cut across the road for the purpose of carrying off accumulating water and emptying the same on section 12. That in the spring of 1907 Drauhard, township trustee, by and with the consent of the other members of the board together with the assistance of Horton, destroyed this culvert and built a tall embankment and dam and ditch along and in the highway and constructed a culvert diagonally across the highway from section 11 to section 1, whereby the water that flowed from all the land that sloped in that direction was accumulated above the dam and conveyed by the ditch to the southwest corner of plaintiff's land, and that the defendants pretended to dig a ditch along the south side of plaintiff's land to release the water into a certain creek; such ditch being entirely insufficient. It further alleged that this action on the part of the defendants had destroyed certain alfalfa of the plaintiff and damaged a portion of his land; the prayer being for \$1,000 damages and an injunction from maintaining such ditch, embankments, and obstruction and from putting in any other culvert, and a mandatory injunction requiring them to open the one formerly used. After the issuance of a restraining order, the parties entered into a stipulation by which the plaintiff agreed to dismiss his action, the township agreed to pay all the costs, and each party agreed to pay his own attorney's fees; the plaintiff to abandon all claims for damages, the township to construct and maintain a good culvert so as to prevent the flooding of plaintiff's land, Horton to dedicate to the township for road purposes a strip of land 16 feet wide extending from the northwest corner of the northwest quarter of section 12 to a certain creek and to remove his fence back along such strip, a ditch and a dike sufficient to take care of all ordinary flood waters. The township agreed as soon as practicable after constructing such culvert, ditch, and dikes, to remove and cease to maintain the one complained of. The stipulation was signed by the plaintiff and Horton and by Drauhard as trustee and approved by counsel. On April 20, 1910, in

conformity with such stipulation, a judgment was rendered "that, pursuant to said stipulation and the fulfillment of the same as set out and shown by the memorandum filed herein, said action be, and is hereby dismissed at the costs of Odell township." This journal entry was approved by the attorneys. On May 2, 1910, the defendants moved to set aside the judgment on the grounds that the stipulation was made without the knowledge or authority of the township board and improvidently, and that it was highly prejudicial to the interests of the township and the highway involved in the petition. Without any evidence, and over the objection of the plaintiff, the case was reinstated for hearing at the following September term of court. The plaintiff requested that special findings be made "as to whether or not it is decided to set aside the stipulation made by the parties to this action, or whether the township trustee had any authority to enter into the same"; but such findings were not made. On September 10th, the defendants filed an answer admitting the organization of the township, the official capacity of Montgomery and Drauhard, and alleged that the embankment, culvert, and ditch complained of were made with the knowledge, consent, approbation, and assistance of plaintiff; that plaintiff accumulated a large amount of surface water and threw it in a body into the ditch; and that the injury could not be apportioned between him and the defendants. The reply was a general denial. After a trial was had in which a demand for a jury was denied the plaintiff, the court was requested to make 12 findings of fact, all of which were refused except the eleventh and twelfth, and the court concluded as a matter of law that, as the plaintiff was a party to the original agreement and contributed to the work of putting the ditch where it was first located and worked upon it afterwards, he was too late to ask relief from a court of equity, and taxed the costs to him.

[1] The plaintiff assigns various errors alleged to have occurred upon the trial, and also complains of the action of the court in setting aside the judgment of April 20, 1910. The defendant argues that the stipulation was not binding, although signed by the township trustee, and suggests that even the entire township board could not have bound the township by such agreement. The statute provides that the duties of the township trustee shall be, among other things: "Fourth. To have the care and management of all property, real and personal belonging to his township and to superintend the various interests thereof." Section 9584, Gen. St. 1909. Section 9587 required him to report to the board of county commissioners annually the affairs of the township for the preceding year, stating in detail the items

of account audited and allowed, the nature of each account, and the name of each person to whom such account was allowed. Section 9588 provides that, in addition to the duties then prescribed by law (1871), "the township trustee shall have the custody and disposition of the property of his township and shall, on going out of office take from his successor in office a receipt," etc. By the act of 1885 (Gen. Stat. 1909, §§ 9629 to 9636), the township board constitutes a board of commissioners of highways of which the trustee is the chairman; it being their duty to keep the roads and bridges of their respective townships in repair and improve them as far as practicable. This act authorizes them to employ a general superintendent, let contracts, appoint overseers, employ laborers, etc.; but the power to let contracts and purchase tools, machinery, or material can only be exercised by the board at an authorized meeting.

In view of these statutes, which were in force at the time covered by the record, it would seem that the township trustee who, with his township, had been sued both for injunction and for \$1,000 damages, on his own behalf and on behalf of the township might properly stipulate to end the litigation without the recovery of any damages by making certain changes in the ditches set forth in the agreement. Such stipulation appears to have been made upon due consideration, and to have met the approval of counsel for all the parties, and to have been followed by a dismissal of the cause in accordance therewith. To set aside the judgment was in effect to avoid the stipulation, and we cannot discover what power the trial court had to make the order without any showing of fraud or collusion, but merely upon the request of the defendants. What appeared to be a complicated local controversy seems to have been amicably adjusted by all concerned on terms apparently fair and reasonable. The township was a party to the stipulation and by its managing officer signed it, and, although the motion of defendants to set it aside alleged that it was improvidently made and was highly prejudicial to the interests of the township, we cannot understand how the township itself, the trustee, and road overseer, as well as the adjoining landowner, could well make this allegation within a few days after having signed such a stipulation, and it is still more difficult to see how the mere allegation, unsupported by any proof whatever, could justify absolving the parties from their stipulation and set aside a judgment which had been entered in pursuance thereof.

[2] The Code, § 596 (Gen. St. 1909, § 6191), authorizes the vacating of a judgment at or after the term, but only upon grounds expressly mentioned. *Vail v. School District*, 86 Kan. 808, 122 Pac. 885; 23 Cyc. 889-896.

But we know of no statute or authority by which a stipulation can be set aside save for some sufficient reason alleged and admitted or proved.

The order setting aside the judgment is reversed. All the Justices concurring.

(87 Kan. 774)

SARBACH v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

ELECTION OF REMEDIES (§ 7*) — CLAIMS AGAINST DECEDENT'S ESTATE.

A creditor seeking to recover a fund alleged to have been misappropriated by its agent may simultaneously in separate actions proceed against the estate of the misappropriator and other parties alleged to have participated in the misuse of the fund, and, after the full amount of the claim has been allowed against the estate and classified, such creditor is entitled to the same dividend as other creditors of the same class, without regard to the result of pending suits against such other parties.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 12; Dec. Dig. § 7.*]

Appeal from District Court, Jackson County.

In the matter of the estate of Albert Sarbach. From an order allowing a claim of the Fidelity & Deposit Company of Maryland, Carrie Sarbach appeals. Affirmed.

I. T. Price, Charles Hayden, and Crane & Woodburn Bros., all of Holton, for appellant. Garver & Garver, of Topeka, for appellee.

WEST, J. Carrie Sarbach is administratrix of the estate of her deceased husband, Albert Sarbach, with debts amounting to over \$76,000; the estate being insolvent. Having collected in about \$32,700, she petitioned the probate court for an order of distribution among the undisputed claims and was directed to pay 25 per cent. upon all which had been allowed except that of the Grand Lodge of Masons, which was ordered to be held in abeyance until it could be determined how much, if anything, should be recovered by the lodge in its suits against various banks and individuals. From this order an appeal was taken to the district court, where the administratrix was ordered to pay without regard to the pendency of the cases referred to. From that order this appeal was taken. The claim of the Grand Lodge was for moneys claimed to have been received by Sarbach as Grand Treasurer with which he was chargeable at the date of his death. Subsequent to the allowance of this claim, suits were brought against certain banks and persons to recover various sums alleged to have been wrongfully paid or received by them out of the trust fund in possession of Sarbach as Grand Treasurer in some of which cases judgments were recovered and

appealed from to this court. The Fidelity & Deposit Company of Maryland claims to have succeeded to all the rights of the Grand Lodge touching the fund in question and is the appellee herein.

It is contended by the administratrix that the Fidelity Company should not be allowed to collect 25 per cent. of its claim against the estate from her until it appears whether it can collect more than 75 per cent. from the other banks and persons sued; that the other suits are for portions of the identical money claimed to have been in the hands, or which should have been in the hands, of Sarbach at his decease; and that, as the other defendants are solvent, the estate should not be made to pay such a per cent. as would permit the Fidelity Company to become overpaid; and it is argued that the probate court rightfully withheld payment of the 25 per cent. until these claims could be fully adjudicated and the court could equitably determine the amount that each would, on final distribution, be entitled to, or liable for, and to prevent the payment of an undue amount to any one creditor of the fifth class from funds which under the law belong to other creditors of the same class to their detriment.

The Fidelity Company contends that the estate owes the entire indebtedness, and that, while the claimant can recover but once, it has a right to the same dividends as other creditors of the estate without waiting for the adjudication of other actions involving the same shortage out of which all the litigation has grown. Authorities are cited in support of the rule that the creditor can demand and receive dividends upon the full amount of his claim regardless of any sums received from his collateral.

We do not regard the question as the familiar one of a creditor pursuing an insolvent estate while holding collateral for his debt, and do not think the same rule necessarily applies. The contention of the creditor is that Sarbach had, or should have had, in his hands over \$16,000 belonging to the Grand Lodge which has assigned its claim to the appellee; that Sarbach had misappropriated this amount of funds thereby rendering his estate liable therefor, the claim for which has been allowed and classified; that other banks and persons besides Sarbach participated in the misappropriation of this same fund and therefore have become liable for such portions thereof as their part in the transaction concerned; that different parties having misused a fund belonging to a creditor who may look to one or all for reimbursement, and while he can have but one recovery of the full amount, he may pursue any one or more at will until the amount properly coming from the ones thus pursued is received. A very similar question was raised in *Washbon v. Bank*, 86

Kan. 468, 474, 121 Pac. 515, 517. It was there held that the proof and allowance of a claim against the estate is not a bar to an action against one of the banks, but that the claimant might consistently pursue both remedies until there should be one satisfaction. It was said: "So here, the plaintiffs have not waived their claim of ownership of the fund sought to be recovered, but are pursuing the estate of the one who misappropriated it and the bank who paid out the money with alleged knowledge of its trust character. This they may do until from one source or the other their claim, if rightful, shall be satisfied."

We think the appellee has the same right to the 25 per cent. dividend as other creditors of the same class, and if, in any of the pending proceedings, any overplus should be recovered, the creditor must account to the estate therefor; but, until such contingency happens, neither of the debtors who have participated in the wrongful diversion of the fund in question can require the claimant to stay proceedings until it is seen how much some other debtor may be compelled to pay.

The appellee suggests that there was no motion for a new trial, and that therefore we cannot consider any errors resulting from rulings upon evidence. The evidence consists of a stipulation that the allegations of the petition and amended petition of the administratrix should be taken as true, and, while the abstract does not show the proceedings or steps taken to perfect an appeal, the one question of law has been briefed and argued, and in view of the stipulation a motion for a new trial was not necessary. *Wagner v. Railway Co.*, 73 Kan. 283, 85 Pac. 299; *Darling v. Railway Co.*, 76 Kan. 893, 93 Pac. 612, 94 Pac. 202; *Sheets v. Henderson*, 77 Kan. 761, 93 Pac. 577; Civil Code, § 305 (Gen. St. 1909, § 5899).

The judgment is affirmed. All the Justices concurring.

(87 Kan. 615)

WESTINE v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The findings showed, among other things: That the plaintiff, a brakeman in the employ of the defendant, about 7:40 o'clock p. m. on July 17th was walking south on the main track, receiving signals from his conductor and repeating them to his engineer, who were moving their train on a siding to clear for an incoming passenger train. The latter backed in on the main track. Its conductor was on the rear car and could have discovered by the exercise of reasonable care that the plaintiff was unconscious of its approach and of his own danger in time to have stopped the train, which the conductor could have done within 15 feet. That the passenger train struck the plaintiff and dragged him 30 feet. Held, that under all

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r. Index.

the circumstances the question of plaintiff's alleged contributory negligence was for the jury. [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

Appeal from District Court, Neosho County. Action by Andrew P. Westine against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. R. Smith, O. J. Wood, and A. A. Scott, of Topeka, for appellant. Farrelly & Evans, of Chanute, for appellee.

WEST, J. The plaintiff, a brakeman in the employ of the defendant, was, at the time of the injury, engaged in taking signals from his conductor, who was at the rear of a train about 15 or 16 cars away, and communicating to him his engineer. It was about 7:40 o'clock p. m. on July 17th. He was walking south on the main track on which a passenger train was backing in from the north; the conductor thereof being on the end of the rear car. The jury found, among other things, that when Westine stepped upon the track the passenger train was about 150 feet north and was equipped with air and air brakes; that its conductor was on the rear end of the train and in charge of the air brake, and could have seen Westine about 150 feet before he was struck; that under the facts and circumstances he could have seen the plaintiff on the track and observed and appreciated that he was unaware of the approach of the train and unconscious of his peril, in sufficient time to have stopped the train before striking him; that the conductor could have stopped the train within 15 feet by the exercise of ordinary care and prudence; that by applying the air on the cab of the engine it could have been stopped within 10 feet; that the train which struck the plaintiff dragged him 30 feet. The appellant contends that even with these findings contributory negligence was shown, and that the plaintiff could not in law recover. When the case was here before (84 Kan. 213, 114 Pac. 219) it was decided: "A question of contributory negligence arising upon the failure of a brakeman to look for an approaching train while actively engaged in giving signals for the movement of his own train, and while giving necessary attention thereto, is held, under the evidence in this case, to be one of fact for a jury." It was there said that, while the plaintiff knew that the passenger train should come in at about the time of the injury, "it still remained for a jury to determine whether the plaintiff ought, in the exercise of reasonable prudence, to have looked out for the expected train, in view of the nature of his duties and the importance of attending to the work of removing his own train to the siding, and the dangers to be apprehended." 84 Kan. 221, 114 Pac. 222.

In view of the findings referred to, which were the result of the second trial, the rule already announced applies even more clearly than before.

The judgment is affirmed. All the Justices concurring.

(87 Kan. 746)

STATE v. TERRILL

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. FALSE PRETENSES (§ 7*)—FALSE REPRESENTATIONS—SUFFICIENCY.

The fact that some of the false representations made by a defendant, who was convicted for obtaining money by false pretenses, may have been mere opinions and some that did not come within the condemnation of the statute, is not fatal to the conviction, where false representations were made by him which contributed to some material extent in inducing the owner to part with his money.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. § 7.*]

2. FALSE PRETENSES (§ 4*)—FALSE REPRESENTATIONS—SUFFICIENCY.

A false representation, made with intent to cheat and defraud another, by which money is obtained, is a false pretense within the meaning of section 94 of the Crimes Act (Gen. St. 1909, § 2584), whether it is oral or in writing.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 1; Dec. Dig. § 4.*]

3. FALSE PRETENSES (§§ 31, 49*)—INFORMATION—EVIDENCE.

The information examined, and held to state an offense under the statute, and it is further held that there is sufficient testimony to sustain the conviction.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 38-41, 62; Dec. Dig. §§ 31, 49.*]

Appeal from District Court, Pawnee County.

George H. Terrill was convicted of obtaining money by false pretenses, and appeals. Affirmed.

G. Polk Cline, of Larned, and Chas. A. Baker, of Kinsley, for appellant. J. S. Dawson, Atty. Gen., W. H. Vernon, of Larned, and S. N. Hawkes, of Topeka, for the State.

JOHNSTON, C. J. George H. Terrill, the appellant, was convicted of obtaining \$400 from Mrs. M. L. Foss by means of false pretenses. In the information it was alleged that Mrs. Foss was the beneficiary in a policy of insurance issued by the Knights and Ladies of Security, and that, with intent to cheat and defraud her, appellant represented to her that the policy had been issued irregularly and that the only way to obtain the money due on the policy was through the assistance of the appellant and one Erdman by paying them \$400, and that, believing his representations to be true, she paid him that amount. It is then alleged that the representations were untrue and known by him to be untrue when made. It is contended on this appeal that appellant

was, in fact, convicted of an offense other than the one charged against him; that his representations and acts may have made him liable to conviction for defrauding the insurance company; but, as the company did not complain of his fraud, no one else could, and, at any rate, the testimony did not show that a fraud was committed on Mrs. Foss. His version of the testimony is that M. L. Foss, who was insured, was in bad health, and that appellant induced him to take out a policy and accompanied him to the office of Dr. McCurdy, who first examined Foss and refused to pass him. He was at once examined by Dr. Ewing, who reported favorably on the application, and then papers were accordingly made out and forwarded to the home office, where the application was approved and a policy of insurance issued. Terrill further claimed that Foss was not initiated in the local lodge; that the lodge would not receive him as a member; that six months after the policy was issued Foss died from a disease of the heart, a condition which Dr. McCurdy found when he examined him; that Terrill, knowing of the alleged fraud in the issuance of the policy, and having participated in it, and knowing also that Foss was not received into the local lodge, represented to Mrs. Foss that she could not obtain the insurance except with the aid of Erdman and himself, who were respectively president and secretary of the local lodge, and that if she would give them \$400 they would make out and sign the necessary certificates and papers by which the \$1,400 mentioned in the policy would be paid; that this was done, and, when the insurance money was received, he was given \$400 and gave one-half of that amount to Erdman.

The testimony in the transcript, which is more complete than in the abstract, does not warrant the inferences drawn by appellant nor his theory of the facts. There was a fair basis for the jury to find that Foss honestly applied for and obtained the policy; that he was in fairly good health; that, while the doctors disagreed as to his condition, the examination of Dr. Ewing, who appears to have been a reputable physician, was not perfunctory, but was honestly made and the risk honestly approved. Appellant in his testimony states that, when he advised the taking out of the policy, he did not have the death of Foss in view and had no personal knowledge of his bad health. The evidence tends to show that, about eight years before the policy was issued, Foss had an attack of rheumatism, but that, other than the rheumatic attack, he was in good health when the policy was taken out. There was nothing to show that any facts as to his health or history were concealed from the medical examiner or misrepresented by him, and, while the doctor who passed on him was probably mistaken as to his con-

dition, the testimony warranted the jury in finding that it was an honest mistake. Again, as to the membership in the lodge, the appellant himself certified in writing that Foss was initiated into the lodge on January 13, 1911, and this certificate was verified by appellant as well as by the president and financier of the lodge. It is true that on the trial appellant testified that Foss was not initiated into the lodge, but he formed that opinion, he said, because he had been so informed and had not seen him there. He was compelled to say, however, that he did not really know whether Foss was a member of the lodge or not. The jury probably concluded that the sworn statement first made that Foss was a member, supported, as it was, by the official statement of the officers of the lodge, was more reliable than the testimony given when he was on trial, and that he was admitting the perpetration of one fraud in order to escape punishment for another that was charged against him. It cannot be said, therefore, that there was an acknowledged fraud against the society; but, on the other hand, the jury might well have determined that a valid policy was issued, that Foss had paid six assessments on the policy, and that the books showed that he was in good standing in the society when he died.

[2] An offense was alleged in the information. In effect, it charged appellant with falsely and fraudulently representing that the policy was irregularly obtained, and that, to overcome this irregularity, the assistance of appellant and Erdman was necessary when, as a matter of fact, the policy was valid and the beneficiary was entitled to the insurance. Under the testimony of the state, the policy was valid, and Mrs. Foss, who paid \$400 in reliance upon the false representations, had a clear right to the insurance. So far as the evidence shows, initiation into the local lodge is not a condition precedent to the issuance of the policy. In such societies the policy is frequently issued before initiation, and, unless there was an invalidating provision in the laws of the society or in the contract itself, the society could not escape liability on a policy actually issued, where assessments had been received and kept, as in this case, on the mere ground that the insured had not gone through the initiatory ceremony in a local lodge.

[1] The fact that some of appellant's representations may have been mere opinions, or that a part of the representations by which Mrs. Foss may have been induced to give up the \$400 did not come within the condemnation of the statute, is not fatal to the conviction. It is enough if false representations which are within the statute were made and which contributed to some material extent in inducing Mrs. Foss to part with her money. It has been decided that: "It

is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses which are false; nor need the pretenses be the paramount cause of delivery to the prisoner. It is sufficient, if they are a part of the moving cause, and, without them, the defrauded party would not have parted with his property." In re Snyder, Petitioner, etc., 17 Kan. 542, Syl. p. 3. See, also, State v. Cowdin, 28 Kan. 269; State v. Gordon, 56 Kan. 64, 42 Pac. 346; State v. Briggs, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 273, 10 Ann. Cas. 904; State v. Hetrick, 84 Kan. 157, 113 Pac. 383, 84 L. R. A. (N. S.) 642.

[2] There is nothing substantial in the claim that the false pretenses must be a token or writing or some pretense in that form. The essential feature of the offense is the character and not the form of the false pretense. Within the meaning of the statute (section 94 of the Crimes Act), any false pretense, whether oral or in writing, by means of which money or personal property is fraudulently obtained, is an offense.

There is complaint of statements made by the county attorney in his argument, and also that things not in evidence were considered by the jury; but it is hardly possible that any of these could have affected the verdict or prejudiced the appellant.

There is some criticism of rulings of the court in giving and refusing instructions; but we think the case was fairly submitted to the jury, and we find nothing substantial in the objections of appellant.

The judgment is affirmed. All the Justices concurring.

(87 Kan. 571)

HENRY v. KAW BOILER WORKS.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—DEFECTIVE MATERIAL—QUESTION FOR JURY.

Where an employé is injured by reason of the breaking of a pole, constituting a part of a hoisting apparatus, and formed by screwing together two joints of well casing, evidence that the threads were rusted, and after the accident were found to be stripped off so far as they had been engaged, is sufficient to take to the jury the question whether the employers were negligent in furnishing defective material for the construction of such apparatus.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1003, 1008, 1010-1015, 1017-1033, 1038-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN.

Where, under the direction of a foreman who has complete charge of the building of a steel tank, a hoisting apparatus is prepared by the workmen, which is unsafe, not because of

any defect in the materials, but by reason of negligence in the manner in which they are put together, and in consequence an employé is injured who had nothing to do with the preparation of the apparatus, and had not sufficient knowledge or experience to enable him to judge of its safety, the employers are liable for the results of the foreman's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

Appeal from District Court, Chautauqua County.

Action by Frank Henry against the Kaw Boiler Works, a copartnership composed of F. G. Palmer and T. B. Gilbert. Judgment for defendant, plaintiff appeals. Reversed.

W. H. Sproul and J. A. Ferrell, both of Sedan, for appellant. W. E. Ziegler, of Coffeyville, for appellee.

MASON, J. Frank Henry sued F. G. Palmer and T. B. Gilbert, a partnership engaged, under the name of the Kaw Boiler Works, in the business of constructing metal tanks, on account of personal injuries received while in their employ. A demurrer to his evidence was sustained, and he appeals.

The evidence tended to show these facts: A foreman of the firm was engaged, with a number of other workmen, including the plaintiff, hired by him, in the erection of a tank, 43 feet in diameter and 25 feet high, constructed of curved sheets of steel 5 feet wide and 8 or 10 feet long, weighing 400 or 500 pounds. For the purpose of raising the sheets composing the top ring, the men, under the direction of the foreman, prepared a hoisting apparatus the principal feature of which was a single pole, which they called a gin pole, composed of two joints of well casing 4 to 6 inches in diameter, screwed together at the ends. As the last sheet was being hoisted into place, by means of a block and tackle fastened to the top of the gin pole, the plaintiff held one end, while the other was being swung into position. The gin pole broke in two where the pieces were fastened together, and the sheet of steel fell, striking the plaintiff and causing him to drop to the ground from the scaffold on which he stood. One piece of the gin pole was screwed into the other between half an inch and an inch, although threads were cut for about three inches. No block or brace was placed inside of the casing. In the fall the threads were stripped off as far as they had been engaged. Elsewhere they were rusty. The casing was old and rusty. The plaintiff was not skilled in the work of building tanks. He had never before handled similar steel sheets or worked around a derrick of any kind. He did not know how much weight the gin pole would stand or how much guying was necessary to sustain it. He had nothing to do with the making of the gin pole. During its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erection he was working on the inside of the tank.

The grounds of negligence set out in the petition are: That the casing of which the gin pole was made was not strong enough for the purpose, owing to its being old and rusty; that the gin pole was not strengthened at the place of union by placing a wooden block on the inside; that the gin pole was not guyed in a proper manner so as to prevent its falling against the plaintiff.

[1] The allegations are probably broad enough to cover also the failure to provide sufficient support for the gin pole, and the failure to screw the ends far enough together. We think the testimony that the joints of casing were old and the threads rusty was sufficient, under the circumstances of the case, to warrant a finding that the company was negligent in not furnishing better material for the construction of a gin pole. In this view the demurrer to the evidence should have been overruled in order that the jury might at least pass upon this matter. As the question whether the company could be held liable upon any other ground will arise upon a new trial, it is desirable that it should be determined now.

The defendant maintains that if sound materials were furnished to the workmen, and the accident resulted from their want of care in putting them together, no liability can attach to the defendants, because the negligence, although the act of the foreman, was that of the plaintiff's fellow servant. There is abundant authority to that effect. *Knudsen v. La Crosse Stone Co.*, 145 Wis. 394, 130 N. W. 519, 33 L. R. A. (N. S.) 223, and cases cited there and indicated by note thereto in 33 L. R. A. (N. S.) 226; note, 3 L. R. A. (N. S.) 500; note, 18 Ann. Cas. 611; 26 Cyc. 1320-1330, especially paragraph of note under subhead "Supervision of Foreman," in the third line of which the word "not" is obviously omitted by inadvertence; 20 A. & E. Encycl. of L. 81, 82; 4 Thompson on Negligence, § 3760; 2 Labatt on Master & Servant, §§ 614-616.

[2] It is said that the situation so presented creates an exception to the rule that a nondelegable duty rests upon the employer to use due care to furnish his employes a safe place to work in, or that the rule does not apply because the employes make their own working place. Whatever other conditions may create an exception to the general rule, or prevent its application, we think in the present case the defendant was liable for any negligence of the foreman, for these reasons: Assuming the facts to be as testified by the plaintiff, he had in fact nothing whatever to do with the construction of the gin pole, and he had no such knowledge or experience as to enable him to judge of the safety of that appliance. He was under the orders of the foreman who employed him, and who was in

entire charge of the construction of the tank. The plaintiff had a right to rely upon reasonable precautions being taken by the foreman to insure his safety, and the foreman was charged with the duty of taking such precautions. While in other relations the foreman may have been the plaintiff's fellow servant, in this respect he stood in the place of the firm, discharging the non-delegable duty of the employers, and his negligence was that of the defendants. The following cases, while not directly in point, illustrate different phases of the principle involved: *H. & St. J. R. Co. v. Fox*, 31 Kan. 536, 3 Pac. 320; *Brick Co. v. Shank*, 69 Kan. 306, 76 Pac. 856; *Maib v. Mill Co.*, 82 Kan. 660, 109 Pac. 688; *National Refracting Co. v. Willis*, 74 C. C. A. 301, 143 Fed. 107; *Chambers v. American Tin Plate Co.*, 64 C. C. A. 129, 129 Fed. 561; *Heck v. International Smokeless Powder Co.*, 77 N. J. Law, 4, 71 Atl. 150; *C. & A. R. R. Co. v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396.

In this jurisdiction the liability of an employer for an injury to one employé caused by the negligence of another depends, not upon their respective rank or the closeness of their association, but upon the character of the duty that has been neglected. He is liable only in case the duty which has been violated is one which the law imposes upon him, and which he cannot delegate to another. *Bridge Co. v. Miller*, 71 Kan. 13, 80 Pac. 18; *Lunn v. Morris*, 81 Kan. 94, 105 Pac. 15. Since that is the sole test, it should be applied in such manner as to carry out the general principles regulating the liability of employer to employé, and be a consistent part of a complete system. The essential reason why an employer is relieved from responsibility for the negligence of his employes in preparing their own working place, from sound material furnished them, is that they are supposed to be competent to judge of its safety, and have the matter in their own hands. It matters little in what terms the immunity is expressed—whether it is said to depend upon assumption of risk, contributory negligence, or fellow service. Where an employé has had no part in the construction of his working place, or of an appliance which he uses, and is not competent and does not assume to be competent to judge of the safety of either, the reason of the rule fails, and the rule should be held not to apply. The employer cannot be heard to say that he has not undertaken to furnish such an employé a completed place to work, or a completed appliance, but only the materials out of which such a place or appliance may be constructed. In that situation the law casts upon him the nondelegable duty of exercising due care to insure the safety of the place or appliance.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

(97 Kan. 778)

LANDREY v. HOLCOMB.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

COURTS (§ 192*) — CITY COURTS — JURISDICTION.

Where a city is divided into two districts, each having a city court, territory added to the city will, in the absence of some specific provision to the contrary, become a part of the district to which it is contiguous, notwithstanding the act creating the courts provides that each district shall consist of certain wards "as said wards are now constituted and established." That provision means merely that the line of division between the two districts as so located will not be affected by subsequent changes in interior ward lines. It does not prevent the enlargement of the districts by the addition of tracts afterwards taken into the city.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 412, 457, 458; Dec. Dig. § 192.*]

Application by Joseph L. Landrey for writ of mandamus against Frank M. Holcomb. Writ denied.

James M. Meek, of Kansas City, for plaintiff. L. S. Harvey, of Kansas City, for defendant.

MASON, J. In 1897 the Legislature created two courts to be known as "the city court of Kansas City, First district," and "the city court of Kansas [city], Second district." Laws 1897, c. 107, § 1. The territory of the city (called a township in this connection) was divided into two districts, which were thus defined; the words out of which the present litigation grows being printed in italics: "The First district shall be composed of the Second, Third and Fourth wards of Kansas City, Kansas, and the Second district shall be composed of the First, Fifth and Sixth wards of said city, *as said wards are now constituted and established.*" Laws 1897, c. 107, § 4. The judges and clerks were required to be residents of their respective districts. Originally the voters of each district were to elect its judge and clerk. Section 4. By amendment the selection of both sets of officers was left to the voters of the city at large. Laws 1903, c. 212, § 1. Joseph L. Landrey is a candidate for judge of the Second district, and has presented to Frank M. Holcomb, the county clerk, for filing, a petition for his nomination for that office. The clerk, being doubtful of the construction of the statute, refuses to file the petition upon the ground that Landrey is not a resident of the territory that composed wards 2, 3, and 4, or 1, 5, and 6, when the court was created, but is a resident of the Seventh ward, which has been formed from territory taken into the city since that time. Landrey asks a writ of mandamus to compel the clerk to file his petition.

The question presented is whether the plaintiff is a resident of the Second district. The act creating the two districts provided

that it should be composed of certain wards "as said wards are now constituted and established." The bare letter of the statute makes no provision for adding to or taking from the territory of the districts as so created, and seems to forbid any change whatever in their boundaries. The legislators must, however, have realized that the city might be enlarged by the taking in of new territory, and to suppose that they meant that territory added to the city should not become a part of either district is to impute to them a purpose to deny to residents of such territory all right to participate in the selection of the officers of either city court, and all right to be candidates for such places—a discrimination for which no possible motive is apparent. Such a purpose should not be attributed to them if the language employed is capable of any other reasonable construction. Upon this principle, the court held that, although all reference to the city of Holton was omitted from a legislative apportionment act, the evident purpose was that it should form a part of the Thirty-Eighth representative district, as the disfranchisement of its citizens could not have been intended. *Shellabarger v. Com'rs of Jackson County*, 50 Kan. 138, 32 Pac. 132.

Some force must be given to the words, "as said wards are now constituted and established," but, if possible, they should be so interpreted as not to result in an unreasonable discrimination against the residents of territory subsequently attached to the city. When the act was passed, the city contained but six wards. We think the purpose of the Legislature in basing the division into districts upon the ward lines as then established was that the dividing line thus indicated should not be affected by subsequent changes of interior ward boundaries. For instance, if a tract should be detached from the Fifth ward and added to the Fourth, it would not thereby become a part of the First judicial district, but would remain a part of the Second. The Legislature evidently had in mind rearrangements of the ward lines of the territory then composing the city, and not changes resulting from the taking of new territory into the city. No special provision having been made regarding the disposition of such new territory as might be acquired from time to time, the natural inference is that the Legislature intended, not that it should occupy the anomalous position of being within the municipality, but not within either of its judicial districts, but that it should form a part of the district to which it was contiguous. The territory of the Seventh ward, of which the plaintiff is a resident, adjoins the Sixth ward, and nowhere touches the First district. Upon its being brought into the city, it became, and has ever since been, a part of the Second district.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

It is ordered that the county clerk accept and file the nomination petition tendered by the plaintiff. The actual issuance of a writ will, of course, be unnecessary. All the Justices concurring.

(87 Kan. 788)

STATE v. LINK.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 814*)—GUILT OF PRINCIPAL—INTENT OF CODEFENDANT.

The defendant was charged alone as principal with the crime of an assault with intent to rob. His guilt did not depend upon his entertaining a common purpose with another person who participated in the assault or upon the state of that person's mind, and instructions asked on the contrary theory were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

2. CRIMINAL LAW (§ 814*)—INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.

It is not prejudicial error to refuse the usual instructions relating to circumstantial evidence, when the incriminating circumstances shown by the evidence are merely corroborative of direct proof of guilt ample to sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

3. CRIMINAL LAW (§ 1187*)—APPEAL—INVITED ERROR—INSTRUCTIONS.

The defendant cannot complain of an instruction relating to the defense of an alibi which was based on evidence introduced by him, and which was given in response to an instruction which he asked admonishing the jury that his presence at the time and place specified in the information was essential to a conviction, although the proof clearly showed personal presence and participation in the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1187.*]

Appeal from Court of Common Pleas, Wyandotte County.

Clifford Link was convicted of assault with intent to rob, and appeals. Affirmed.

Daniel J. Maher and Jacob S. Detwiler, both of Kansas City, for appellant. Jno. S. Dawson, of Topeka, and James M. Meek, of Kansas City, for appellee.

BURCH, J. The defendant was charged with assaulting H. F. Crafton with intent to rob, and was convicted and sentenced accordingly. He appeals and assigns error in the giving and refusing of instructions.

[1] The evidence disclosed that Crafton was assaulted by the defendant and a man named Gilliland with the intention alleged. Instructions were asked and refused making it necessary to a conviction that the jury should find that a common purpose to rob existed in the minds of the two assailants,

and that the defendant knew of the purpose entertained by Gilliland. The defendant was charged alone as a principal, and his guilt or innocence did not depend upon the existence or continuance of a design held in common with Gilliland or on the state of Gilliland's mind.

[2] Instructions on the subject of circumstantial evidence were asked and refused. The case was not one, however, calling for such instructions. The state produced direct and positive testimony regarding the defendant's conduct, which was amply sufficient to warrant a verdict of guilty, and the incriminating circumstances surrounding the transaction which were given in evidence were merely corroborative. *State v. Gereke*, 74 Kan. 196, 86 Pac. 160, 87 Pac. 759.

[3] The defendant complains of an instruction to the jury relating to the defense of an alibi, because, as he now asserts, the evidence established his presence at the scene of the assault. That being true, the instruction was harmless. But the defendant introduced evidence to show that he was at his home some distance away when the assault was made, and he asked an instruction admonishing the jury that it was essential to a conviction that he should have been present at the time and place specified in the information. If, therefore, error were committed, it was invited.

The judgment of the district court is affirmed. All the Justices concurring.

(87 Kan. 786)

KANSAS CITY v. SIHLER HOG CHOLERA SERUM CO. et al.

(Supreme Court of Kansas. July 16, 1912.)

(Syllabus by the Court.)

NUISANCE (§ 61*)—PUBLIC NUISANCE—ELEMENTS.

The allegations of the petition on a demurrer to which the defendants elected to stand, taken as true, showed that a large number of hogs were kept adjacent to the city in such a manner that odors from the place and from garbage hauled thereto were offensive to the people living in the neighborhood and to those who passed along the streets, and offensive to such an extent as to impair the health of citizens and diminish the value of their property. Held to constitute a nuisance, the continuance of which should be perpetually enjoined (citing 5 Words and Phrases, pp. 4855-4866).

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 142-151; Dec. Dig. § 61.*]

Appeal from Court of Common Pleas, Wyandotte County.

Action by the City of Kansas City against the Sihler Hog Cholera Serum Company and others. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

Angevine, Cubblison & Holt, of Kansas City, for appellants. R. J. Higgins and W. H. McOmish, both of Kansas City, for appellee.

WEST, J. Kansas City sued to enjoin the defendants from hauling garbage and other refuse through its streets in such manner as to permit the emanation of obnoxious odors from its wagons, and from keeping and maintaining their hogpens at any place within three miles of the city limits.

The petition alleged: That the defendants "are engaged in the business of feeding a large number of hogs at and adjacent to the city limits of Kansas City, Kan., to wit, immediately north of the north line of Beacon Hill annex, the said north line of Beacon Hill annex being the north city limits of Kansas City, Kan. That the exact number of said hogs so kept and fed by the defendants at said place is not to your petitioner known. That the place where the said hogs are kept and fed is adjacent to the city limits of Kansas City, Kan., and within one-eighth of a mile of said city limits. That within the city limits of Kansas City, Kan., and within a radius of one-fourth of a mile from the place where said hogs are kept and fed, there lives a large number of the residents of Kansas City, Kan. That the odors from the said hogpen are offensive to the people living in said neighborhood, and particularly to the people passing along the public highways within the city of Kansas City, Kan., adjacent to the said hogpens. Third. That the said hogs so kept in said hogpens are fed with garbage and other refuse collected in Kansas City, Mo., and hauled in wagons owned and controlled by the said defendants through the streets of Kansas City, Kan., to the said hogpens. That the said wagons are so constructed, as to permit, and they do permit, emanation therefrom of obnoxious odors when passing through the streets of Kansas City, Kan. That, when the contents of said wagons are deposited in said hogpens they likewise cause obnoxious odors to arise so as to affect the people passing along the public highways within the city of Kansas City, Kan., adjacent to the said hogpens. Fourth. That by reason of the matter complained of the value of the property adjacent to said hogpens has been greatly lessened and diminished, and the health of the residents living adjacent to said hogpens has been and will continue to be impaired. That the carrying on of the business of hog feeding so adjacent to the city of Kansas City, Kan., is a public nuisance."

A demurrer was interposed on the ground that no cause of action was stated, and, this being overruled, the defendants elected to plead no further, whereupon the trial court ordered "that the defendants and each of them, their agents, servants, and employes, be, and they are hereby, perpetually restrained and enjoined from so hauling garbage and other refuse through the streets of Kansas City, Kan., as to cause obnoxious odors to emanate therefrom. It is by the

court ordered that the defendants and each of them, and their agents, servants, and employes, be perpetually restrained and enjoined from feeding, keeping, or maintaining more than 10 hogs on the premises heretofore used by them as a hog feeding lot; and it is further likewise ordered that the defendants and each of them, their agents, servants, and employes, be likewise perpetually restrained and enjoined from establishing a hog feeding lot where more than 10 hogs will be fed, kept, or maintained within three miles of the city of Kansas City, Kan. It is further ordered that the plaintiff herein shall recover its costs from the defendants, which costs are taxed at \$30.20." The defendants appeal.

It is insisted that there are not sufficient facts well pleaded to form a basis for any injunction. While the allegations are not very specific, yet an admission of their truth amounts to a concession that the defendants were feeding a large number of hogs adjacent to the city in such a manner that the odors from the place and from the garbage hauled thereto were offensive to the people living in the neighborhood and to those who passed along the streets, and offensive to such an extent as to impair the health of citizens and diminish the value of their property. Bouvier defines nuisance as "anything that unlawfully worketh hurt, inconvenience, or damage." It is true, as urged by the defendants, that everything which may offend those of highly sensitive nerves or of diseased condition may not be a nuisance in contemplation of law, but a thing which is so conducted as to cause noxious odors to emanate to the extent of impairing health and injuring the value of property comes within all the legal definitions. 5 Words and Phrases Judicially Determined, pp. 4855-4886. As laid down by Cyc: "There must be, not merely a nominal, but such a sensible and real, damage as a sensible person, if subjected to it, would find injurious; regard being had to the situation and mode of occupation of the property injured." 29 Cyc. 1154. "It is well established that noxious smells may constitute a nuisance, although they are not unwholesome or injurious to the health, but merely offensive and unpleasant. But every disagreeable smell is not an actionable nuisance, for considerations as to the extent of the injury or annoyance arise in connection therewith." 29 Cyc. 1187. The underlying doctrine of the law of nuisance is that one shall not be permitted so to use his own property as to injure the property of another. In Longnecker v. Railroad Co., 80 Kan. 422, 102 Pac. 498, it was said that, while the plaintiff might for brief periods occupy the street in front of his barn for carrying on the business of feeding and selling horses and the profession of veterinary surgeon, still "the plaintiff has no right to use the street in front of his prem-

ises as a sort of equine hospital for the regular practice of his profession." In *Stotler v. Rochelle*, 83 Kan. 86, 109 Pac. 788, 29 L. R. A. (N. S.) 49, the following expressions are found among the quotations approved by the court: "It is quite clear that the law does not recognize any legal right in any one to compel his neighbor to follow his tastes, wishes, or preferences, or to consult his mere convenience. He cannot dictate the style of architecture, or, generally, the location of the buildings, or maintain that an unsightly or ill proportioned edifice is a nuisance because it offends his eye, or his too cultivated taste. * * * The diminution of the market value of adjacent buildings by such use will not of itself make it a nuisance. But there is a limit to such right. No man is at liberty to use his own without any reference to the health, comfort, or reasonable enjoyment of like public or private rights by others. Every man gives up something of this absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered unreasonably in the use and enjoyment of their property. * * * This illegal, unreasonable, and unjustifiable use to the injury of another, or of the public, the law denominates a nuisance." 83 Kan. page 88, 109 Pac. page 789, 29 L. R. A. (N. S.) 49. "One of the great difficulties in defining a nuisance technically is to describe the degree of annoyance necessary to cause the actionable injury. * * * The determination, however, of the question, rests in sound judgment, and depends upon common sense in each case. * * * Even that which causes a well-founded, reasonable apprehension of damage may be a nuisance." 83 Kan. page 89, 109 Pac. page 789, 29 L. R. A. (N. S.) 49. "Thus a business or erection which should be located in a remote locality may be a nuisance merely because located in a residence or populous neighborhood." 83 Kan. page 90, 109 Pac. page 789, 29 L. R. A. (N. S.) 49. "The question is one of reasonableness or unreasonableness in the use of property, and this is largely dependent upon the locality and its surroundings." 83 Kan. page 90, 109 Pac. page 789, 29 L. R. A. (N. S.) 49. After reviewing many authorities, the court said: "However carefully the hospital might be conducted, and however worthy the institution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residence purposes, not to the oversensitive alone, but to persons of normal sensibilities. The court concludes that upon these considerations the injunction was rightfully granted." 83 Kan. page 91, 109 Pac. page 790, 29 L. R. A. (N. S.) 49. In *Gilmore v. Salt Co.*, 84 Kan. 729, 115 Pac. 541, 34 L. R. A. (N. S.) 48, it was said: "We regard it as well settled by the

weight of authority, and in accordance with sound reason, that one has no right to deposit upon his land refuse matter of any sort, whether in itself offensive or not, by which the water underlying his neighbor's land may be so affected through percolation as to be unfitted for its ordinary use, or injurious to vegetation." In *State v. Lindsay*, 85 Kan. 79, 116 Pac. 207, 35 L. R. A. (N. S.) 810, it was held that the maintenance of an asylum or retreat could be enjoined because the character of its inmates and their conduct caused fear, consternation, and disturbance of the peace in the community. We have nothing to consider but the petition itself, and we think its allegations, taken as true, show that the place complained of is so conducted as to be a nuisance, and that the plaintiff is entitled to a perpetual injunction to prevent the continuance thereof; also to prevent the hauling of garbage or other refuse through the streets so as to cause offensive odors to emanate therefrom. The question, however, as to the location of defendant's business at some other place, was not before the court, and is not for determination.

The judgment is modified, and is affirmed so far as indicated in the foregoing paragraph. All the Justices concurring.

(87 Kan. 727)

STORY v. LANG et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

LANDLORD AND TENANT (§ 139*)—RIGHTS OF LESSEE—EMBLEMENTS.

The purchaser of a tract of land agreed to give the owner for it a certain quantity of wheat within 11 years, and that on each year he would deliver the wheat grown on the land, except so much as was necessary for seeding, and to pay the expense of harvesting and threshing the crops, and that, if the purchaser had not paid the stipulated quantity at the end of the 11-year period, he would pay the owner the balance due on the basis of 60 cents per bushel for the quantity not delivered. He was given possession of the land and raised several crops, but had not complied with the conditions of the contract. While in possession of the land, although in default as to the payments, he rented it to tenants, who put in a crop of wheat. After the crop was sown, an action was brought by the owner against the purchaser to cancel the contract of sale and obtain possession of the land, in which the tenants were named and served as defendants. Three days before the harvesting of the crop was begun, a judgment was rendered in the case decreeing a cancellation of the contract, the restoration of possession, and barring the defendants from claiming any interest in the land. Held, that the rights of the purchaser were not terminated until the contract of sale was canceled, and that the tenants under him were entitled to a tenant's share of the crop which they had grown on the land while the action was pending.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 492-507; Dec. Dig. § 139.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court, Trego County.

Action by Adaline E. Story against Ignatz Lang and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Herman Long, of Wa Keeney, and C. B. Daughters, of Manhattan, for appellant. David Ritchie, of Salina, for appellees.

JOHNSTON, C. J. This was an action brought by Adaline E. Story, the appellant, to recover 990 bushels of wheat from Ignatz Lang and Rudolph Augustine, appellees, who made a cross-claim, and asked for judgment against the appellant for 632 bushels of wheat which they alleged she wrongfully took from them.

In 1903 appellant sold a tract of land to John Younger, for which he agreed to pay to her, within a period of 11 years, 3,000 bushels of wheat, or, in lieu thereof, the value of that quantity of wheat reckoned at the price of 50 cents per bushel. The grantee was required to sow wheat on certain tillable land, and to turn the crop over to the grantor in payment of the land, except so much as was necessary to pay for the seed and the harvesting and threshing of the crops. Shortly after the contract was made, Younger transferred his interest in it to Paul Flax, who entered into possession of the land, and held possession of it under the contract until 1909, when he rented it to appellees. They planted it in corn in the spring of 1909, and in the fall of that year they put the land in wheat—the crop in controversy here. A dispute arose between Flax and appellant as to the performance of the contract, and on December 27, 1909, she began an action against him in which she asked a judgment decreeing that the contract of sale had been rescinded, and that it be canceled and held for naught. The appellees were also named as parties, and judgment was asked barring them from claiming any interest in the land. Although served with summons, they made default, and after a trial, which concluded on June 21, 1910, it was adjudged that appellant was entitled to the possession of the land, and that appellees, as well as Flax, were barred from claiming any interest adverse to appellant. On June 30, 1910, execution was issued to enforce the judgment. The wheat crop was not wholly ripe on June 21st, but appellees began harvesting the crop three days later, and finished it about July 4th. The appellees began threshing the crop, and had threshed 990 bushels of it when they were interrupted by the sheriff, who took possession under the writ issued in this case. The threshing was completed by the appellant, and the appellees are claiming the 632 bushels which she threshed and sold. The court held that Flax, being in possession under a contract with appellant, had a right to lease the land to appellees on the customary rental basis, and that the judgment

rendered when the annual crop was practically matured did not prevent them from harvesting it, but that they were entitled to the wheat raised subject to the claim of appellant for rent due her as owner of the land.

The contention that the right to the crop was adjudicated in the former action is not sound. That was primarily an action to cancel the contract between appellant and Flax and to bar him and those claiming under him of any interest in the land. Until judgment was rendered in that action, the contract relation between them was not severed. The adjudication was that the contract should then be set aside, and the right to the possession of the land should be restored at that time, but it determined nothing more than that. Until the contract was set aside, Flax could not be regarded as a trespasser on the land, as the contract provided that he should have possession of the land for eleven years, and only eight years of that period had expired when the contract was canceled. It is true that he had not complied with the conditions of the contract, but there was a provision in it that if, at the end of the 11 years, he had not delivered the quantity of wheat specified he could pay the balance due on the basis of 50 cents for each bushel not yet delivered. Until the contract was canceled, appellees had a right to deal with Flax, and to assume that his possession was not unlawful. So long as appellant permitted Flax to remain in possession of the land, other persons might deal with him on the theory that his defaults, if any, had been waived, and that appellant was willing to take cash at the end of the 11-year period, instead of the annual share of the wheat. In *Sornberger v. Berggren*, 20 Neb. 399, 30 N. W. 413, a contract for the sale of a tract of railroad lands was made which contained a stipulation that, if the purchaser or his assignee failed to make the payments at the specified time and to strictly comply with all the conditions, it should, so far as the grantor was concerned, become null and void. It was assigned and the assignee rented the land to a tenant for a share of the crops, and it was held that the rights of the assignee were not terminated until the contract was actually forfeited, and the fact that he had been in default for several years did not deprive his tenants of their share of the immature crop growing on the land before the forfeiture was declared. That was upon the theory that, until the lease or contract is terminated, the tenant who planted the crops is entitled to the emblements, and it is said that "the doctrine of emblements is founded on the clearest equity and the soundest policy, and ought to receive a liberal encouragement." *Stewart v. Doughty*, 9 Johns. (N. Y.) 108. See, also, *McKean v. Smoyer*, 37 Neb. 604, 56 N. W. 492; *Monday v. O'Neil*, 44 Neb. 724, 63 N. W. 32, 48 Am. St. Rep. 760; *Reeder et al. v. Sayre*, 70 N. Y.

180, 26 Am. Rep. 367; *Sievers v. Brown*, 36 Or. 218, 56 Pac. 170. The appellees were in no sense trespassers, as they contracted with a purchaser in possession. The court found that they did not participate in any wrongdoing of Flax, but, on the other hand, believed that he had a right to contract with them, and further believed that Flax could not be dispossessed until the 11-year period had expired, as an action in relation thereto had been decided in his favor. The matter of crops was not referred to in the equitable action wherein judgment was rendered in favor of appellant, and the court rightly held that the right to the crops was not put in issue in that case. That question not being adjudicated, and, appellees being tenants of one who had a contract which on its face had three years to run, there is no reason why they are not entitled to a tenant's share of the crop which they planted. In *Sornberger v. Berggren*, supra, it is said: "At common law, which prevails in this state, a tenant who sows or plants a crop where it is not possible for him to know that his estate will terminate before the crop can ripen, and it does terminate before, is entitled to harvest and secure the crop at maturity. This rule is applied to tenants for life and tenants at will, unless the title under which they claim contains some express provision to the contrary." 20 Neb. 404, 80 N. W. 416. Here the crop was practically ripe when the contract was canceled and the right of Flax terminated. The judgment was entered on June 21st, and the harvesting was begun on June 24th. The execution on the judgment was not issued until June 30th. It was returned into court on August 11th, but when it was served was not shown. The ripeness of the crop at the time of judgment was an equitable, but not a controlling, consideration. It is sufficient that the right of Flax had not ceased, and that when it would terminate was uncertain when the crop was sown by appellees. They were therefore entitled to harvest and take off the crop which had been sown before that time in due course of husbandry, giving the owner a landlord's share.

This appears to have been done, and therefore the judgment is affirmed. All the Justices concurring.

(87 Kan. 576)

DICKEY v. COFFEYVILLE VITRIFIED BRICK & TILE CO.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 79*)—OIL LEASE—FAILURE TO OPERATE—PENALTY.

An oil lease provided that, if oil was found on the premises in paying quantities, the lessee should drill eight wells and pay to the lessor a certain royalty of the oil produced, and that for each six months' failure to operate any well the lessor was to be paid \$100. There

was a further provision that the lessee might surrender the lease as to any unproductive well and should remove the machinery and fixtures therefrom and be released from further obligations. Held that, after the required number of wells were drilled, the lessee was liable only for the stipulated royalties so long as the wells were operated in good faith, and that after operations ceased, and until the lease was surrendered, the lessee was liable for \$100 per well for each six months' failure to operate.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 209; Dec. Dig. § 79.*]

2. MINES AND MINERALS (§ 79*)—OIL LEASE—CONSTRUCTION—FAILURE TO SURRENDER—LEASE.

The mere failure formally to surrender the lease, after the casing and machinery had been removed from the wells and all operations had ceased, did not entitle the lessor to further payment of rentals.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 209; Dec. Dig. § 79.*]

Appeal from District Court, Neosho County.

Action by Walter S. Dickey against the Coffeyville Vitrified Brick & Tile Company. Judgment for plaintiff, and defendant appeals. Modified and remanded.

W. E. Ziegler and Chas. Bucher, of Coffeyville, for appellant. Jones & Reid, of Chanute, for appellee.

PORTER, J. Walter S. Dickey brought this action to recover rentals under the terms of an oil and gas lease. The case was tried to the court, and appellee recovered judgment in the sum of \$4,800, together with \$1,200 interest. The Brick Company appeals.

The lease was executed in December, 1901, and by its terms the appellee was to be paid a royalty of one-eighth of the oil realized; and there was a provision that: "If oil is found in paying quantities upon the described premises, said second party agrees to continue drilling wells as fast as possible until there are at least eight wells inside of one year from this date. He further agrees that the wells shall be completed and operated just as soon as possible, and should he fail to have the first well in operation within seven months from this date he shall pay the first party one hundred dollars in cash, and for each and every succeeding well, if not in operation within six months from the time of drilling, he shall pay to first party one hundred dollars, and continue to pay this amount for each well every six months until operation is begun and continued."

The petition alleged that appellant drilled eight oil wells within the first year, and that oil was found in paying quantities, but that appellant failed and neglected to operate any of the wells and to pay any royalties therefrom, and judgment was asked for \$100 on the first well as of July 25, 1902, and for \$100 each succeeding six months thereafter, and the same amount for each of the other

seven wells from the dates when drilled. The answer alleged that oil was not found in paying quantities in any of the wells, that the total production of all of them during the entire period amounted to only about 1,200 barrels, which had been sold at the market price and appellee's one-eighth royalty, which amounted to only \$171.24, had been deposited to his credit with the purchaser. There was an agreed statement of facts covering most of the issues. This was supplemented by proof offered by the appellant, which was not contradicted, showing that the best of the wells never produced to exceed two to four barrels each per day, and further that appellant had at a financial loss of \$20,000 attempted by every means known to the business to make the wells produce oil in paying quantities. The evidence further showed that appellant continued to occupy the premises from the time the wells were first drilled, endeavoring to produce oil, until January 31, 1905, when operations ceased.

The main contention of the appellant is that the burden rested upon the appellee to prove the averment of the petition that oil was found in paying quantities, that appellee's right to demand \$100 per well for every six months' failure to operate them rests entirely upon a wrongful or inexcusable refusal to operate paying wells. In this connection, it is insisted that the only evidence offered upon this issue conclusively established the fact that none of the wells were paying wells. The clause reads: "If oil is found in paying quantities upon the described premises, said second party (lessee) agrees to continue drilling wells as fast as possible until there are at least eight wells inside of one year." The statement that oil was found in paying quantities on the premises cannot be construed as an averment that any well was a paying one. It means simply that oil was found on the premises sufficient to warrant the appellant in drilling the required number of wells. After they were drilled and operations were begun, the appellant's rights in case any well proved unproductive are provided for in another clause, which reads: "If wells are put in operation and at any time in the future the party of the second part shall become satisfied that it is not paying, he shall surrender this lease and remove all machinery, pipes and fixtures from the premises, and be released from all further obligations."

The terms of this lease were before the court in *Dickey v. Brick Co.*, 69 Kan. 106, 76 Pac. 398, in which *Dickey* sought the cancellation of the lease, and in which he was defeated. It was ruled in the syllabus (par. 3) as follows: "If the lessee become satisfied that a particular well is not paying, and such fact exist, the lease is terminated with respect to the unprofitable well only." In

the opinion it was said in reference to the clause now under consideration: "Here it may be said that there are two conditions precedent which must concur to justify the lessee in surrendering the lease—one that the well is not paying, and the other that the lessee shall become satisfied of that fact." 69 Kan. 111, 76 Pac. 399.

[1] It is the appellant's contention that the provision for the \$100 payments every six months on each well is in the nature of a penalty designed solely to prevent the lessee from sealing up paying oil wells and refusing to operate them, and thus deprive the lessor of the royalties which would accrue to him by their operation as provided for in the lease, and that the consideration moving to the lessor in all such cases is the receipt of his royalties if oil is found in paying quantities, and not payment of the penalty for failure to operate.

On the other hand, the appellee points to the provision of the contract by which the lessee was to pay these sums in case the wells were not operated, and the further provision for the surrender of the lease if oil should not be found in paying quantities. The latter provision reads: "In case gas or oil is not found in paying quantities upon said described land, this lease shall be void and be surrendered and said second party shall remove all the fixtures from the premises. If wells are put in operation and at any time in the future the party of the second part shall become satisfied that it is not paying, he shall surrender this lease and remove all machinery, pipes and fixtures from the premises, and be released from all further obligations."

We have not been aided by the citations to cases from other courts, because in none of them were the terms of the lease at all similar to the one before us. The construction given to the lease by the trial court obviously works some hardship to the appellant. On the other hand, to give it the construction which appellant contends for would result in hardship and injustice to the appellee. With the benefits and hardships of the contract the court has nothing to do. It appears that appellee sought the aid of the courts long ago to secure a cancellation of the lease, not, however, on the ground that the lessee had failed to operate (the suit having been brought before the time allowed for drilling wells had expired), but on the ground that the lease being terminable by the lessee whenever he was satisfied it was not paying, it was equally so at the option of the lessor. He was defeated in that contention. *Dickey v. Brick Co.*, 69 Kan. 106, 76 Pac. 398. It is shown by the agreed statement of facts that appellant drilled eight wells within the first year and operated them with some intermissions until January 31, 1905, when all attempts to op-

erate the wells ceased. The lease was not formally surrendered until December, 1907. The court made no findings, but gave appellee judgment for \$4,800 and interest on that sum amounting to \$1,200. In view of the evidence and facts agreed to, we think it is apparent that the court arrived at the amount of the judgment by allowing \$200 per year for each of the eight wells for three years' failure to operate or to surrender the lease. The agreed statement shows that the appellant removed the casing and material from the wells two years after all operations ceased; that is, in February, 1907.

[2] We construe the terms of the lease to mean that, so long as the lessee operated the wells in good faith and paid to the lessor the stipulated one-eighth royalties, the lessee was not liable for any additional payments; that for every six months' failure to operate each well until the lease was surrendered the lessee was liable to pay \$100. The evidence and the agreed facts show conclusively that the appellant in good faith continued to operate the wells until January 31, 1905. The uncontradicted evidence as to the amount expended in efforts to make the wells productive negatives the idea that until that date appellant was not acting in good faith and doing everything in its power to make the wells produce in paying quantities. No demand was ever made by the lessor for the payment of the \$100 per well until the suit was brought. It is true that no demand is required by the lease; but the failure to claim or demand payment for the intermittent periods when no work was being done, together with the undisputed evidence as to the large sums expended by the lessee in apparent good faith, indicate that until January 31, 1905, when all operations ceased, neither party to the lease considered that any payments were to be made for the few months in which there had been no active operations.

We think the court was not warranted in allowing for the last year, after the casing had been removed. All that remained to be done after that was the mere formal surrender of the lease. It is obvious that, when the casing is removed from oil wells, no further operation of them is possible or could be in contemplation. To allow judgment in such an amount for the mere failure to cancel and surrender the lease requires a construction of the language of the instrument which in our opinion is not warranted and which could hardly have been intended by the parties.

The judgment will be modified, and the cause remanded, with directions to reduce the amount to \$3,200 and interest from the time payments were due. All the Justices concurring.

(37 Kan. 610)

NATIONAL BANK OF NORTON v. DUNCAN et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

HOMESTEAD (§ 117*)—CONVEYANCE—JOINDER OF HUSBAND AND WIFE.

A homestead can be alienated or incumbered only by the joint consent of the husband and wife, and, when the title is in the wife, the written consent of the husband to mortgage on certain conditions is not sufficient when such conditions are not accepted.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 191-202; Dec. Dig. § 117.*]

Appeal from District Court, Norton County.

Action by the National Bank of Norton against Elizabeth Duncan and another. From a judgment for plaintiff, defendants' appeal. Reversed and remanded.

L. H. Thompson, of Norton, for appellants.
J. R. Hamilton, of Norton, for appellee.

WEST, J. The bank sued Duncan and wife to recover the balance on a note for \$3,000 and to foreclose a mortgage on their homestead at Norton which stood in the name of the wife. The petition alleged that on May 18, 1910, the defendants executed their promissory note for \$3,000 due in 90 days; that on that day the defendants orally and in writing agreed with the plaintiff to execute and deliver the mortgage; that but for such promise on which plaintiff relied the money would not have been advanced; that pursuant to such agreement Elizabeth Duncan did, on May 18th, execute and deliver to plaintiff her real estate mortgage; that at that time J. H. Duncan in writing by a letter agreed to join therein; that after he had received the \$3,000 he refused and neglected to join. The contents of a letter alleged to have been lost were also set forth, to the effect that Duncan wrote from Steamboat Springs, Colo., about May 15th, that he had struck a great deal in horses and had bought 60 head and had drawn a sight draft for \$3,000 which he hoped the bank would honor, "and we will give you a mortgage on our Norton property to secure you. I have written my wife about it and told her to call at your place and make note and mortgage." The petition further alleged that on May 13th there was paid and credited on such indebtedness \$2,000, that afterwards Duncan overdraw his account in the sum of \$667.89, and therefore judgment was prayed for \$1,667.89 and interest. The answer alleged that the property was the homestead of the defendants and that they had at no time jointly alienated or incumbered the same.

The testimony, among other things, showed that, before the transactions in question, Duncan had gone to Colorado and left a note at the bank for \$500 to cover any demands he then thought he might need in addition

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to a credit of nearly \$200 which he then had. On May 18th he wired from Steamboat Springs to the bank to wire the bank there that his check was good for \$3,000 for three loads of horses, "letter coming." On the same date the bank wired, and on the same day the cashier wrote that he was surprised at receiving the message, that, if the bank had known before Duncan left that he wanted such a deal it could probably have been arranged for, but that upon such short notice it could not be done. The letter contained this sentence: "We are awfully sorry that matters are as they are, but we cannot help it." May 20th Duncan wired: "I have not rec'd letter. Take care of check mailed you, mortgage recorded, 60 head of horses; wife will give you mortgage there on place; it means \$2,000 to me; only want it 60 days." May 21st the bank wired Duncan: "Tried hard to arrange to take care of your deal but cannot do so." June 24th the bank cashier wrote that a consolidation had taken place, and Duncan was requested to send draft for the amount of the overdraft and balance on note of \$1,890.99. On May 26th the cashier procured Mrs. Duncan to execute a mortgage dated May 18th. This was eight days after writing Duncan that the deal could not be handled and five days after wiring him to the same effect. Mrs. Duncan testified that the next morning she received a letter from her husband that he had checked on the bank for \$3,000 and hoped they would take care of it, that she went over to the bank where the cashier told her that he had received a message to that effect, but said: "We cannot possibly take care of him. We absolutely cannot take care of him." She also testified that on the morning of the 27th she asked the cashier for the papers she had fixed up the night before, and that if she had received her mail she would not have given them up, to which the cashier replied that he had sent them out the night before to Kansas City and would have to wire there to stop them. It appears further that Duncan, on finding that the bank would not honor his draft for \$3,000 sold an interest in his contract to a party at Steamboat Springs, and thereby raised the \$2,000, which was forwarded to the plaintiff bank. It appears that the bank did, after all, honor the draft, though just when it is difficult to tell from the abstract. At any rate, Duncan had made the local arrangements for the money before he ascertained that the bank had concluded to take care of his draft, and by being compelled to make such arrangements he lost a large portion of the profits he would otherwise have realized. The mortgage was sent to him for execution, to which he replied on July 5th: "I am in receipt of yours of the 30th inclosing mortgage for \$3,000 which you ask me to sign. You are certainly somewhat mistaken in what I owe the National Bank. This mortgage was made to cover check I drew on

your bank which you wired me you could not take care of, but two days later you wired me you had taken care of my check for \$3,000, so I sent mortgage on horses, and this mortgage on property there was fixed by my wife, but during the time you wired me you could not take care of check and then you did. I let Mr. Poppin of Steamboat Springs have interest in the horses and on May 28th he mailed you N. Y. draft 5352 for \$2,000, so I only owed \$1,000. I afterward bought a few horses and gave you the note for \$500 with myself and wife on the note. * * * I inclose you the mortgage without signing, and it don't look good to give note for \$3,500 when I am only indebted \$1,500." On May 27th he wrote from Steamboat Springs that he was glad the bank had protected his paper, that if it had been done at once it would have saved him over a thousand dollars, that he had to let a local party in so that the profit would have to be divided.

By considerable industry we have been able to extricate the foregoing facts from the abstract, and they appear to show (although the alleged letter was lost and the cashier's testimony was not had) that Duncan did advise the bank that he and his wife would make the mortgage for \$3,000 to take care of the draft for the same amount; that the bank repeatedly refused to protect the draft, but did finally do so, receiving a mortgage on the horses and a credit of \$2,000, and after this was done the bank procured Mrs. Duncan to execute the mortgage for the full amount and later forwarded it to Duncan for execution; and that he very naturally refused to execute a mortgage for \$3,000 to cover a debt, which he claims was \$1,500. It is familiar law that the homestead can be alienated only by the joint consent of the husband and wife, and, while such consent need not always be in writing (*Dudley v. Shaw*, 44 Kan. 685, 24 Pac. 1114; *Durand v. Higgins*, 67 Kan. 111, 72 Pac. 567; *Johnson v. Sandelson*, 69 Kan. 263, 76 Pac. 867), it must always be joint and simultaneous (*Ott v. Sprague*, 27 Kan. 629; *Howell v. McCrie*, 39 Kan. 686, 14 Pac. 257, 59 Am. Rep. 584; *Wallace v. Insurance Co.*, 54 Kan. 447, 38 Pac. 489, 26 L. R. A. 806, 45 Am. St. Rep. 288). Waiving the question as to whether Duncan could be held on a mortgage which he did not execute, by reason of the fact that he had promised in writing to join therein, we have here the case of a promise thus to join on a certain condition, which condition had not been fulfilled and had been repeatedly denied at the very time the execution by the wife was procured, and by no process of reasoning can the conclusion be reached that under these circumstances and conditions there was such joint consent as the law requires.

The only agreement to join in the mortgage was upon condition that the bank honor the draft so that the contract at Steamboat Springs could be carried out. The bank re-

fused to protect the draft, and Duncan was forced to make other arrangements and lose a large share of his profits. When the bank finally concluded to take care of the draft, its delay had already caused the change and the loss, and, even after Mrs. Duncan had signed and requested the return of the instrument, her request was denied and the mortgage, said to be in Kansas City, was forwarded to Duncan in order to secure his signature; the bank knowing at the time that the wife, so far as she could, had withdrawn her consent. To hold that the bank could thus force Duncan to treat the mortgage which he had been requested to sign as his would be to permit one party to change another's contract and then bind him to it as changed.

While there is nothing in the pleadings to indicate it, the defendant's brief suggests that the matter was treated and decided as an equitable mortgage. But equitable mortgages are declared when the party's conduct requires such holding in order that an innocent party who has kept his agreement may not suffer loss by one who has failed to keep his. The bank is in no condition to claim that the instrument signed by the wife only was a legal or equitable mortgage upon the homestead.

"But an equitable mortgage can arise only from a specific agreement between the parties in interest. And there must be clear and unequivocal proof of the intention to create a mortgage and of the sum which it was to secure." 27 Cyc. 976.

"But in order to have this effect there must be a complete and binding agreement for the giving of a mortgage, and a mere proposal or offer to give a mortgage, not accepted or assented to by the other party, nor acted on by him, will not amount to a mortgage in equity." 27 Cyc. 983.

Complaint is made that the court refused to quash the summons; but, as there was an appearance and answer, the error, if any, was waived.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

(37 Kan. 740)

STATE ex rel. DAWSON, Atty. Gen., v. SAPP, Judge.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE.

Whenever a verdict or plea of guilty has become final, the court is under an absolute duty to pronounce sentence, and has no discretion, as a disciplinary measure, to suspend it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

2. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—LOSS OF JURISDICTION.

Where after a verdict or plea of guilty the defendant is permitted to go at large under an arrangement that he shall escape punishment unless the court shall in the future determine to impose a sentence, the jurisdiction of the case is lost with the expiration of the term, and no valid sentence can thereafter be pronounced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

3. CRIMINAL LAW (§ 982*)—SUSPENSION OF SENTENCE—LOSS OF JURISDICTION.

The rule stated applies notwithstanding the sentence purports to be suspended until a certain date, for the purpose of retaining control of the defendant, who is ordered to appear at that time, and show that he has not violated the law in the interval.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

Application by the State, on the relation of John S. Dawson, as Attorney General, for writ of mandamus against Edward E. Sapp, District Judge of Cherokee County. Writ denied.

J. S. Dawson, Atty. Gen., for plaintiff. A. S. Wilson, of Galena, for defendant.

MASON, J. On December 11, 1911, in the district court of Cherokee county, sitting at Columbus, a number of defendants pleaded guilty to violations of the law relating to the sale of intoxicating liquors. They have not been sentenced. On December 30th the Attorney General applied to this court for a writ of mandamus, requiring sentence to be pronounced. An answer to the application has been filed, and the case is submitted upon a motion of the state for judgment upon the pleadings. The answer sets out, among other matters, that the defendants had pleaded guilty under an arrangement that their sentences were to be suspended, and that they were to pay the costs, that "such sentences were suspended until the first day of the May term, 1912, for the purpose of retaining control of these defendants; and requiring them to report and show their good faith in the matter," that the defendants were required to appear at that time, and show to the satisfaction of the court that they had not violated the law in the interval; that they were allowed various periods, ranging from 30 to 90 days, to pay the costs; that the term of court ended December 16th.

Two principal contentions are made against the allowance of the writ: (1) That the court had discretion to make the order suspending sentence; and (2) that, if not, then jurisdiction of the cases has been lost and no sentence can now be pronounced.

A court may postpone the rendition of judgment in a criminal case, and has a practically unlimited discretion in that regard, so long as the imposition of a sen-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes.

tence as a matter of course at some time remains in contemplation. As to this, there is no conflict in the authorities. There is a difference of judicial opinion, however, as to whether a court may withhold sentence with the understanding that it may never be pronounced at all. The cases on the subject are fully collected in a note in 83 L. R. A. (N. S.) 112, introduced by this paragraph: "It may be stated generally that a court has power temporarily to suspend sentence in order to afford time for motions for new trials, appeals, etc., and to inform itself as to sentence to be pronounced. A conflict, however, exists as to the power of courts to suspend sentence indefinitely, some decisions holding such a suspension to be an infringement upon the executive power to reprieve and pardon." Other recent notes on the subject are to be found in 182 Am. St. Rep. 644; 25 Harvard Law Review, 739; and 6 Columbia Law Review, 548.

[1] We think the better rule is that, where a verdict or plea of guilty has become final, the court has no discretion, as a disciplinary measure, to suspend the imposition of sentence, but is under an absolute duty to pronounce it, and this duty is violated whenever an order is made the purpose and natural effect of which is that the defendant shall understand that he may never be punished. There is an obvious and important difference between the mere delay to pronounce sentence and its suspension in the sense in which the expression is here used. Whether a postponement is rightful depends not upon its length or definiteness, nor upon whether it extends beyond the term, but upon its purpose and character. Whenever prior to judgment the defendant is permitted to go at large with the understanding that (although the verdict or plea of guilty is to stand) he may escape punishment altogether, and that his subsequent conduct may affect the matter, the court is really exercising a power of parole, which does not belong to it except as conferred by statute. In the present case, it is clear that the defendants were in effect given a discharge during good behavior. Obviously the understanding was that they were not to be punished for their past misconduct unless they misbehaved in the future. The entering into such an arrangement was not within the scope of the court's duties.

[2] A more difficult question is whether the order made by the court resulted in a loss of jurisdiction with the expiration of the December term of court, when it could no longer be vacated. In jurisdictions where the right of the court to suspend sentence is denied, it is generally held that, when the defendant is set at liberty upon an indefinite suspension, he cannot be further proceeded against, and, if rearrested, is entitled to be discharged. See notes already cited; also, 19 Encyc. Pl. & Pr. 448; 12 Cyc.

773, note, 41, 25 A. & O. Enc. of L. 314. The following cases bear directly upon this phase of the matter: Gray v. State, 107 Ind. 177, 8 N. E. 16; Commonwealth v. Maloney, 145 Mass. 205, 13 N. E. 482; Weaver v. People, 38 Mich. 296; Grundel v. People, 38 Colo. 191, 79 Pac. 1022, 108 Am. St. Rep. 75; In the Matter of Flint, 25 Utah, 338, 71 Pac. 531, 95 Am. St. Rep. 853; People v. Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 477; State v. Hockett, 129 Mo. App. 639, 108 S. W. 590. The principle upon which these cases turn was applied in *Re Beck*, 63 Kan. 57, 64 Pac. 971. There, after a conviction upon several counts, the defendant was sentenced upon but one. Later an attempt was made to sentence him upon the other counts, but he was discharged upon habeas corpus; the court saying: "It was competent for the court temporarily to suspend judgment for the purpose of hearing motions for a new trial and in arrest of judgment, also to gain information that would enable the court to impose a just sentence on the defendant; to give the defendant an opportunity to perfect an appeal, or for other proper relief; but an indefinite suspension, or the holding of the sentence over the head of the defendant, to be executed from time to time as the court may see fit, is wholly unauthorized." 63 Kan. 59, 64 Pac. 972. The principle is substantially the same as that which forbids a discretionary stay of execution of a sentence after it has been pronounced. In *re Strickler*, Petitioner, 51 Kan. 702, 32 Pac. 620; *Ex parte Clendenning*, 22 Okl. 108, 97 Pac. 650, 132 Am. St. Rep. 628, annotated in 19 L. R. A. (N. S.) 1041; In *re Peterson*, 19 Idaho, 433, 113 Pac. 729, 33 L. R. A. (N. S.) 1067.

In many of the cases the action of the court which results in a loss of jurisdiction is described as the indefinite postponement of a sentence. As already indicated, we think the important consideration in this connection is the purpose of the postponement. The mere omission to pronounce sentence, even though several terms pass without an order of continuance or any other action, might not amount to a suspension of sentence, in the sense here intended, if it were occasioned, for instance, by a doubt as to whether a verdict should be set aside, or as to what punishment ought to be assessed. On the other hand, the fact that in the present case the order purported to suspend the sentences until a definite time does not prevent a loss of jurisdiction. A mere postponement of sentence until that time would of course not have divested the court of jurisdiction.

[3] But the defendants were ordered to appear at the May term, not that they might receive sentence, but that they might report and show their good faith in the matter, and their good conduct in the interval. The purpose was expressed to retain control of them

—clearly in order to influence their conduct, perhaps in part with regard to the payment of costs. If this order were valid, its effect could have been indefinitely extended by additional orders of the same character. It was, in substance, an attempt to grant a parole in a manner different from that authorized by statute. It might have been vacated prior to the final adjournment of the court, but with the lapse of the term all control over the defendants ceased. The reason of the rule applied is that the defendant sought not, in the absence of a statute permitting it, to be held in fear of punishment which may or may not be inflicted at the pleasure of those in authority. The rule being for the protection of the defendant, a doubt may exist whether any one else should be permitted to invoke it. But there could be no purpose in granting a writ requiring a sentence to be pronounced, which would be held void if attacked by the person against whom it runs.

The writ is denied. All the Justices concurring.

37 Kan. 716)

POTTORFF et al. v. WARD.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. CONTRACTS (§ 321*) — BREACH — RIGHT OF ACTION.

Where a thresherman agreed with an owner of wheat to cease threshing for a time within which necessary repairs should be made upon the machinery, and threshing was resumed contrary to the agreement, causing the destruction of wheat by fire in the absence of the owner who had relied upon the agreement, the loss thereby caused should fall upon the party violating the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1508-1527; Dec. Dig. § 321.*]

2. CONTRACTS (§ 353*) — BREACH — RIGHT OF ACTION.

An instruction that, notwithstanding the agreement, the thresherman could not be held liable unless the fire was caused by negligent operation of the machine, is erroneous.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 93, 1829-1844; Dec. Dig. § 353.*]

Appeal from District Court, Ford County.

Action by W. H. Pottorff and others against S. H. Ward. Judgment for plaintiffs, and defendant appeals. Reversed.

L. A. Madison, of Dodge City, Lee Bond, of Leavenworth, M. N. McNaughton, of Tonganoxie, and Carl Van Riper, of Dodge City, for appellant. Scates & Watkins, of Dodge City, for appellees.

BENSON, J. The action was to recover a balance due for threshing wheat. The defendant filed a counterclaim for damages for the loss of wheat burned while the

threshing was in progress. Evidence was offered by the defendant tending to prove the following facts, viz.: That the threshing machine was defective and caused waste; that complaint was made and repairs were promised, but the loss continued, and the appellant, owner of the wheat, requested appellee, the owner of the threshing machine, to stop work until the next afternoon when the defects were to be remedied; that this was agreed to, and thereupon the appellant withdrew his help engaged in hauling wheat, and neither he nor his employes returned the next morning, relying upon the agreement to cease work. The appellee, however, resumed threshing the next morning, and shortly afterwards two stacks of wheat were destroyed by fire in operating the machine. Evidence was offered by the appellee tending to prove that such an agreement had not been made.

The court instructed the jury upon this issue that even if they found that the agreement had been made, and was violated by the appellee, they could not charge him with the loss, unless the fire was caused by his negligence. This instruction eliminated the agreement altogether, for without it the appellee would be liable for negligent destruction of the wheat. If the agreement was made, and the work which was resumed contrary to its terms caused the loss at a time when the appellant and his employes, relying upon it, were absent, and so unable to protect the wheat from fire, the resulting loss should fall upon the party violating the agreement. That he operated his machinery carefully is not a sufficient reason for the breach of his agreement not to operate it at all during the designated time. The instruction was therefore erroneous.

[1, 2] If the appellee had entered the premises and proceeded to thresh the wheat in the first instance without the knowledge or consent of the owner, and had thereby destroyed it, he would have been liable for the resulting loss without regard to negligence. *Wetzel v. Satterwhite* (Tex. Civ. App.) 125 S. W. 93; *Field on Damages*, § 732. A loss caused by the resumption of operations without the knowledge or consent of the owner within the time covered by the agreement cannot be distinguished in principle. But for the agreement upon which he had the right to rely the owner might have protected his property from hazard and loss.

Whether an agreement as alleged was made, and whether the fire was caused by operation of the machinery, were questions of fact for the jury.

The judgment is reversed, and the cause remanded for a new trial. All the Justices concurring.

(37 Kan. 526)

CULBERTSON v. IOLA PORTLAND CEMENT CO. et al.

(Supreme Court of Kansas. July 6, 1912.)

(*Syllabus by the Court.*)

**1. ACTION (§ 45*)—PLEADING (§ 64*)—JOIN-
DER OF CAUSES—DUPLICITY.**

Where a lessee of gas land drills wells on adjoining land, and through them drains the gas from the leased land, and the lessor brings an action to recover the royalties for the gas taken from his land through the wells on the adjoining land, as well as those sunk on the leased land, it is not necessary to set out the indebtedness of the lessee in two counts; nor did the fact that gas was wrongfully taken through the wells on the adjoining land prevent the recovery of all the royalties due in a single action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-383, 386-448; Dec. Dig. § 45;* Pleading, Cent. Dig. §§ 134-187; Dec. Dig. § 64.*]

2. REFERENCE (§ 8*)—GROUNDS—EXAMINATION OF LONG ACCOUNT.

As the action was brought to obtain an accounting, and required the examination of a long account of the gas taken from several wells for a considerable time, the court was warranted in sending it to a referee for trial.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 13-23; Dec. Dig. § 8.*]

**3. MINES AND MINERALS (§ 79*)—CONDUCT IN
GENERAL—INSPECTION OF PREMISES.**

It was competent for the court to order an inspection of the gas wells, to enable it to determine the capacity of the wells and the rights of the parties in the premises.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 209; Dec. Dig. § 79.*]

**4. MINES AND MINERALS (§ 78*)—GAS LEASE
—ACCOUNTING.**

When a lessee undertakes to develop gas land, and gives the lessor a rental or a royalty on the gas produced, and the contract does not specify the number of wells to be drilled, there is an implied obligation that he will fully develop the land with reasonable diligence and sink sufficient wells to secure to the lessor the gas underlying his land; and, if the lessee sinks and operates wells on adjoining land, and thereby drains the leased land, he is, at least, liable to the lessor for a share of the gas so taken.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.*]

Appeal from District Court, Allen County.

Action by Sherman Culbertson against the Iola Portland Cement Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Baxter D. McClain and Campbell & Goshorn, all of Iola, for appellants. J. R. Miller, B. E. Clifford, and Charles H. Apt, all of Iola, for appellee.

JOHNSTON, C. J. This was an action by the appellee, Sherman Culbertson, for an accounting and to recover from the appellants, the Iola Portland Cement Company and L. L. Northrup, for the gas obtained

and used by them from the lands of appellee under a lease executed by the grantor of the appellee to the grantor of the appellants in 1902. There were the usual stipulations in the lease as to the development of the land for oil and gas, and also one that, "should gas be found on said premises of a minimum capacity of 3,000,000 cubic feet per well, daily, second party agrees to pay to first parties fifty dollars annually for every well from which gas is used off the premises; also one-eighth of all money (net) received from the sale of said gas or from the sale of said well or wells." Operations under the lease were begun within the prescribed time, and three wells were drilled in 1902. In two of them gas was found, and one of them proved to be a dry hole. It was alleged that gas was taken by appellants from the producing wells, without paying for the same, and also that gas was taken from appellee's land through wells which were drilled by them on lands adjoining that of appellee. It is alleged that there was a general pool of gas there, and that appellants had drilled wells on the adjoining land, and through them had extracted the gas from under appellee's land, the amount of which appellee was unable to state, but that by both means appellants had taken each day more than 3,000,000 cubic feet, and that it was worth three cents per thousand cubic feet.

When the case was called, the court determined that it was a proper case for reference, and a referee was appointed, who was directed to make findings of fact and conclusions of law. A trial was had before the referee, and upon the testimony he found that a large quantity of gas had been taken from appellee's land, which had been piped by appellants to their cement factory in Iola and there used for manufacturing purposes; that the value of the gas so taken and used was two cents per thousand cubic feet; and that, so reckoned, appellee was entitled to a judgment for \$2,252.47. The court approved the findings and rendered judgment against the appellants for the amount so found.

[1] Appellants assumed that the petition of appellee stated more than one cause of action, and complain that the court refused to require him to separately state them. There was but one cause of action, and that was for an accounting of all the gas obtained and piped from appellee's land, whether it was obtained from wells drilled on the land, or from those drilled on adjoining land. The fact that gas was taken by both means was no reason for setting out the indebtedness in two counts; nor did the fact that some of it was wrongfully taken require the bringing of two actions to recover the value of all the gas appropriated by appellants.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
125 P.—6

[2] Appellants insist that they were entitled to a jury trial; but the action was for an accounting, and it appears that an examination of long accounts of the gas taken by the different methods was necessary. It was peculiarly a case for reference. Civ. Code, § 299 (Gen. St. 1906, § 5893).

[3] Complaint is made of an order of the court, permitting appellee to inspect and take measurements of the capacity of a certain gas well, upon condition that 24 hours' written notice be given appellants of the time when the inspection would be made. It was also provided that the appellants were to be represented by their officers or agents during the inspection and measurement of the well, and they were directed to render to appellee full and free facilities to open, inspect, and take measurements of the well, so as to ascertain its capacity as a gas-producing well. It is contended that there was no authority for ordering or making such an inspection, and that those acting under it would, in fact, be committing a trespass. There is no specific statutory authority for the order; but such orders have been made by courts of equity from the beginning. It may be done where there is a real necessity for inspection, or where the facts to be determined cannot well be determined by the ordinary methods. A statute authorizing it was upheld in *Montana Co. v. St. Louis Mining, etc., Co.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398; and it was held, and cases were cited showing, that the right to make such an order was an inherent power of a court of equity, which could be exercised independent of any statute, and that this power had never been denied. In making the contention that it was a trespass and an illegal interference with a man's absolute control of his own property, it was held that the necessities of justice warranted the inspection, and it was said that: "To 'establish justice' is one of the objects of all social organizations, as well as one of the declared purposes of the federal Constitution; and if, to determine the exact measure of the rights of parties, it is necessary that a temporary invasion of possession of either, for the purposes of inspection, be had, surely the lesser evil of a temporary invasion of one's possession should yield to the higher good of establishing justice." 152 U. S. 169, 14 Sup. Ct. 508, 38 L. Ed. 398.

Inspection is frequently ordered in mining cases; but the power is exercised to assist in determining the value of buildings, and to ascertain other essential facts. *Lewis v. Marsh*, 8 Hare, 97; *Thomas Iron Co. v. Allentown Mining Co.*, 28 N. J. Eq. 77; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Thorburgh v. Savage Mining Co.*, 7 Morr. Min. Rep. 667, Fed. Cas. No. 13,986; *State v. District Court*, 28 Mont. 528, 73

Pac. 230; *Bennett v. Griffiths*, 30 L. J. N. S. pt. 2, Q. B. 98; *Kynaston v. East India Co.*, 3 Swanst. 249; *State v. Seymour*, 35 N. J. Law, 47; *Winslow v. Gifford*, 6 Cush. (Mass.) 327; 27 Cyc. 669.

In interpreting an act authorizing the injunction restraining persons from mining on the land of another, and authorizing a survey to ascertain the facts in relation thereto, it was held that a survey of a mine which extended outside of the state was invalid; but it was stated that, without a statute, courts had authorized inspection of mines on neighboring lands, in which the plaintiff had no interest. In re Carr, *Petitioner*, 52 Kan. 688, 35 Pac. 818. No error was committed in granting the order of inspection.

[4] The sufficiency of the evidence is attacked by appellants, and it is contended that, under the terms of the lease, no liability arose for the gas taken by appellants. It provided that, if gas was found in any well of a minimum capacity of 3,000,000 cubic feet daily, a certain rental per well should be paid, and also a certain royalty on all the gas sold from the premises. The contention is that the evidence did not show a particular well to be of the minimum capacity. On this question considerable testimony was taken, some of it expert in character, which supported the finding of the referee that the two producing wells were each of a capacity that exceeded 3,000,000 cubic feet of gas per day. This was shown by the testimony of persons acquainted with the field, and who were experienced in the mining of gas. It is conceded that absolute accuracy of measurement could not be attained; but, taking the situation as it was, it appears that the best evidence obtainable was produced; and it further appears to have been sufficiently definite and reliable to warrant the findings made. This provision in the lease, fixing the minimum capacity of the wells drilled on appellee's land, evidently was intended to impose an obligation upon the lessee to operate any well of that capacity, and to pay to appellee the stipulated rentals and royalties. If, when a well was sunk and tested, it did not produce the quantity mentioned, the lessee was not required to operate it; but, if he chose to operate the well and take gas from the leased land, no reason is seen why he should not pay the stipulated share to the lessor.

Nor is there any reason why appellee was not entitled to show the quantity of gas taken from his land through wells drilled on adjoining lands. It was reasonably well established that there was a pool of gas under appellee's land which extended under adjoining lands on which appellants had wells that were being operated. It is clear that the taking of gas from these wells would drain that underlying the land of appellee. Appellants cannot escape liability for the gas extracted from appellee's land through

the wells sunk by them on the adjoining land. In Thornton on Oil and Gas, § 101, it is said that: "A lessee must act in good faith in the operation of the leased premises. He cannot, under the guise of ownership of the adjoining premises, drain the lands he has leased by sinking wells on such premises, under the claim of a right to do so, and not put down a sufficient number of wells on the leased territory as will protect it from the wells operated on such adjoining territory, when the lessor, at least, receives his compensation by a royalty on or a part of the oil produced, or by a rental of so much per producing well."

Since the number of wells to be drilled on the land was not specified, there was an implied obligation on appellants to fully develop the land and put down as many wells as were necessary to secure to appellee his proportionate share of the pool of gas. *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109; *Thornton on Oil and Gas*, § 91. According to the findings, appellants failed to develop the land in such a way as to give appellee his proportionate share of the gas produced from the pool, and that to have done so would have required the sinking of at least another well. Having failed in this respect, the appellee is entitled to recover his share of the gas actually taken from his land, without regard to which side of the line the wells through which it was taken were sunk. The quantity so taken appears to have been fairly well established by the evidence. In *Howerton v. Gas Co.*, 82 Kan. 387, 389, 108 Pac. 813, 814 (34 L. R. A. [N. S.] 46), it was said that: "No reason is seen why witnesses of experience, acquainted with the gas field, may not testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land, both for protection from drainage by neighboring leaseholds and to obtain the gas underneath the land."

Nor is there any reason why witnesses could not as well testify with reasonable accuracy as to the quantity of gas obtained from the wells. Appellants say they should not be held to pay for the gas, because the lease only required that they pay one-eighth of the money received from the sale of gas, and that they did not sell gas to others. The taking of the gas from the land by appellants and the piping of it to their factory, where it was used in manufacturing cement that was sold on the general market, is a sale, within the meaning of the provision of the lease. Besides, this provision was intended for another purpose, as we have seen, and cannot be used to relieve appellants from paying for gas actually taken from appellee's land.

The judgment of the district court is affirmed. All the Justices concurring.

(2: Kan. 557)

PERKINS v. WESTON et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

EASEMENTS (§ 61*) — OBSTRUCTION—REMEDY.

Where two parties have in succession secured from a city the benefits of ordinances vacating parts of the same street, upon the same terms, and each has erected a warehouse upon his own lot extending upon ground within the limits of the vacated street, and they have entered into a contract with each other respecting a right of way for one of the parties over the property of the other, in lieu of rights formerly enjoyed in the street, the remedy of one of the parties for an obstruction of the way so granted is an enforcement of the contract, and not an annulment of the ordinance vacating that part of the street.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 153; Dec. Dig. § 61.*]

Appeal from Court of Common Pleas, Wyandotte County.

Action by Z. T. Perkins against Alfred Weston and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions.

George W. Littick, of Kansas City, for appellants. Thomas A. Pollock and Geo. B. Allen, both of Kansas City, for appellee.

BENSON, J. This is an action to vacate a city ordinance and to enjoin the obstruction of a street. Third street, in Kansas City, extends north and south. Ferry street, next east of Third street, runs in a diagonal course, so that the lots situated between these streets diminish in length from the north to the south as Ferry street approaches Third street. Armstrong avenue extended east and west from Third to Ferry street before that part was vacated. The Missouri Pacific Railway occupies a right of way parallel with and adjoining Ferry street on the east. The appellee owns lot 6, which is 44 feet in width, and extends from Third street to Ferry street, and abutted on the south on Armstrong avenue before the vacation referred to. The appellants are the owners of lots 4 and 5, situated immediately north of lot 6, and also extending from Third street to Ferry street. On December 18, 1896, the city adopted ordinances vacating Armstrong avenue between Third street and Ferry street and that part of Ferry street south of the north line of lot 6. These ordinances contained the following section: "Section 2. That this ordinance shall become null and void unless Z. T. Perkins puts up a grain store and warehouse and other improvements at the cost of \$3,000 inside of nine months from the passage of this ordinance, on or adjacent to the property vacated." The part of the avenue so vacated was steep and unfit for travel.

Upon the adoption of these ordinances, appellee erected a warehouse on lot 6, and the ground south of it, which had been a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

part of the avenue, and is now designated as lot 31. The warehouse is one story in height at its west frontage on Third street, but, because of a declivity, the ground floor on the east front is 20 feet below that on Third street.

From 1897 to 1904 the appellants occupied the appellee's warehouse as tenants, and carried on their business there. In May, 1904, the city adopted an ordinance, at their instance, vacating Ferry street from the north line of lot 4 (the north line of appellants' property) south to the line of lot 6, thus extending the former vacation to cover the east front of the property of appellants. The last ordinance contained a provision that the appellants should erect a warehouse at a cost not less than \$5,000—the same as the provision in the former ordinance, except as to the amount.

After the first vacation ordinances were passed, the Missouri Pacific Railway Company entered into an agreement with the appellee, by which it released any claim for damages caused by the vacation of Ferry street, and agreed to release all its rights in the vacated tract that would revert to him as the owner of the adjoining lot 6. Long before that agreement was made, the city had granted to the railway company the right of way to lay its tracks along and across Ferry street. A switch track was laid to facilitate business at the appellants' warehouse after it was constructed.

The effect of the several ordinances referred to, if valid, was to vacate Ferry street south of the north line of lot 4, east of the lots of both of the parties, and Armstrong avenue south of appellee's lot. Each party claimed to own by reversion the lands to the center of the vacated streets adjoining their respective lots.

After the ordinance was passed vacating Ferry street east of appellants' lots 4 and 5, they erected a warehouse and elevator on these lots, a corner of which extended eight or ten feet over and upon ground included in Ferry street before the vacation.

On September 23, 1904, the appellee, with knowledge of the vacation of Ferry street opposite the appellants' property, entered into an agreement with them in writing, whereby appellee consented that the railway company should construct a switch, starting from the one already constructed to his lot 6, and to run partially across his land to lots 4 and 5 occupied by appellants. The appellants agreed to pay \$12.50 per year in consideration of this consent, and agreed further: "To allow said party of the first part access from the rear of his property across their said lots in order to reach Second street, and thus have access to Minnesota Ave. Said second parties also agree that in the use of said switch they will not allow cars to be so placed as to prevent access at all times by the party of the first part from

his lots to Minnesota Ave., and said right of way is not to be obstructed as to prevent the passage of teams. Said second parties also agree to construct and maintain a suitable crossing across the said switch tracks. Said parties of the second part further agree that they will not allow cars to stand on switch upon the land owned by said party of the first part."

Soon after the switch connections had been made, on account of some objections made by the appellee, the switch track was removed to the east of the center line of old Ferry street. It has been maintained and used there ever since, and has been extended to a business establishment further north on Ferry street. The appellants repaired and improved the way at considerable expense, and it is used by both parties in carrying on business at their respective warehouses. The appellants have constructed an underground conveyor to carry grain from the switch track across the way, about 20 feet, into their building, raising the surface 4 or 5 feet for this purpose. The grain is received in a box at the side of the track, connecting with the conveyor, leaving the way from the box to appellants' building 12 to 16 feet in width. Ferry street was 30 feet wide. The payments for the privilege of switch connections were made for two years, but the last payment was returned.

The appellee alleges that the ordinance vacating Ferry street north of his property was enacted for the private use and benefit of the appellants, regardless of the rights of the appellee and others, without providing for or paying resulting damages, and is void for these reasons, and because of the stipulations for erecting a warehouse. He further alleges that the street has been obstructed by the elevator, switch tracks, and cars standing thereon and the receiving dock. He also alleges that in January, 1906, he revoked the permission to construct and maintain the switch, and gave notice of the termination of the agreement concerning the switch privileges and right of way.

The answer, after pleading the several vacating ordinances, alleges the execution of the agreement referred to, avers that it has been performed by appellants, that it is still in full force and effect, that the way had not been closed or obstructed, that it has been improved so as to make a good roadbed, and that there has been no denial of ingress or egress over it.

The testimony of the appellee concerning the obstruction of the way was, in brief, that cars were left standing on the switch, so he could not get out or in with teams; that this occurred "every few days"; that he could hardly get out or in with a load, because the track was not fixed as agreed; that there was no way of going out or in from his property, except over a 12-foot strip

between the switch and the elevator; that a slope or grade had been made over the conveyor, and wagons had been stalled at different times at that point. He testified that he complained of this condition, but appellants would do nothing. A witness for the appellee, who had been in his building for four years, testified: "There are two routes north from the Perkins building, on Ferry street, to Minnesota. One is level, and one has quite an abrupt raise. There is one car there nearly all the time on the Weston switch—stands usually at the conveyor—more than one car occasionally. If two cars, and one was pinched down, quite likely over driveway of level route. Don't know just where Ferry street is. Have occasion to drive over this ground back of Weston's. The condition there has not caused very much inconvenience; just two places where the switch can be crossed, eight feet in width."

Ferry street extends north a short distance to Minnesota avenue, one of the principal thoroughfares of the city. From the location and use of the warehouses of both parties, it is evident that the use of Ferry street, or of the way over that part of it vacated by the last ordinance, affords the only practical ingress and egress for both parties in carrying on their business. It is also apparent that all the vacation ordinances were in the interest of the lot owners; the city authorities probably believing that the improvements contemplated would be of substantial public benefit. The parts vacated in the interest of the appellee were, in their unimproved condition, of no public use. The parts vacated at the instance of the appellants were of some use, it appears, to a few families, although the street, being practically unimproved, was in a bad condition; and it does not appear that any one has complained of the vacation, except the appellee. The vital question to be considered is whether, in the situation here presented, grounds exist for an injunction in his behalf.

The parties were engaged in the same business. The importance of the way to both, whether it remained a street or not, was fully understood. The appellee entered into a contract recognizing the appellants' rights to grant a right of way, thus recognizing the validity of the last vacation; for, if the street was not vacated, his right to pass and repass could not be questioned. The conduct of the appellee for over two years was inconsistent with the theory that the street had not been vacated. Expenditures were made and the way improved by the appellants by putting in cinders and crushed rock from time to time, and expenses were incurred in locating and relocating the switch. The appellee saw the building being erected by the appellants, partly in the vacated street, without objection, and without attempting proceedings to prevent it.

Courts of equity frequently refuse relief after undue and unexplained delay, when in-

justice would result, by granting it. *City of Leavenworth v. Douglass*, 59 Kan. 418, 53 Pac. 123. In this case there was not only long delay, but an express recognition by contract of the rights claimed by appellants. With full knowledge of the facts, the appellee saw fit to secure rights and privileges by negotiation and agreement, which he now asserts were already his. Then he recognized the vacation as valid; now he asserts that it is void. Another reason is suggested why the appellee's prayer for an injunction should be refused. He had engaged in the same undertaking he now denounces as unlawful, and is enjoying the fruits of a like proceeding. He claims that the streets south and east of his lot were legally vacated, and also claims the reversion of adjacent property. Yet the ordinances are in the same terms. It is said that the validity of the first ordinances is not questioned, and that the appellants have no standing to question it, because they do not own property abutting upon the part of the street then vacated. This fact might prevent them from obtaining affirmative relief; but are they estopped from pleading the apparent want of equity in the claims of their adversary, who asserts rights in himself of the same nature which he declares to be unfounded in them? Without regard to this feature of the case, however, it is believed that the appellee is bound by his contract and his acquiescence in the claims of the appellants. His remedy is not the extreme and doubtful one of setting aside an ordinance, but of enforcing the contract.

The power to vacate streets is expressly conferred upon the city council by law. The limitations upon that power were considered by this court in the *Leavenworth depot case*, just cited, and in *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625. The legislative power over streets was again discussed in *Highbarger v. Milford*, 71 Kan. 331, 80 Pac. 633. It may be conceded that, notwithstanding the plenary power of legislation, equity will interfere in a proper case to protect vested rights; but how far a court of equity may go in setting aside ordinances enacted in pursuance of legislative authority it is not necessary now to decide. The power of a city council in the vacation of streets, how far the motives of its members may be considered, and the effect, where the object is the benefit of an individual, are questions discussed in *McQuillin on Mun. Cor.* § 61, and in *Dillon on Mun. Corp.* vol. 3, § 1160, and notes. In the following cases diverging views of courts upon these questions are shown: *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; *Kean v. Elizabeth*, 54 N. J. Law, 462, 24 Atl. 495; *State ex rel. v. Board of Park Comrs*, 100 Minn. 150, 110 N. W. 1121, 9 L. R. A. (N. S.) 1045; *City of Marshalltown v. Forney*, 61 Iowa, 578, 16 N. W. 740; *People v. A., T. & S. F. Ry. Co.*, 217 Ill. 594, 75 N. E. 573. The

court is inclined to the opinion that the vacating ordinances are valid; but it is not necessary to decide that question, since the rights of the parties should be determined by the contract.

It is said that this court cannot disturb the judgment, since the evidence is not all presented. The testimony of the parties, however, is here. The contract was pleaded, and its existence is admitted. The appellants concede that it is in force; and no reason is shown why the rights of both parties should not be measured by its terms. True the appellee says it has not been kept by the other party; but the remedy for this default is, not in reopening a street which the parties, acquiescing in the ordinance of the city, have treated as vacated, but by protecting the parties in the reasonable use and enjoyment of the privileges given by the contract. This does not necessarily mean that the appellee should have the unrestricted use of the entire width of the former street, but a reasonable right of way, consistent with the business of both parties, without unnecessary hindrance or obstruction.

The judgment reserves the rights of the railway company, whose switches are manifestly an advantage, if not indispensable, to both parties. This order was made by consent, and, of course, is proper. But the judgment annuls the ordinance vacating the street, and forever enjoins the appellants from interfering with its use as a public street. This goes far beyond what is considered equitable.

The judgment is reversed and the cause remanded, with directions to enter judgment for the defendants. All the Justices concurring.

(87 Kan. 641)

EVANS v. CENTRAL LIFE INS. CO.
(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. INSURANCE (§ 130*)—CONTRACTS—APPLICATION—REPRESENTATIONS by SOLICITOR.

One who signs an application for life insurance without reading it, upon the assurance of the soliciting agent that it conforms to representations orally made, and that such signing is customary but not necessary, may refuse to accept a policy tendered him, on the ground that it does not meet such representations, notwithstanding the application contains a provision that no statement made by the solicitor would affect the rights of the company unless embodied in the written application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 195-202; Dec. Dig. § 130.*]

2. INSURANCE (§ 198*)—CONTRACTS—PREMIUM NOTE—RECOVERY OF AMOUNT PAID.

Where such applicant has been compelled to pay to an innocent holder a negotiable premium note given at the time of such application, he may recover from the company the amount so paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457-467; Dec. Dig. § 198.*]

3. COSTS (§ 172*)—ATTORNEY'S FEES.

In the absence of a statute allowing it, a successful plaintiff is not entitled to recover his attorney's fee, even in an action for damages on account of the defendant's fraud or malicious misconduct.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 665-687; Dec. Dig. § 172.*]

4. JUDGMENT (§ 253*)—ATTORNEY'S FEES—CONFORMITY TO ISSUES AND PROOF.

A judgment purporting to be for the recovery of the plaintiff's attorney's fee cannot be upheld on the theory that it was allowed as punitive damages, where the record shows that no issue as to the allowance of punitive damages was presented or determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.*]

Appeal from District Court, Harvey County.

Action by E. F. Evans against the Central Life Insurance Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

J. O. Nicholson, of Newton, and Keene & Gates, of Ft. Scott, for appellant. Ezra Brannine and Harry W. Hart, both of Newton, for appellee.

MASON, J. E. F. Evans was induced by a soliciting agent of the Central Life Insurance Company to apply for insurance upon his life. He gave a negotiable note for \$176 for the first premium, and signed a written application, which was forwarded to the company's main office. A policy was sent to him; but he refused to accept it on the ground that it did not conform to oral representations that had been made to him by the agents, concerning the cost and the benefits of the policy he was to receive. The representations included a statement of the amount by which the premium would be reduced each year by a distribution of surplus; the policy contained no guaranty of this amount. He paid \$100 in satisfaction of the note, which had been negotiated, and sued the company for the amount. He recovered judgment, and the defendant appeals.

The principal contention of the defendant is that, even assuming the correctness of the plaintiff's version of the transaction, no recovery should have been allowed, because the agents had no authority to make the representations referred to, and the plaintiff had notice of such want of authority. The basis of this contention is a provision of the application (which did not embody the representations) reading as follows: "No statements, promises or information made or given by, or to the person soliciting or taking this application for a policy, or by or to any person, shall be binding on the company or in any manner affect its rights, unless such statements, promises or information be reduced to writing in this application and presented to the officers of the company at the executive office."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

According to the plaintiff's testimony, at his first meeting with the agents he agreed orally to take a policy, and gave them his note for the first premium. Later one of them returned and asked him to sign the written application; saying, however, that while this was customary it did not make any particular difference whether he signed it or not. He answered that he was too busy to talk about it at that time. The agent then said he wished to send off the application at once, and the plaintiff signed without reading it, saying that he would take it for granted that what the agent said was true. The application gave no specific information as to the terms of the insurance, except that it was to be on the twenty-payment life plan, for \$5,000 (in two policies), the premium to be \$176.50, payable annually, the apportionment of surplus or profits to the policy holder to be regulated by such principle as the company should adopt.

[1, 2] Under the plaintiff's evidence he was not bound to accept the policy tendered him. Whatever may have been the restrictions upon the authority of the agents, they represented the company in the matter of soliciting and procuring the application, and the company was chargeable with all that they knew as to how it was obtained. *Pfeister v. Insurance Co.*, 85 Kan. 97, 116 Pac. 245. The company could not repudiate the act of the agents as unauthorized and retain its fruits. *Wagon Co. v. Wilson*, 79 Kan. 633, 101 Pac. 4. This action is not one to compel the insurance company to issue a policy of the kind described by the agents, but in effect one to relieve the plaintiff from the obligation to accept the policy tendered him on the ground that its character had been misrepresented—that it was not the kind of policy he had agreed to take. In *Blanks v. Moore*, 139 Ala. 624, 36 South. 783, a similar provision in the written application was held to preclude the applicant from rejecting the policy on the ground that it did not conform to the oral representations of the soliciting agent. No claim was there made, however, that the application was signed without a full knowledge and understanding of its contents, and the court held the rule to apply which forbids the variation of a written contract by parol evidence. Assuming that in the present case the application was sufficiently definite to constitute a complete offer to accept and pay for a particular kind of policy, the evidence warranted a finding that the plaintiff, through justifiable reliance upon the assurances of the company's agents, was ignorant of its contents. In that situation the controlling principles are those applied to a similar state of facts in the opinions from which the following extracts are made:

"It is contended that the fraud of Mouser [the agent], if sufficiently alleged, does yet not attach to the defendant [the insurance company]. This is asserted on the strength

of the provision of the application that statements and premises of the solicitor shall not affect the rights of the company unless reduced to writing and presented in the application. We do not understand that this provision operates to confer upon the company the right to retain money received in consequence of fraud practiced by its agent after it has knowledge of the fraud. How could it retain money under such circumstances without becoming party to the fraud? Upon the case stated there was never a free consent to the apparent contract; the agent practiced fraud on both the insurer and insured, and justice requires that the contract be held voidable at the instance of either party, if injured thereby. And such we conceive to be the law deducible from the decisions of this court as well as others." *McKay v. New York Life Ins. Co.*, 124 Cal. 271, 273, 56 Pac. 1112.

"The provision of the application that the company should not be affected by statements or promises made by or to the agent unless the same were reduced to writing and presented in the application can be of no avail to defendant on the facts which the evidence for the plaintiff tended to show. For present purposes it is sufficient to say of such provision that plaintiff had no knowledge of it and did not assent to it, although such knowledge might be imputed to him if his signature to the application had been honestly obtained, yet, since the instrument as completed by the agent was fraudulent as to plaintiff, it must follow that defendant can derive no advantage from any stipulation thus fraudulently procured." *La Marche v. New York Life Ins. Co.*, 128 Cal. 498, 502, 503, 58 Pac. 1058.

"It was stipulated in the application, which was made part of the policy, that 'no statements, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, promises, or information shall be reduced to writing, and presented to the officers of the company at the home office, in this application.' Counsel's contention is that this clause is applicable to this case, and hence the false representations of Wood, even if made, are wholly irrelevant and immaterial; and he cites in support of this proposition *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934. The learned counsel has, however, failed to observe that that was an action upon the contract, to recover upon the policy, and that in its opinion the court expressly recognizes that the fraud of the agent who obtained the application would have been a good ground for rescission by canceling the policy and returning the premiums." *McCarty v. New York Life Ins. Co.*, 74 Minn. 530, 77 N. W. 426.

In testifying concerning one of the repre-

sentations made to him, the plaintiff said: "I didn't believe it. It was too good to be true." The defendant urges that this is fatal to a recovery, because it shows that the plaintiff did not in fact rely upon the representation, and could not have been misled by it. The plaintiff may have doubted whether the company would insure him on as favorable terms as the agents represented, but he was not on that account required to accept insurance on whatever terms the company saw fit to offer.

Testimony concerning the statements of the soliciting agents was objected to as an attempt to prove their authority by their own declarations. Most of it was competent upon the theory already indicated, and the rest was not prejudicial. The contention is made that the plaintiff had the benefit of the policy issued by the company. He returned it very soon after its receipt. It was sent to him again, and he again returned it, with a letter stating that under no circumstances would he accept it. Later he asked the company to return him the policy, but this was nearly two years after its issuance, at the time when it had on any theory ceased to be effective.

[3] In addition to the amount paid by the plaintiff in settlement of the note, the court gave him judgment for \$50 for his attorney's fee in the present action. In some jurisdictions the recovery of an attorney's fee is allowed as an element of damages resulting from fraud or malicious misconduct. 13 Cyc. 79; 20 Cyc. 142. In *Winstead, Sheriff, v. Hulme*, 32 Kan. 568, 4 Pac. 994, it was said that in a replevin action attorney's fees cannot be recovered when the elements of malice or oppression do not mingle in the controversy. The language used might seem to imply that if these elements were present such a recovery might be had. It is evident from the entire opinion, however, that what the court had in mind was that under such circumstances punitive damages might be recovered, and in that case the amount necessarily expended by the prevailing party in the litigation might be considered in fixing the amount. It has been said that this may be done without evidence of such amount (*Titus v. Corkins*, 21 Kan. 722), and that the reception of evidence thereof is not error (*Duff v. Read*, 74 Kan. 730, 735, 88 Pac. 263). In *A., T. & S. F. R. Co. v. Stewart*, 55 Kan. 667, 672, 41 Pac. 961, the allowance of an attorney's fee in addition to exemplary damages was conceded to be erroneous. Attorney's fees in the case in which the judgment is rendered have never been allowed as such in this state, except where specifically authorized by statute, or by agreement, and we think it must be said that the law does not allow their recovery, even in actions for damages resulting from fraud and malicious misconduct. In some states exemplary

damages are treated as in part compensatory, and a recovery of the amount expended in the litigation is allowed as an item thereof. See cases cited in notes in 8 Am. St. Rep. 158; 4 L. R. A. (N. S.) 907; and 28 L. R. A. (N. S.) 761. In this state exemplary damages are not regarded as compensatory in any degree, but are awarded solely as punishment. *Machinery Co. v. Smith*, 87 Kan. 331, 124 Pac. 414, decided June 8, 1912. The amount of damages that should be allowed as punishment in a given case cannot be determined by any fixed rule. The fact that the offender's misconduct has caused the injured party to incur the expense of litigation—an expense for which (except as to items taxable as costs) he cannot claim compensation—is merely one of the matters that may be considered in fixing it.

[4] It is argued that the judgment for the additional \$50 in this case may be upheld as an award of punitive damages. The petition did not claim punitive damages, but did ask a recovery of attorney's fees as such, and the journal entry so characterized the amount allowed. No issue as to the allowance of punitive damages seems to have been presented or decided. The judgment will therefore be modified by the deduction of the amount allowed as an attorney's fee.

The judgment is affirmed, with the modification indicated. All the Justices concurring.

(37 Kan. 532)

MARTIN et al. v. BATTEY et al.

(Supreme Court of Kansas. July 6, 1912.)

(Syllabus by the Court.)

1. VENUE (§ 5*)—NATURE OF ACTION—ACTIONS RELATING TO REAL PROPERTY.

An action, which had for its purpose the determination of the interests of the contending parties in several tracts of land and the partition of the same among them, is local in character, and must be brought in the county in which the land is located; and, where a plaintiff brought an action in a county where one of the tracts is located, and in which some of the defendants had an interest, and where he undertook to bring into the action infants, who owned land in a county remote from the one in which the action was brought, but had no interest in the land situated in the latter county, there was no jurisdiction of the subject-matter of the action, so far as it affected the land of the infant defendants; and no consent of theirs could give jurisdiction to the court of these issues, or validity to the judgment based thereon.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 4-11; Dec. Dig. § 5.*]

2. INFANTS (§ 80*)—ACTIONS—APPOINTMENT OF GUARDIAN AD LITEM.

In such a case the court has no authority to appoint a guardian ad litem for the infant defendants; nor can a guardian ad litem be appointed until service has been obtained upon the infants and jurisdiction over them acquired, as the Code directs.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 210-221; Dec. Dig. § 80.*]

3. WILLS (§ 778*)—RIGHTS OF LEGATEES—ELECTION.

A wife domiciled in Illinois died there, owning lands in that state and in Kansas. She left a will, giving her husband a life estate in all of her property, after which it was to go to the other heirs in designated proportions. The will was probated in Illinois, and an authenticated copy of it was admitted to record and probate in this state. In Illinois the surviving husband determined to take under the will, and he entered into the possession of the property devised, and accepted and enjoyed the provisions made for him in the will. *Held*, that he elected to take under the will; and, having done so in that state, it is effectual in Kansas, as he could not elect to take under the will in Illinois and under the law in Kansas.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2004, 2006, 2010; Dec. Dig. § 778.*]

Appeal from District Court, Jewell County.

Action by F. L. Martin and another against Galen S. Battey and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

F. L. Martin and F. F. Prigg, both of Hutchinson, and R. C. Postlethwaite, of Jewell City, for appellants. R. W. Turner, of Hillsboro, New Mexico, and Lutz & Jordan, of Beloit, for appellees.

JOHNSTON, C. J. This was an action by the appellants, F. L. Martin and Florence L. Sawyer, to quiet their title to a half section of land situated in Jewell county. They alleged that they held the legal title in fee simple, and that Galen S. Battey and Galen S. Battey, Jr., a minor, claimed some interest in the land, and had represented to others that they had an interest in the land adverse to appellants, thus slandering the title and preventing appellants from making a sale of the land, but that appellees' claim of title was illegally made, and constituted a cloud and incumbrance on the land, and appellants therefore asked that their title be quieted.

Shortly after the original petition was filed, it was amended by adding Marjorie Battey White, Charles Wheaton Battey, Walter Sibley Battey, and Galen Bradford Battey as parties defendant, and asking the quieting of the title as against the adverse claims asserted by the new parties. In an answer and cross-petition of the defendants, they alleged that they were the owners of the property, and had acquired it through the will of their grandmother, Pauline A. Battey, subject to a term estate for the use of Clara Ellen Battey, so long as she should remain the wife of Galen S. Battey, the son of the testatrix. It was alleged that the will was duly admitted to probate by the county court of Bureau county, Ill., where the testatrix resided at the time of her death, and that the will so probated had been duly admitted to record and probate in the probate court of Jewell county, and that letters testamentary were duly issued by that court.

The appellants, for answer to the cross-

petition, pleaded a judgment of the district court of Reno county, Kan., rendered April 9, 1902, in favor of Losada L. Battey, wherein he was plaintiff and all the appellants were defendants, except Galen Bradford Battey, who was born after the rendition of the judgment; and they alleged that Losada L. Battey had since that time conveyed the land to appellants. The reply to this answer was that the court was without jurisdiction to render the Reno county judgment. On the issues formed a trial was had, and the court made elaborate findings of fact, and concluded that the title to the land was in the appellees, subject to the term estate of Clara Ellen Battey, and that this estate had passed and belonged to appellants.

It appears that the land involved here, as well as other tracts, was the property of Pauline A. Battey prior to and at the time of her death on July 11, 1897. The home of the family was in Bureau county, Ill., and she left as survivors her husband, Owen W. Battey, and her two sons, Losada L. Battey and Galen D. Battey, who were her only heirs at law. A few weeks before her death she executed a will, in which her husband was named as executor, and which was duly probated in Bureau county, Ill. Shortly after it was probated there an authenticated copy of the will and of the probate of the Illinois court was admitted to record in the probate court of Jewell county, and an executor appointed. In this will she gave a life estate in all of her property to her husband, and she gave Clara Ellen Battey, the second wife of her son, Galen S. Battey, a term estate in the land in controversy, as well as in other land, and the remainder in fee simple to the children of Galen S. Battey. When Pauline A. Battey died, Galen S. Battey had one child, called Marjorie, born of his first marriage. He was then living with his second wife, Clara Ellen Battey. Of the second marriage, Walker Sibley Battey was born July 22, 1897, Charles Wheaton Battey on February 7, 1899, and Galen Bradford Battey on May 22, 1903. In the will Losada L. Battey was given the use of real estate in Illinois and Kansas during his life, after which it was to pass to his children, if he had any. Authority was given to the executors to sell this land and reinvest the proceeds of it in other property for his use and benefit, if it was deemed profitable to do so. Owen W. Battey, the husband of the testatrix, qualified and acted as one of the executors of the will, and, after taking legal advice as to his rights as husband of the testatrix, determined to take under the will, and he entered into possession of the property, the use of which was devised to him. He never made a formal renunciation of his rights under the will. About a year and a half after the death of his wife, Owen W. Battey died. A few months after the death of Owen W. Battey, Losada L.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Batthey instituted an action in the Illinois court to contest the will of his mother, and after the issues were made up and the case was ready for trial he dismissed it. Prior to that time, he had taken possession of the property, the use of which was given to him by the will, and he also received the rents and profits derived from it.

While the action to contest the will was still pending, and on February 17, 1900, he brought an action in Reno county, Kan., naming Galen S. Batthey and Clara Ellen Batthey, his wife, and Marjorie Batthey as defendants. He alleged that he was the owner of an undivided half of a tract of land in Reno county and of several tracts in Jewell county, and he asked for a partition of the same. The summons was served on Galen S. Batthey and his wife in Mitchell county; but his daughter, Marjorie, who resided in Illinois, was not served. Galen S. Batthey and his wife answered, setting up the will and the proceedings under it, alleging that Clara Ellen Batthey was in the exclusive possession of the land under the will as a term tenant; that Losada L. Batthey had been given a life interest in certain lands under the will, and that he had accepted the conditions of the will and entered into the use of the property so given to him; and that he had no interest of any kind in the land in Jewell county. On July 19, 1900, an amended petition was filed in that action, in which Charles Wheaton Batthey and Walker Sibley Batthey, the other children of Galen S. Batthey then living, were named as defendants, and in it he described an additional tract of land in Jewell county, claiming to own a half interest in it, and alleging that defendants were in possession and receiving the rents and profits of it. Afterwards an affidavit was filed for service by publication on Marjorie Batthey, in which it was stated that the action was brought to determine the title to real estate, and for a partition of the same. A summons against the infant boys was then sent to Mitchell county, and a return made that service had been personally made upon them. The court appointed an attorney as guardian ad litem for the three minor defendants, who filed an answer, which was a general denial, and which invoked the protection of the court because of the tender years of these infant defendants.

Afterwards, and on October 11, 1900, a second amended petition was filed, in which the lands in Jewell county, as well as in Reno county, were described, and he alleged that he owned a half interest in them; that the defendants owned the other half interest, but the exact interest of each he did not know; that he was entitled to the immediate possession of his one-half, but that they had wrongfully kept him out of the possession; and he stated that the value of the possession was \$2,000 per year from January 1, 1898, and defendants were therefore indebted

to him in the sum of \$8,000. He asked judgment for partition and for possession of his share, and also for \$8,000, the value of the use while he was excluded from his land. A separate answer was filed by the guardian ad litem, which denied generally, and also specially as to liability for rents and profits, and alleged that the children owned the Jewell county land through the will of their grandmother, and a recovery of the costs was asked. An answer was also filed for Galen S. Batthey and Clara Ellen Batthey, setting out the will, its acceptance by the parties, and the disposition of the real estate in accordance with its terms, and alleging that Losada L. Batthey was estopped to question its provisions, and, further, was indebted to them for the use of property transferred by the will, and asked that they be reimbursed for expenditures which they had made on the property. On April 9, 1902, after a jury had been impaneled to try the case, the attorneys for Losada L. Batthey and for Galen S. Batthey and Clara Ellen Batthey entered into negotiations for a settlement, and they finally made an agreement, which was reduced to writing. The parties to the agreement were Clara Ellen Batthey and her husband and Losada L. Batthey and his wife. No one else signed it; but it was submitted to the guardian ad litem for the minors. By it a settlement was made by these adult parties, which adjusted differences which had arisen between them, and recognized the interest of Losada L. Batthey in property in Kansas, Illinois, and Nebraska, and under which Clara L. Batthey was to purchase his interest in the property for \$9,000. He failed to carry out his part of the agreement, and, after a suit had been brought by Clara Ellen Batthey to enforce the agreement, a new one was made between them, by which deeds were exchanged between the adult litigants, and Clara Ellen Batthey and her husband executed a quitclaim deed, which purported to convey the land in controversy in this action. A judgment was entered, decreeing a division of property, and which, among other things, adjudicated that Losada L. Batthey was the owner of an undivided one-half of the land in controversy, and directing a partition of the same. Commissioners to make the partition were named, and they subsequently acted and reported their action to the court. The report was approved and filed in the district court in Reno county, although they did not view the land in Jewell county. A final order was made, barring the children from any interest in the lands allotted to Losada L. Batthey.

[1] The principal question in the case is the effect of the Reno county judgment on the minors' interests in the lands in Jewell county. Did the Reno county court acquire jurisdiction of the land in Jewell county, or of the persons of the appellees? The petition filed there asked for partition, but the

amended petition, under which an attempt was made to bring the minors into the case, proceeded on the theory that the plaintiff was out of possession; and therefore a determination of the title and a recovery of possession was sought. The action was for the possession and partition of lands in Reno county, as well as of tracts in Jewell county. The appellees, however, had no interest in the Reno county land, and did not reside there. They claimed title to Jewell county land, but had no concern as to what was done with that in Reno county. How could an action be brought in Reno county to determine the title and recover an interest in real property in Jewell county? The Code provides that an action "for the recovery of real property, or for any estate or interest therein, or for the determination in any form of any such right or interest, or to bar any defendant therefrom," or "for the partition of real property," must be brought in the county in which the real property is situated, unless it is an entire tract, situated in two or more counties in which event it can be brought in either county. Civ. Code, § 48 (Gen. St. 1909, § 5641). So strict is this requirement that, if a party seeks to recover the possession of land, and it consists of separate tracts in two or more counties, separate actions must be brought in the counties where they are situated. This is true, although the same parties are contesting for each of the tracts. In *Jones v. Investment Co.*, 79 Kan. 477, 99 Pac. 1129, an action was brought in Sedgwick county, to quiet the title to land in Scott county, against defendants, who claimed no interest in the Sedgwick county land, and it was expressly held that the court had no jurisdiction over the Scott county lands. It was said: "The question is not one of misjoinder of causes of action, but is one of venue over disconnected and unrelated subjects of action; and the plaintiff could not enlarge the jurisdiction of the Sedgwick county court to include Scott county land, claimed only by the plaintiffs in error, by suing other defendants in Sedgwick county, who claimed Sedgwick county land only."

A party seeking to recover land cannot compel another, claiming interest in or title to it, to litigate the title in any county except where the land is situated. Under the statute, the subject of the action must be within the jurisdiction of the court; and no judgment which it can render in one county, determining title or right of possession, can affect land in a distant county, any more than such a judgment could affect land in another state. A judgment affecting title to realty can only operate on the res that is within the jurisdiction of the court rendering it. A party may rely on what is shown by the records of the court having jurisdiction, and may safely purchase an interest, without looking to the records in courts in

other counties or states. Indeed, it has been held that a plaintiff, having brought an action for the recovery of real property in the proper county, cannot, after the parties have appeared, amend and add a transitory cause of action. The two cannot be blended. *Neal v. Reynolds*, 88 Kan. 432, 16 Pac. 786. In *Dwelle v. Hinde et al.*, 19 Ohio Cir. Ct. R. 618, the action was properly brought as to one branch of the case; but in another branch the plaintiff undertook to have an interest in real estate, which was situated in another county, determined, and it was held: "As to the interest of such defendants in real estate located in another county, the court in such action would not acquire jurisdiction, and defendant cannot be required to answer as to his interest in such land, and have his interest therein determined by the court in such action." Syl. par. 1.

As the Code specifically provides that actions for the recovery, partition, determination of an interest, or sale, of real property must be brought in the county where the real property is situated, except in the cases mentioned, there can be no jurisdiction of the subject-matter of such an action in any other county. If the court is asked to act upon the person of the defendant, the action may be tried in any county where the defendant may be served, and a lack of jurisdiction over him may be waived; but when the court is called upon to act upon real estate, it is essential that the action shall be brought within the prescribed territorial jurisdiction, and, if not brought there, the court is without power to adjudicate the issues, either with or without the consent of the parties. In *Jacks et al. v. Moore*, 33 Ark. 31, which was an action for injury to real property, a question arose under a statute which provided that such an action must be brought in the county where the land is situated; and it was held that, although no exception was taken in the trial court as to jurisdiction, there was no authority to try the case, and that no consent of parties, either express or implied, could give jurisdiction to the court or validity to its judgment. In *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70, 8 Ann. Cas. 340, an action to enjoin a trespass on land was held to be local, and, being local, could only be brought in the state or county where the land was located, and, not being brought there, it should have been dismissed as without jurisdiction. In *Nashville v. Webb*, 114 Tenn. 432, 85 S. W. 404, 4 Ann. Cas. 1169, it was held that, if a local action was brought in the wrong county, the court could acquire no jurisdiction of the suit; and that consent itself could not give the court jurisdiction. See, also, *Munger v. Crowe*, 115 Ill. App. 189; *Peterson v. Fowler*, 73 Tex. 524, 11 S. W. 534; *Den, Watson et al. v. Kelty et al.*, 16 N. J. Law, 517; *New Albany & Salem Railroad Co. and Others v. Huff*, 19 Ind. 444; *Austin's Heirs, etc., v. Bodley*, 20 Ky. 434.

There being no jurisdiction in the Reno county court as to the Jewell county lands, its judgment did not affect the interests of the children named as defendants in that action in the lands in Jewell county; and certainly it could not affect the child born since the judgment was rendered. It is said that they were brought into court, and, having litigated the question of partition, are bound by the result of the litigation. The pleadings, as well as the affidavit for publication service, show that title to the land was involved, and that the action was brought to determine the title and interest of the several parties in the land; and it was also stated that the appellees were in possession of the land in Jewell county. If it be assumed that a different rule applies in cases of partition than in those involving title, it must nevertheless be held, under the pleadings, that the first question presented was the determination of the title and interests held by the respective parties. As the plaintiff was out of possession, and the defendants were in possession, claiming title under the will of their grandmother, a determination of the title of the claimants was the first step in the litigation; and there could be no partition of land among the several owners until the question of title and ownership had been decided. *Delashmutt v. Parrent*, 39 Kan. 548, 18 Pac. 712; *Denton v. Fyfe*, 65 Kan. 1, 68 Pac. 1074, 93 Am. St. Rep. 272; *Chandler v. Richardson*, 65 Kan. 152, 69 Pac. 168; *McNulty v. Bank*, 69 Kan. 51, 76 Pac. 395.

As appellees had no interest in the land in Reno county, where that action was brought, the court had no power to send process to Mitchell county for service upon the minors there, nor to bring in any nonresident defendants for that purpose, and thus force them to litigate in Reno county questions affecting the title to land in Jewell county.

[2] The court undertook to appoint a guardian ad litem, and named an attorney who was acting for the adult defendants; but the court had no power to make the appointment. Aside from the fact that the court had no jurisdiction of the subject-matter of the action, as against them, the Code provides that the appointment cannot be made until after service of summons in the action, as directed by the Code; and this had not been done. Civ. Code, § 32 (Gen. St. 1909, § 5625). Service was not made on the father, mother, guardian, or person in control or with whom the infant defendants lived, as the law requires. Civ. Code, § 77 (Gen. St. 1909, § 5670). This is the process by which jurisdiction over minors is acquired; and the appointment of a guardian ad litem is a step which can only be taken after jurisdiction has been acquired. The attorney, who was designated as guardian ad litem, had no authority to bind the minors; and any part he may have taken in agreeing upon the terms of settlement, pre-

liminary to the entry of judgment, was not binding on the minors, and did not affect the interests they held in the land in Jewell county.

[3] It is contended that, regardless of the effect of the Reno county judgment, *Losada L. Battey* was entitled to a share of the estate of his father, *Owen W. Battey*, who, it is claimed, acquired an undivided one-half of the land owned by his wife at the time of her death. This is upon the theory that the laws of Kansas, where the land is situated, govern in the matter of election, whether the living spouse shall take under the will or under the law; and that a valid election to take under the will was not made by *Owen W. Battey*. The testatrix and her husband were domiciled in Illinois, and the land in that state was devised by the will. By the terms of the will, *Owen v. Battey*, the husband, was given the use of all the property of the testatrix during his natural life, and after his death it was to go to the children in the proportions heretofore stated. After her death, and after having taken legal advice, he announced that he did not intend to renounce the will, as he might have done under the laws of Illinois, but did desire that the terms of the will should be fully carried out. The trial court found that he consulted a lawyer as to his rights, and was advised as to the share of the real estate which he would take under the laws of Illinois, but that it did not appear that he was ever advised what were the rights of a surviving husband under the laws of Kansas; and no formal election was ever made by him in Kansas. It was also found that, not only did he determine to take under the will, but that he took possession of the land in controversy, and, so far as he was able to do so, he accepted and enjoyed the benefits of the will. He was adjudged insane on July 5, 1898, less than a year after the death of his wife; and his conservator remained in possession of the personal property until his death, which occurred the following January. It thus appears that a binding election was made in Illinois, and the question arises: Was it effective as to the Kansas land? Is a second election necessary; and can it be that the surviving husband can claim under the will in one jurisdiction and against it in another?

It is true that the laws of the state in which the lands lie control as to the descent or transfer of title of such land by will. There is some conflict of authority as to whether the rules of interpretation of the domicile of the testator, or of the place where the land is located, shall control in determining whether the testator intended that the gift to the survivor was intended to be in lieu of dower or in addition to dower, and whether the acceptance of the gift precludes a taking under the law. In a case where the domicile was New York, and

some land devised was situated in Virginia, it was held that the right of the widow to dower in land in Virginia should be determined by the rule in New York, rather than by the rule of Virginia. *Bolling v. Bolling*, 88 Va. 524, 14 S. E. 67. In Massachusetts it was held that the rule of the domicile did not control on this question. *Staigg v. Atkinson*, 144 Mass. 564, 12 N. E. 354. See, also, *Atkinson v. Staigg*, 13 R. I. 725; 2 Whart. Conflict of Laws, § 5992. In respect to an election, it was held that, where there is an election, or rather the renunciation of a foreign will made in a foreign jurisdiction, it will be respected in the state of the domicile, and should have the effect there upon the widow's rights as that law allows. *Mary J. Wilson v. Rebecca Cox et al.*, 49 Miss. 538. In the opinion it was remarked: "If she abandons the will, then her rights of property, wherever situated, are determined by the law of the testator's domicile. There can be but one renunciation, where the estate is dispersed in several jurisdictions. The widow cannot elect in one forum to abide by the will, and abandon it in another. Her election, if made at all, must be in the forum of the original probate, whose laws fix her rights as distributee in all the jurisdictions where the property may be situated." 49 Miss. 545.

In *Waterfield v. Rice et al.*, 111 Fed. 625, 49 C. C. A. 504, it was decided that a provision in an Ohio statute, requiring an election by the widow to take under the will, only applied to wills made in Ohio, and was inapplicable to foreign widows, and that when a will, made and probated in another state, was brought into Ohio, and there probated and recorded as a foreign will, it was deemed to be properly proved, and that there had been an election to take under the will in the domicile of the testator. In *Apperson, Ex'r, v. Bolton et al.*, 29 Ark. 418, it was ruled that the right of a widow to renounce the provisions of a foreign will and to take dower out of lands in Arkansas was governed by the laws of that state, but that, if there was an acceptance of the will in the state of Tennessee, the state of the domicile, she could not make a different selection in Arkansas. It was said that "It is a general principle of law that one cannot claim under a will and against it, too, and an acceptance of the provisions of the will in Tennessee would bind her everywhere"—citing *Jones v. Gerock*, 59 N. C. 194; *Blunt et al. v. Gee et al.*, 9 Va. 492. In *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324, a party residing in Wisconsin owned land in Minnesota. He died in Wisconsin, leaving a will which disposed of all his property. The laws of that state gave the widow dower, but provided, for an election by her whether she would take under the will or under the law. The widow was insane,

and her guardian filed a notice, electing to take under the law. An action was brought in Wisconsin to construe the will, and, if it should be determined to be a case for an election by the widow, to have the court make such election. It was determined that the bequest was intended by the testator to be in lieu of dower, and that it was a case for election, and the court made the election. It was held by the Minnesota court that the determination of the Wisconsin court was conclusive between the parties; and that, while the probate court of Minnesota had authority to make an election, if, in fact, no election had been made there, the Wisconsin court had full authority to make an election, and the election which it did make was effectual everywhere. Following these authorities, the acceptance of the benefits of the will by Owen W. Battey in Illinois was operative as an election there, and is equally effectual in Kansas. Under the Illinois statute, if there is no affirmative act of election and no renunciation of the provisions of the will within one year after letters testamentary or of administration are issued, the survivor is deemed to have elected to accept the provisions of the will. *Hurd's Rev. St. (Ill.) 1911, c. 41, § 11*. There never was a renunciation of the will by Owen W. Battey, nor by any one for him. On the other hand, he went into possession of the property given to him by the will, declaring his approval of it and a decision to conform to its requirements and to carry out its provisions. If it could be said that there was no election by him in Illinois, and the question of election had arisen when the will was presented for probate in Kansas, it must have been held that the declarations and acts of Battey amounted to an election to take under the will. It has been held that a record is not the only proof of such an election, but that one may be made by acts in pais, providing an intelligent and deliberate choice is made. *Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522; *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307; *Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074.

It is true there is no showing that the law of Kansas in regard to an election was explained to the testator; but on the testimony it cannot be inferred that he was ignorant of his rights, or that he did not make a deliberate and intelligent choice. When the ancillary proceedings were taken in Kansas and the authenticated will recorded here, it imported regularity and validity, and was sufficient to establish testamentary title to the lands therein devised.

We find no error in the proceedings, and therefore the judgment of the district court is affirmed. All the Justices concurring, except SMITH, J., who did not sit.

(87 Kan. 874)

FISHER v. DELAWARE TP., WYANDOTTE COUNTY.

(Supreme Court of Kansas. July 6, 1912.)

*(Syllabus by the Court.)***TOWNS (§ 45*)—IMPROVEMENT OF HIGHWAY—INJURY TO EMPLOYEES—LIABILITY.**

A township engaged in improving a public highway acts in the capacity of an agency of the state, and is not liable to an employé for personal injuries occasioned by the negligence of its officers.

[*Ibid.* Note.—For other cases, see *Towns*, Cent. Dig. §§ 79, 80; Dec. Dig. § 45.*]

Appeal from Court of Common Pleas, Wyandotte County.

Action by O. O. Fisher against the Delaware Township of Wyandotte County, Kan. Judgment for plaintiff, and defendant appeals. Reversed.

C. W. Trickett and L. W. Keplinger, both of Kansas City, for appellant. James F. Getty, of Kansas City, for appellee.

BENSON, J. This is an action to recover damages for personal injuries suffered while working upon a public road. The question is whether the township is liable.

The road is one of the public highways which the board of county commissioners of Wyandotte county is authorized to improve and maintain by chapter 276 of the Laws of 1899. In pursuance of section 2 of that act, the township board had proceeded to grade the Kaw Valley road. At the time of the accident work was in progress filling up and widening a place in the grade. The appellee was injured in this work while operating a defective scraper. He alleges that he was in the employ of the township, and that it is liable because it furnished a defective appliance which caused the injury. The appellant denies that the appellee was in its service, and alleges that the work was being done by the county authorities. It also denies liability for any negligence of its officers in any work upon the road. The evidence shows that, in pursuance of an arrangement between the county and township boards, the latter undertook to grade the roadbed, and completed that work according to stakes set by the county engineer. The county board or the chairman of that board, however, ordered additional work upon the grade. For this purpose the following order was given: "O. K. Williamson. You are authorized by me as chairman of the Board of County Commissioners to employ teams and men to grade roads and ditch them (along the Kaw Valley road) according to your survey." Mr. Williamson had previously been engaged in doing similar road work for the township board. Pursuant to the above order, he proceeded to work upon the grade, when the township board finding this work in progress notified him that the board would not be responsible for the pay, whereupon

he said he was doing the work for the county. After this notice no further objection was made, and Williamson employed the appellee to work with his team in filling up the grade where he was hurt. The scraper was one of a number that had been borrowed by the township board for the grading it had previously done, and the road overseer consented that Williamson might use it for this particular work. In doing road work generally in the townships, it was the custom for the member of the township board residing in the vicinity of the improvement to employ the necessary labor, supervise the work, and report to the board, but no resolution or formal order to that effect had been adopted. The clerk resided at Edwardsville, and had personally looked after the grading of this road, but it had been done with the knowledge and by consent of all.

The appellee was injured on January 26, 1910. About a year before that time he had been employed by the clerk of the board, and had worked with other laborers in grading this road. Early in January, 1910, he applied to the clerk for further work. The evidence relating to the interviews on this subject is conflicting, but the testimony of the appellee must, in the light of the verdict in his favor, be accepted as true. His testimony in brief was that the clerk said to him, "We are going to fill up that low place out there"; that "O. K. (Williamson) was going to be the boss of it." He worked for the township a day or two, hauling stone under the orders of the clerk, and, then seeing that the additional grading was in progress at the place which the clerk had indicated, he applied to Williamson, and was immediately set to work and soon afterwards was injured. The answer contains a verified denial of the allegation that Williamson was the agent of the township. An estoppel is pleaded in the reply based upon the conduct of the township and its officers giving the appellee reason to believe that the work was being done for the township. The jury found that Williamson was the agent of the township board, but that no officer of the township except the clerk ever gave the appellee reason to suppose that Williamson was such agent, and none of them knew of the talk between the appellee and the clerk.

The defense is based principally upon contentions that a township is not liable for injuries sustained through the negligence of its officers unless such liability is created by statute, and that neither the township nor the township board of highway commissioners employed the appellee or carried on the work in which he was injured. The first of the above propositions rests upon a distinction declared at an early day by this court between municipal corporations proper, such as cities, and quasi corporations, such as counties, townships, and school districts. Concerning the latter it was said: "True,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

they are called in the statute bodies corporate. * * * Yet they are denominated in the books, and known to the law, as quasi corporations; rather than as corporations proper. They possess some corporate functions and attributes, but they are primarily political subdivisions, agencies in the administration of civil government, and their corporate functions are granted to enable them more readily to perform their public duties." *Beach v. Leahy*, 11 Kan. 23, 29. The history and the reason of this distinction are given in the opinion in that case, and are elaborately stated in the leading case of *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, freely cited in decisions and text-books.

In *Eikenberry v. Township of Bazaar*, 22 Kan. 556, 31 Am. Rep. 198, it was declared that, while cities are municipal corporations proper, townships are quasi corporations, and that the difference between them is well established. Applying this distinction, it was held that, as there is no express statute imposing a liability upon townships for injuries sustained from defects in highways, they are not liable for damages for neglect of duty in failing to keep a public road in safe condition. But it was held in *Jansen v. City of Atchison*, 16 Kan. 358, after a review of earlier cases, that a city was liable in such a case. In *County of Marion v. Riggs*, 24 Kan. 255, the same rule of nonliability was applied in an action against a county, although an earnest effort was made by counsel to induce the court to reconsider its previous ruling. It is a significant fact that the opinion in *House v. Board of Com'rs of Montgomery County*, 60 Ind. 580, 28 Am. Rep. 657, then cited as opposed to the decisions of this court, was afterwards overruled in *Board of Commissioners of Jasper County v. Alliman, Adm'r*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58, establishing the rule in that state in harmony with the decisions of this state and the weight of authority on this subject. See, also, *Smith v. Board of Commissioners of Allen County*, 131 Ind. 116, 30 N. E. 949. The principle was again affirmed in an action based upon the negligence of a township in failing to erect watermarks at a ford. *Township of Quincy v. Sheehan*, 48 Kan. 620, 29 Pac. 1084. In another action to recover damages for the neglect of a board of education in failing to take a bond from a contractor as required by statute, the court held that: "A quasi municipal corporation, like the board of education of a city, is never liable for the consequences of a breach of public duty or the neglect or wrong of its officers, unless there is a statute expressly imposing such liability." *Lumber Co. v. Elliott*, 59 Kan. 42, 51 Pac. 894. The rule of nonliability of counties, townships, and school districts for the negligence of their officers having been established, the Legislature by chapter 237 of the Laws of 1887 (Gen. Stat.

1909, § 658) declared that counties and townships might be held liable for damages caused by defective bridges and highways in certain cases, but it was said in *Cunningham v. Clay Township*, 69 Kan. 373, 376, 76 Pac. 907, that, before the enactment of that statute, such an action could not have been maintained, and the limit of the township's liability must therefore be found in the statute itself. Again in *Shawnee County v. Jacobs*, 79 Kan. 76, 99 Pac. 817, 21 L. R. A. (N. S.) 209, it was held that a county in building a bridge upon a public highway acts as a subdivision of the state government, and is not liable for the negligent performance of the work, unless expressly made so by statute. Judge Dillon states the prevailing rule thus: "In the United States there is no common-law obligation resting upon quasi corporations, such as counties, townships, and New England towns, to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the Legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is to treat this as a public, and not a corporate, duty, and to regard such corporations, in this respect, as public or state agencies, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute." 4 Dillon on Mun. Corp. (5th Ed.) § 1688. While the soundness of this distinction has been questioned, it is too firmly fixed in the jurisprudence of this state, following the weight of authority elsewhere, to be overturned except by legislative action. If the policy had not been approved by the people, it is fair to presume that it would have been changed by statute. The fact that it was modified in some respects indicates the legislative purpose to adhere to it in others.

The appellee seeks to distinguish the cases cited and to uphold the liability of the township upon the proposition that it was specially authorized to create the relation of master and servant. The statutes are referred to constituting the trustee, clerk, and treasurer, a board of highway commissioners to have charge of roads and bridges, imposing upon them the duty to make improvements and repairs and authorizing them to let contracts, appoint overseers, and employ laborers as they may deem expedient. Gen. Stat. 1909, §§ 9629, 9633, 9634. Reference is also made to the statute constituting the township a body politic and corporate. It is argued that these provisions devolve ministerial duties upon the board not given by earlier statutes from which the liability claimed to exist in this instance arises. Townships and counties were declared to be bodies politic and corporate by the General Statutes of

1868 (Gen. Stat. 1868, c. 25, § 1, and chapter 110, § 1), but in *Bench v. Leahy*, supra, it was held that this fact did not change the principle. By the section last referred to a township was also authorized to make all contracts necessary or convenient for the exercise of its corporate powers. Road overseers were primarily and specially charged with the repair of roads before the act creating the township board of highway commissioners was passed. *Hari v. Ohio Township*, 62 Kan. 315, 62 Pac. 1010; *Shanks v. Pearson*, 66 Kan. 168, 71 Pac. 252. It was also their duty to open new roads. Laws 1874, c. 108, § 12. Such improvements necessarily required labor, and provisions existed for levying and collecting taxes and auditing the accounts of overseers for expenditures therefor. It will be noticed that several of the decisions cited were made after the act creating a board of highway commissioners was passed, yet it was not suggested in any of them that its provisions had wrought any change in the liability of townships or counties for negligence of their officers.

The particular statute under which the road in question was improved does not expressly confer authority on the township board to grade the road, but provides that, when graded by the township board, road overseer, or by any parties, it shall be the duty of the county commissioners to cause it to be macadamized. It is not denied, however, that the board had the power to do the necessary grading under the general provisions of law defining their power and duties. In this situation it is contended that the relation of master and servant was voluntarily created, and that the township is liable for negligence as in ordinary cases where that relation exists. The decisions before referred to are also differentiated in the argument by the fact that the duties negligently performed in those cases were duties due to the public generally, while here the duty to the appellant to furnish a safe appliance was special and particular. This claim of a distinction as related to actions against counties and townships based upon negligence is not supported by the weight of authority. The broad reason upon which exemption from liability exists is that the township or county, as the case may be, in building roads, is acting in the capacity of an agent of the state—the sovereignty—and is no more liable than the state itself would be should it employ some other agency in doing the work. That building and improving highways is a general public or governmental duty has never been doubted. True, cities are held liable for defective streets, and townships are not, but the reason for this difference is not based upon the supposition that a city street is a private affair, and a county or township road is not, for both are general and public. This matter was considered in *Wulf v. Kansas City*, 77 Kan. 358, 373, 94 Pac. 207, 212.

The question there related to the control of parks and boulevards, and it was said: "That public parks are not for the sole use and benefit of the citizens of the city, but are for the enjoyment of the public generally, while ordinarily subject to municipal management, has been frequently held." Again, it was said in *Shawnee County v. Jacobs*, 79 Kan. 76, 99 Pac. 817, 21 L. R. A. (N. S.) 209: "The duty of building bridges and maintaining the public highway has devolved upon the counties and townships of this state since its organization. In the performance of this duty the county acts as an agency of the state, and is no more liable for its acts while so engaged than the state itself would have been if doing the same work." The foregoing applies to townships, for both are agencies of the state so far as they are authorized by the Legislature to act in building and improving roads. *Elliott on Roads and Streets*, § 9. It is true that citizens of the locality have a more specific interest in roads of the vicinage because of frequent use, but they have no better right to use them than others. While a multitude of cases have been brought by travelers who have suffered through defects in highways, actions by laborers for personal injuries caused by such negligence have been less frequent. The same rule, however, is applied: "A servant's right of action for injuries resulting from any negligence which may be committed by the agents of a municipal corporation while engaged in the performance of one of its public functions is subject to the same limitations as those which circumscribe that right in the case of the state itself. On the other hand, such a corporation is liable as an employer, under the same circumstances as a private individual or corporation, wherever the injury complained of was received by the servant while participating in work which was being done in connection with the exercise of a power conferred upon the corporation for the purpose of enabling it to carry out one or other of its merely ministerial functions." 2 *Labatt on Master and Servant*, § 847. In *Thompson on Negligence*, § 5802, it is said: "Assuming that the nature of the duty in which the corporation is engaged is such that it may be liable at all under the principles already explained, then it seems that it is liable to its servants for negligent injuries visited upon them, under the same principles which govern the liability of other employers to their employes." "The principle established by the authorities is that the duty of keeping public ways in repair is one imposed upon all towns and cities alike as a public duty from the performance of which they derive no special advantage in their corporate capacity, and that the agents selected to execute this duty in obedience to the law of the commonwealth are to be regarded as public officers rather than as the servants or agents of the municipal

corporation by which they are employed. The relation of master and servant does not exist, and the maxim respondent superior does not apply." *Barney v. City of Lowell*, 98 Mass. 570. That action was for injuries to a teamster engaged in hauling rock to repair a highway. The same result was reached in *Hennessey v. New Bedford*, 153 Mass. 260, 26 N. E. 999, in an action by a laborer to recover for injuries suffered by the caving in of a gravel pit from which material was taken to repair streets. The rule was also applied in *Colwell v. Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218, where an employé was injured by a defective stone crusher used in preparing material for streets. It was said that the city was clearly performing a governmental function, and was not liable. While that case and *Barney v. City of Lowell*, supra, extend the rule of nonliability in such cases to cities, the principle upon which counties and townships are exempted from such liability here is forcibly stated in both—resting upon the fact that they act as governmental agencies, and not in a merely proprietary capacity. In Illinois, in an action against a county for injuries to workmen occasioned by negligence of its officers and agents in erecting a courthouse, a recovery was denied upon the ground that the county was acting as a governmental agent, and so exempt from liability. The court said: "The authorities, however, do not seem to make a distinction between the negligence of a town or county in failing to observe a duty and the performance of that duty in a negligent manner." *Hollenbeck, Adm'r, v. Winnebago County*, 95 Ill. 148, 183, 35 Am. Rep. 151, citing *Hamilton Commissioners v. Mighels*, 7 Ohio St. 109, a case in which the injury was caused by defective steps in a courthouse.

In an action in New Hampshire against a town for damages caused by the death of a laborer upon a public highway, the court, after stating the dual capacity of the towns—public and proprietary—said: "If it (the act of its officers) is a public, governmental duty, in the performance of which the corporation is clothed with sovereignty, then the officer is not to be regarded as the agent of the corporation, for whose negligence it can be held responsible." *Gates v. Town of Milan*, 76 N. H. 135, 80 Atl. 39, 35 L. R. A. (N. S.) 599. It was held that the improvement of highways was a governmental function and recovery was denied. In *Hughes v. County of Monroe*, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33, this question was considered in an action by an employé at a county insane asylum for personal injuries. The court said: "It is true we are not dealing with a municipal corporation, for in February, 1891, the county of Monroe was a political division of the state, and, at most, only a quasi corporation; but, nevertheless, the

reasoning in the opinion just cited is applicable." It was held that the county, being in the discharge of public duties, and to that extent exercising acts of sovereignty, was not liable. A note appended to the report of this case and several other similar cases, found in 39 L. R. A. 33, 82, reviewing the decisions on this subject, classes as exceptional the states of Maryland, Pennsylvania, and Iowa. At page 80 of this note *Hannon et al. v. County of St. Louis et al.*, 62 Mo. 313, is referred to as a case where "liability was affirmed on the ground that the injury arose (to an employé of a county asylum) in discharge of a self-imposed duty not enjoined by any law, which is a very fine-drawn distinction." With regard to this supposed distinction this court has said: "There is a line of authorities which hold that municipal corporations are liable for the negligent performance only of such ministerial public duties as are imposed upon them by law, but not for the negligent performance of assumed duties which are permissive only. To this doctrine we do not agree. The performance of public duties which are imperative upon the corporation as well as those which are merely optional is for the same general purpose—the general welfare of the community." *Bowden v. Kansas City*, 69 Kan. 587, 593, 77 Pac. 573, 576 (66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955). The *Hannon Case* was also referred to in *Shawnee County v. Jacobs*, 79 Kan. 76, 81, 99 Pac. 817, 21 L. R. A. (N. S.) 209, but was not considered persuasive to fix liability upon the county. Notes in 9 Ann. Cas. 1156, and 21 Ann. Cas. 1346, refer to a multitude of cases upon this subject. The opinion in *Matsumura v. Hawaii County*, 19 Hawaii, 18, 21 Ann. Cas. 1338, and a dissenting opinion in the same case cite and comment upon many authorities.

The appellee cites *Williams v. Kearny County*, 61 Kan. 708, 60 Pac. 1046, in support of a distinction between duties of counties and townships which are public and general, and such as are special and particular, and deduces the conclusion that the township in this instance owed him a duty of the latter kind. The relation, however, between him and the township was but an incident of the exercise of the broad governmental power relating to highways. Within the authorities and upon principles firmly established in this jurisdiction we cannot distinguish between injuries to an employé and to a third person occasioned by negligence of township officers in making highway improvements. The general language of the opinion in the *Williams Case* must be interpreted in the light of the facts then under consideration. The county had entered into a lease and the property had been destroyed. The opinion distinguishes that case from former decisions holding counties exempt from liability for negligence by the

fact that the relation of the parties was contractual. It was said that the county owed to the plaintiff the duty to protect the building from negligent destruction "not, however, in his mere capacity as a citizen, but because of the contractual relation it had assumed to him." That opinion is referred to in a note in 8 Dillon on Municipal Corporations (5th Ed.) p. 1593, where it is said that the county was held liable by virtue of its contract and the obligations assumed under its covenants. *U. S. v. Bostwick*, 94 U. S. 53, 24 L. Ed. 65, is referred to in that opinion. The decision originated in the Court of Claims, and was also based upon the covenants expressed and implied in a lease. It was held that a failure to comply with the covenants was a breach of the contract for which the government consented to be sued in the Court of Claims. A claim for damages not covered by the covenants referred to was held to be not within the jurisdiction of that court. It cannot be held that the opinion in the *Williams Case* overrules well-settled principles firmly established by prior decisions and followed without qualification since, upon which counties and townships are held exempt from liability in cases like the one now under consideration. The opinion of this court in *Bowden v. Kansas City*, 69 Kan. 587, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955, is cited as upholding the liability of the township, but it should be observed that the liability there declared was against a municipal corporation proper, which as we have seen has been held liable for defective streets from an early period.

Another question fully discussed in the argument is whether the finding that *Williamson* was authorized to act as agent for the township is supported by any evidence. The solution of this question, and the related question whether the township is estopped from denying that authority, would require very careful consideration, but, having reached the conclusion that the township is not liable were the authority sustained, these questions need not be answered.

As the township, as an agency of the state, is not liable, the judgment is reversed, and the cause remanded, with directions to enter judgment for the defendant. All the Justices concurring.

(37 Kan. 348, 585)

STATE ex rel. DAWSON, Atty. Gen., v. ATCHISON, T. & S. F. RY. CO. et al.

(Supreme Court of Kansas. June 8, 1912.
Supplemental Opinion July 6, 1912.)

(Syllabus by the Court.)

1. INSPECTION (§ 3*)—PROPERTY SUBJECT—STATUTORY PROVISION.

The statute expressly requires all grain going into or coming out of a public elevator to be inspected by officers of the state grain de-

partment. No such express requirement is made with regard to other grain, and upon a consideration of the entire act inspection thereof is held not to be compulsory; the provisions of the statute with regard thereto being construed as referring to inspection made upon request of the owner.

[Ed. Note.—For other cases, see *Inspection*, Cent. Dig. §§ 3-7; Dec. Dig. § 3.*]

2. INSPECTION (§ 3*)—PROPERTY SUBJECT—STATUTORY PROVISION—"PUBLIC ELEVATOR."

An elevator in which the grain of different owners is kept entirely separate, but in which the grain of the same owner delivered at different times is mixed together, except where he directs otherwise, is not a "public elevator" within the meaning of a statute providing "that all elevators or warehouses located in this state in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which the grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, and doing business for a compensation, are hereby declared public warehouses."

[Ed. Note.—For other cases, see *Inspection*, Cent. Dig. §§ 3-7; Dec. Dig. § 3.*]

3. INSPECTION (§ 3*)—PROPERTY SUBJECT—STATUTORY PROVISION.

The fact that the operator of an elevator reserves the right to mix the grain of different owners has the same effect in determining its public character as though the grain were actually mixed.

[Ed. Note.—For other cases, see *Inspection*, Cent. Dig. §§ 3-7; Dec. Dig. § 3.*]

Johnston, C. J., and Smith and Benson, JJ., dissenting.

Supplemental Opinion.

4. INSPECTION (§ 6*)—GRAIN INSPECTION FEES—DEPOSIT IN COURT—JURISDICTION OF COURT.

Where fees were collected by the state grain department for inspection of grain and in doubtful cases by order of the Supreme Court were deposited with the clerk of the court pending its decision of the question as to the right of inspection, an order by the Supreme Court that the money in the hands of the clerk belonging to the state be appropriated to the costs of the case for which the state is liable is beyond the authority of the court. Laws 1911, c. 199, §§ 2, 3, providing that all fees collected for grain inspection shall be turned into the state treasury forming a fund for the payment of expenses of the grain department.

[Ed. Note.—For other cases, see *Inspection*, Cent. Dig. § 12; Dec. Dig. § 6.*]

5. INSPECTION (§ 6*)—GRAIN INSPECTION—FEES—REPAYMENT.

Where fees from owners of grain for compulsory inspection under Laws 1911, c. 199, were collected without authority, and the grain passed into a public elevator the fees must be returned to the person from whom received, leaving the state to settle with the managers of the elevator, and the fees must be returned without the surrender of the certificate of inspection.

[Ed. Note.—For other cases, see *Inspection*, Cent. Dig. § 12; Dec. Dig. § 6.*]

Original proceeding by the State, on the relation of John S. Dawson, Attorney General, for mandamus to the Atchison, Topeka & Santa Fé Railway Company and others. Denied.

J. S. Dawson, Atty. Gen., S. M. Brewster, Asst. Atty. Gen., and Geo. R. Allen and J. W. Dana, both of Kansas City, Kan. (Keplinger & Trickett, of Kansas City, Kan., of counsel), for plaintiff. M. A. Low, Paul E. Walker, W. R. Smith, O. J. Wood, A. A. Scott, J. G. Slonecker, Robt. Stone, Geo. T. McDermott, and Blair, Scandrett & Magaw, all of Topeka, B. P. Waggener, of Atchison, Jno. Madden and W. W. Brown, both of Parsons, A. L. Berger, of Kansas City, Kan., Frank Hagerman, of Kansas City, Mo., R. R. Vermillion, of Wichita, J. M. Challis, of Atchison, F. H. Wood, of St. Louis, Mo., and Kimbrough Stone, of Kansas City, Mo., for defendants.

MASON, J. The state brings mandamus against a number of railroad companies and the owners and operators of a number of grain elevators, the purpose of which, in a general way, is to require them to conform to the provisions of the statute providing for the inspection of grain. Evidence has been taken before a commissioner, who has made detailed findings of fact and conclusions of law. The case is submitted upon his report and the evidence. The state asks that each of the railroad companies be required: (1) To furnish to the state grain inspection department daily manifests of all grain arriving in its freight terminal yards in Wyandotte county. (2) To permit the weighmasters and inspectors of the department to inspect and weigh the grain in cars in such terminal yards. (3) To collect from the proper parties and pay to the department the fees for such inspection and weighing. And that each of the elevator owners or operators be required: (1) To procure a license to transact business as public warehousemen, giving a bond as such. (2) To make reports to the grain department of the movements of grain in and out of the elevators, and of the issuance and cancellation of warehouse receipts. (3) To permit the weighmasters and inspectors to weigh and inspect all grain moving into or out of the elevators. (4) To pay the fees for such inspection and weighing. The officers and directors of a voluntary unincorporated association known as the Kansas Grain Dealers Association, having a membership of 800 persons, firms, and corporations, engaged in buying and selling grain, have intervened and unite with the defendants in contesting the plaintiff's demands.

Questions are raised as to the construction and validity of various parts of the statute. The two principal questions of construction are: Does the statute contemplate a compulsory inspection of any grain except that stored in public elevators? Can any elevator be public in which the grain of each owner is kept entirely separate and distinct from that of all others? The commissioner was of the opinion that the first question should be answered in the negative; the second in the affirmative.

[1] The statute involved is chapter 222 of the Laws of 1907, published as article 1 of chapter 37 (sections 3327-3363) of the General Statutes of 1909; as amended by chapter 199 of the Laws of 1911. Section 23 of the original act, after making it the duty of public warehouseman, whenever inspection and weighing is established, to receive for storage, all grain tendered, proceeds: "Such grain to be in all cases inspected, weighed and graded by a duly authorized inspector and weigher * * * and all grain delivered from such warehouse shall be inspected and weighed on its delivery by a duly authorized inspector and weigher of grain." The defendants maintain that this provision compels the inspection of all grain that is stored in public elevators, but that the statute nowhere, either expressly or by fair implication, makes inspection of grain compulsory under any other circumstances. The plaintiff contends that the purpose of the language quoted is not to confer authority to inspect grain, but to impose the duty upon the public warehouseman to refuse to receive or deliver it without inspection; that the inspection contemplated by the act is a compulsory inspection; and that the department has full power to enforce it, irrespective of the wishes of the owner of the grain. To decide the issue so made, the entire statute must be considered. Only the more obviously important features can be presented in a summary.

The act is described in its title as one "in relation to the inspection, storing and grading of grain." The first section reads: "A department of record for the inspection and weighing of grain is hereby established, to be called the 'state grain inspection department.' Said department shall have full charge, of the inspection and weighing of grain at all railroad terminals, public warehouses, or other points within the state wherever the business transacted will, by the fees provided by law, pay the salary of an assistant inspector and weighmaster, or wherever, upon request by parties interested, to the chief inspector, he may establish inspection and arrange that the officer in charge accept as full compensation for his services an amount equal to the whole revenue obtained at such a place."

The Governor is required to appoint a chief inspector of grain for the state (section 2), among whose duties are: To have supervision of the inspection and weighing of grain "as required by" law; to supervise the handling, inspecting, weighing and storage of grain; to establish rules therefor, and for the management of public warehouses; to keep records of inspecting and weighing done into and out of licensed warehouses; to investigate complaints of fraud or oppression in the grain trade, and correct them as far as able (section 3). He is authorized to recommend, and the Governor is authorized to appoint, supervising inspectors and weigh-

masters wherever there is a public warehouse. These are required to visit the elevators and railroad tracks every day, the former supervising inspection with a view to securing uniformity, the latter supervising all weighmasters, inspecting scales, and the loading and unloading of grain, with a view to securing correct weights on all grain weighed by the department. Similar provision is made for the appointment of assistant inspectors and weighmasters (section 5). Fees for inspection and weighing are fixed (section 8). The schedule of fees was changed in 1911, the new section including a provision making it a misdemeanor to deny officers of the department access to scales, elevators, warehouses, or other places in the performance of their legal duties (section 1, ch. 100, Laws of 1911). The charges for inspection and weighing are a lien on the grain; when the grain is in transit, they are to be treated as advanced charges and collected and paid by the carrier (section 9). Fees collected are turned into the state treasury (section 10), and all expenses of the department are paid out of the fund so created (section 11). It is a misdemeanor for an officer of the department to be guilty of neglect of duty, or to grade or weigh grain improperly, or to accept reward for a neglect of duty (section 12). Section 13 reads: "The inspection or weighing of grain in this state, whether into or out of public warehouses or elevators, or in cars, barges, wagons, or sacks, arriving at or shipped from points where state grain inspection is established, must be performed by such persons as may be duly appointed and qualified according to law, and any person who shall act as inspector or weigher of grain who has not been thus first appointed and qualified shall be guilty of a misdemeanor."

The officers of the department are given "exclusive control" of weighing and inspecting grain at inspection points, and their certificates are made conclusive to all parties interested, unless appealed from in the manner provided (section 14). Nothing in the act is to be construed to prevent any person selling grain by sample, regardless of grade (section 17). Sections 19 to 35 relate almost wholly to warehouses. If the owner of grain consigned to a public warehouse is dissatisfied with its inspection, or from any cause desires to withhold it from storage, he may have it delivered to him subject only to such charges as have already accrued (section 32). Provision is made for a "Grain Grading Commission," to be appointed by the Governor, to establish grades for all kinds of grain bought or handled in the state (section 36).

Specific arguments are advanced for the construction contended for by the state, which may be thus summarized: The fact that the statute makes it a misdemeanor to deny an officer of the department access to scales, elevators, and other places in the performance of his duties, implies that his in-

spection may be against the wishes of the owner of the grain. If grain were to be inspected only on request of the owner, it would be needless to provide a lien for the inspection fee, since in such case it would be paid. The provision that at the points designated no one but an officer shall inspect or weigh grain shows that the will of the Legislature and not of the owner was intended to control. The officers could not have "exclusive control" of inspection if they could act only on invitation. They are required to perform various duties aside from inspecting and weighing grain; they are paid only from the fund produced by fees, and no fees are charged for any other services; if they can only weigh and inspect grain upon request of the owners, the owners have the power to cut off their compensation and compel them to violate their duty or work for nothing. The purpose of the act is to preserve the credit of the state, the chief means employed being the inspection of outgoing grain; the Legislature would be unlikely to allow the use of this means to depend upon the wishes of the owners. The reasons for official inspection at terminal markets exist whether the grain goes into storage or not. To require inspection at public elevators, leaving it optional elsewhere, would amount to an unjustifiable discrimination. The fact that general inspection is not expressly made compulsory should not be deemed controlling. The statute does not in so many words say that the officers must inspect grain when requested, yet no one would doubt that the duty in such case was mandatory. The history of the legislation strengthens the view that in its present form the main purpose of the statute is inspection. Of this phase of the matter it is said in the state's brief: "It is important to determine whether the present law under which the grain department operates is an inspection law with elevator and warehouse provisions incorporated therein, or a warehouse law with inspection and weighing of grain provided for therein. If the former, then grain inspection and weighing exists state wide, subject to be placed in actual operation under the provisions of the statute and the chief inspector. If the latter, then only such grain as is in, destined for, or being shipped out of a public elevator or warehouse is subject to inspection."

Upon a consideration of these arguments, and those of the defendants in reply, the court reaches a conclusion, in harmony with the commissioner's, that it was not the purpose of the Legislature to make inspection compulsory except as to grain stored in public elevators. There are obvious reasons for requiring an official inspection and weighing of grain, where it is to be mingled with other grain and thereafter bought and sold as a certain quantity out of a larger mass, that do not apply where its identity is to be pre-

served. In the one case the statute is mandatory by express declaration. In the other, it is so, if at all, only by inference. If there had been no purpose to make a distinction, equally explicit language would naturally have been used in each instance. While the Legislature may, for public purposes, compel the owner to pay for the inspection of wheat which he intends to sell by sample, irrespective of grades, the power is so far an interference with his conduct of his business that the intention to exercise it ought to be evidenced by express words or by very clear implication. *Gray v. Stewart*, 70 Kan. 429, 78 Pac. 852, 109 Am. St. Rep. 461. A purpose to enforce the inspection of grain while in the course of interstate traffic, because of its Kansas origin or destination, is likewise one not readily to be inferred from ambiguous language. The statute in some respects is penal, and for that reason should be subjected to a somewhat stricter construction than might otherwise be appropriate. The right given an owner of grain consigned to a public warehouse to recall it, subject only to such charges as have already accrued (section 32), seems to show that inspection is optional with him unless the grain actually goes into the public elevator. The same inference seems warranted by the provision that the act shall not be construed to prevent sales of grain by sample, regardless of grade. The various provisions of the statute, including those giving the grain department exclusive control of inspection, have abundant room for operation under a system where inspection is made (except as to grain in public elevators) only upon request. Most of these provisions are very similar, so far as the present question is concerned, to those of earlier statutes. A section of the act of 1891 (chapter 248, § 42) provided that all grain grown in the state and stored in any public elevator or warehouse must be weighed and inspected as provided in that act. The distinction between compulsory and optional inspection, which the present law seems to intend, was there made too plain for doubt. If it had been the purpose of the later act to efface the distinction, language would naturally have been chosen so explicit as to leave no room for controversy.

The fact that until late in 1910, or early in 1911, the state inspection department did not claim the right to inspect any grain (except that going into or coming out of a public elevator) against the wish or direction of the owner, is urged by the defendants as an administrative construction of the statute adverse to the view of the plaintiff. We deem this argument of little weight, because up to that time such right was not denied, no controversy having arisen, and in fact grain at inspection points was inspected without regard to whether it was intended for storage. Until July, 1911, the department did not inspect grain transferred from one car to an-

other through an elevator, but since then it has claimed the right to do so.

In *State ex rel. Wood v. Smith*, 114 Mo. 180, 21 S. W. 493, which is of more importance in connection with another branch of the case, and to which reference will again be made, it was held that under the Missouri statute, which has much in common with that of Kansas, official inspection was limited to grain in public warehouses. In *State ex inf. v. Goffee*, 192 Mo. 670, 91 S. W. 486, a subsequent amendment was held not to change the law in this regard, although the court said that its language indicated an assumption by the Legislature that some other grain was already subject to state inspection. The language referred to as indicating such an assumption is not in our statute. Other cases having some tendency to sustain the position of the defendants are *State ex rel. Major v. Carlisle*, 235 Mo. 251, 138 S. W. 513; *Puget Sound Warehouse Co. v. Northern P. R. Co.*, 58 Wash. 322, 108 Pac. 955.

[2] It is next necessary to determine whether the elevators of the defendants are public elevators as defined by the statute, which reads: "All elevators or warehouses located in this state in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, and doing business for a compensation, are hereby declared public warehouses." Section 19.

While some of the elevators were formerly conducted avowedly as public elevators, under license, at the time this action was begun the licenses had been surrendered, and all were professedly private. The grain of each owner stored therein was kept separate from that of other owners; but the grain of the same owner was mingled in one mass, irrespective of its grade or the time of receipt, except where the owner directed otherwise. However, all the elevator operators excepting one reserved the right to store the grain with that of other owners (of the same grade) if they so desired. On December 6, 1911, this practice was abandoned, and the clause embodying the reservation was omitted from receipts thereafter issued. Whether the elevators are now conducted as public or otherwise depends upon the construction of the clause, "in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved." This in turn depends upon the meaning to be attached to the word "lot" or "parcel." If the quantity of grain delivered by a single shipment, or at one time, constitutes a separate "lot," then the elevators are public. If the grain belonging to the same owner, whether delivered at the same or at different times, is regarded as constituting the same "lot," if so designated by him, then the elevators are not public.

In order to be public, an elevator must be one in which grain is stored in bulk, and which does business for a compensation. In addition to these attributes, if it also is one in which the grain of different owners is mixed together, it is a public elevator. The plaintiff regards the words, "or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved," as intended to designate another and distinct class of public elevators. The defendants consider them rather as amplifying the phrase, "in which the grain of different owners is mixed together." The plaintiff puts emphasis upon the distinction between "the grain of different owners," on the one hand, and "different lots," on the other, and treats "mixed" as the equivalent of "stored in such manner that the identity cannot be accurately preserved." It reads the statute much as though it said: "In which the grain of different owners is mixed together, or in which the grain delivered at different times, even if owned by the same person, is mixed together." The defendants place stress upon the distinction between "mixed," on the one hand, and "stored in such a manner that the identity cannot be accurately preserved," on the other, and treat "the grain of different owners" as the equivalent of "different lots." They read the statute as though it said: "In which the grain of different owners is mixed together, or in which the lots belonging to different owners are stored in such a manner that their identity cannot be accurately preserved." The court believes the defendant's construction to be the more natural and reasonable. The plaintiff regards this view as denying any effect to the clause "or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved." On the contrary, we think the construction contended for by the plaintiff makes absolute surplusage of the clause, "in which the grain of different owners is mixed together." If the fact that different deliveries of grain (whether owned by the same person or not) are not kept separate makes an elevator public, then the fact that the grain of different owners is mixed together would necessarily do so, since such grain would constitute different lots or deliveries; and the words, "in which the grain of different owners is mixed together," and all reference to different ownership, could be stricken out of the act without altering its effect in the slightest degree. Different lots, in the sense in which the plaintiff uses the term, could be mixed without mixing the grain of different owners; but the grain of different owners could not be mixed without mixing different lots. The mixing of the grain of different owners is either the controlling consideration in determining the public or private character of an elevator, or it has nothing to do with it. The term "lot," if applied to the grain of a

single owner (or to such part of his grain as he shall desire to be handled as a single lot, and kept separate from other grain), has a distinct and definite meaning. Evidence was given that it is so used in the grain trade. Any other meaning would be vague and indefinite. Grain from the same farm, and of the same quality, might be delivered by the same owner at different times. There seems no sufficient reason why it should be regarded as constituting more than one lot, or why the different deliveries should be kept separate. Grain from different locations and of different quality might be delivered by its owner all at once, when it would seem to constitute a single lot on any theory. The classification of elevators into public and private, according to whether the grain of different owners is intermingled, is a natural one, the basis of which is readily perceived. A legislative purpose to make the test of the public character of an elevator turn upon the separate storing of grain of the same quality and ownership, because separately delivered, does not distinctly appear, and is not to be readily inferred.

We regard the history of the legislation as confirming the conclusion we have reached upon the consideration of the mere language of the statute. The language in question originated in Illinois. The Constitution of that state adopted in 1870 contains these provisions: "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses." Article 13, § 1. "The General Assembly shall pass laws for the inspection of grain, for the protection of producers, shippers and receivers of grain and produce." Article 13, § 7. In 1871 the Illinois Legislature passed an act "to regulate public warehouses, and the warehousing and inspection of grain, and to give effect to article thirteen of the Constitution of this state." Chapter 114, § 135, Hurd's Rev. Stat. 1909; Laws of 1871-72, p. 762. This act divided public warehouses into three classes, designated as A, B, and C. Most of the regulations prescribed were made applicable only to warehouses of class A. The several classes were thus defined; the language of the Kansas statute now in question being here italicized: "Public warehouses of class A shall embrace all warehouses, elevators or granaries *in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved*, such warehouses, elevators or granaries being located in cities having not less than one hundred thousand inhabitants. Public warehouses of class B shall embrace all other warehouses, elevators or granaries in which grain is stored in bulk, and in which the grain of different owners is mix-

ed together. Public warehouses of class O shall embrace all other warehouses or places where property of any kind is stored for a consideration." Section 2.

The italicized words, or their substantial equivalent, have been incorporated in statutes in Indiana (section 10,484, Ann. Code of Ind. 1908; Acts of 1879, p. 230); in Missouri (section 6775, Rev. Stat. Mo. 1909); in Nebraska (Laws 1891, c. 55, § 5a); and in Canada (Rev. Stat. of Canada 1906, c. 85, pt. 2, § 48). The Nebraska act was repealed in 1900. Laws of 1909, c. 152. The Canadian act was amended in 1908, these words being omitted from the amended statute. Chapter 45, § 3, 7 & 8 Edw. VII. The words were used in a Wisconsin statute passed in 1905 (chapter 19, § 6), but at a special session in the same year the section containing them was amended so as to express with clearness what we have held to be the true meaning originally intended; the new phraseology being: "In which the grain of different owners is stored in bulk or mixed together, or stored in such manner that the identity of different lots and parcels cannot be accurately preserved." Laws of Wis., Special Session, 1905, c. 12, § 74. A Minnesota statute passed in 1885, modeled upon that of Illinois, contained the words referred to. Laws of Minn. 1885, c. 144, § 1. Commissioners appointed to propose such revision and codification of the public statutes of the state as should "simplify, harmonize, and complete" them, presented a report in the form of a single bill, which was enacted in 1905. In defining "public warehouses," the revised act used these words, which we regard as a rearrangement of those of the original statute, with a purpose to avoid ambiguity and make the meaning clear: "In which grain is received for storage in bulk and that of different owners mixed together or so stored that identity of the different lots or parcels is not preserved." Rev. Laws of Minn. 1905, § 2047. The Minnesota and Wisconsin statutes distinctly show that the Legislatures of those states thought it desirable to use, in addition to the word "mixed," which might be thought to imply an actual commingling and stirring together of the grain of different owners, an expression covering any manner of storage which did not accurately preserve the identity of each lot.

The language in question seems to have been before the courts of but one state. The Missouri statute referred to was enacted in 1889. Laws 1889, p. 124. In 1892 the Supreme Court of that state had occasion to interpret the language in question and held that, "when the statute speaks of different lots, * * * it refers to lots belonging to different owners." State ex rel. Wood v. Smith, 114 Mo. 180, 21 S. W. 493. The grounds of the decision are indicated by this language from the opinion:

"A proper construction of the expression 'stored in bulk and the grain of different owners mixed together' requires they should be read in conjunction as they appear in the act. The language is used in contradistinction to storage of each owner's grain *in kind* and without *mixing with another's*. In the large public elevators which invite the public to store with them, the grain goes into a common bulk, and after that the right of its owner is represented by a warehouse receipt certifying to the amount thereof and its grade, and it is the regulation of such a warehouse to which the statute refers when it uses the language 'stored in bulk and the grain of different owners mixed together.' But the language of the act forbids the construction that the Legislature had in mind those warehouses in which the owners thereof stored their own property, or in which they leased to other persons certain bins therein in which they might store their grain and preserve it separate and distinct from others. In such a case no warehouse receipt is issued. When the grain is sold, the grain itself is delivered. It is not transferred by the assignment of negotiable warehouse receipts, which call for an equal amount of grain of the same grade and kind out of the general bulk. When stored in a rented bin, or in kind, the owner gets the commodity itself as distinguished from its value in money, or its equivalent in other grain of the kind and grade his was inspected and certified to be." 114 Mo. 195, 196, 21 S. W. 498.

"It is insisted by the relator that the mixing of two loads of the same grade belonging to the same owner brings the Empire Elevator within the purview of section 3, which denominates a warehouse as public 'in which grain is stored in such a manner that the identity of different lots cannot be accurately preserved.' Keeping in mind that this act is a substantial transcript of the Illinois act, it is fair to presume the Legislature of this state was actuated by the same purpose that prompted the Legislature of Illinois. That act upon its face purports to be in pursuance of the constitutional mandate that the Constitution of Illinois required the Legislature to pass inspection laws 'for the protection of producers, shippers and receivers of grain and produce.' Hence we are (not) left in doubt as to the purpose of the law. This law was designated to protect the owner of wheat who desired to store it in a public warehouse, where, according to the method of transacting business, the identity of his wheat could not be accurately preserved. It certainly was not intended to apply to a person who rented a bin for his own use and directed the owner of the warehouse to store two or more loads of grain in the same bin, as was done in the Empire Elevator. Such a construction is at variance with the other sections of the law. The act must be con-

strued as a whole. When the statute speaks of different lots, we think it refers to lots belonging to different owners. Moreover, we hold that the whole section 3 refers most clearly to a public warehouse where the public is invited to come and make use of its storage facilities, and when the grain will become mixed in bulk and its identity cannot be accurately preserved." 114 Mo. 197-198, 21 S. W. 498.

The Kansas statute under consideration is that of 1907, but the language in controversy was originally used in the act of 1891. Laws of 1891, c. 248, § 1. In neither enactment was the exact language of the Missouri statute followed throughout. The case is therefore not strictly one for the application of the rule that in adopting the statute of another state the Legislature is conclusively presumed to adopt also the judicial construction there placed upon it. Nevertheless the reasoning back of that rule argues strongly for our following the Missouri decision. While it is true that the language, the meaning of which is in dispute, was used by the Kansas Legislature in 1891, and is preserved in the present law without change, the enactment of 1907 was a revision of the entire subject. Obviously its framers had before them the legislation of Missouri as well as that of Illinois. It is hardly conceivable that they were ignorant of the construction given to the Missouri act by the Supreme Court of that state in 1892, growing out of a controversy at Kansas City, and involving a determination of what constituted a public elevator. If that construction gave the statute a different effect from that intended by the Kansas Legislature, the conviction seems irresistible that the language would have been altered so as to put its meaning beyond doubt.

[3] These conclusions compel a denial of the writ asked, and make it unnecessary to pass upon the other matters that have been argued. A special order as to costs is necessary because of the fact, already referred to, that the operators of all the elevators involved, excepting the Terminal Elevators, reserved the right, prior to December 6, 1911, to intermingle the grain of different owners. We agree with the commissioner that the reservation of the right to reduce to a common mass the grain of different owners in store had the same effect, so far as concerns the public character of the business, as the actual mixing of the grain. Therefore where this right was reserved the elevators were public and were subject to state control, until the practice was abandoned. Various provisions of the statute have been attacked as unconstitutional. If any of them are in fact invalid, they are of such a character that they may be eliminated without affecting the act as a whole, which is valid. The defendants maintain that man-

damus is not a proper remedy, that the state is not a proper party plaintiff, and that the relief sought is too general. We think the right to compulsory inspection of grain in public elevators is one enforceable by mandamus at the suit of the state. It is generally held, although there are cases to the contrary, that mandamus will not lie to compel the performance of a series of acts. *State v. Brewer*, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858, 4 Ann. Cas. 198; *Jackson v. Cochran*, 134 Ga. 396, 67 S. E. 825, 20 Ann. Cas. 220; *McAlester-Edwards Coal Co. v. State ex rel. Marshall* (Okla. 1912) 122 Pac. 194. Assuming the general rule to be sound, we hold it is not applicable here. The defendants maintain that the increased fees provided by the act of 1911 were so large as to characterize the statute as one for revenue and not for inspection, and that in this aspect it is invalid. The commissioner found that if, as contended by the state, inspection was compulsory irrespective of whether the grain was stored in public elevators, the normal annual income of the department would be between \$70,000 and \$75,000, and the expenses between \$55,000 and \$60,000. We do not think the indicated surplus sufficient, upon any construction of the act, to justify the court in attributing to the Legislature a purpose to create a revenue under the guise of an inspection act.

It follows that until December 6, 1911, which was after the case had been argued before the commissioner, the plaintiff was entitled to a writ against five of the operators of elevators. They ought therefore to be charged with a part of the costs of the proceeding (*Nolte v. Telephone Co.*, 86 Kan. 770, 121 Pac. 1111), one-third of which will accordingly be taxed to them.

BURCH, PORTER, and WEST, JJ., concurring.

JOHNSTON, C. J. (dissenting). The prevailing opinion presents a fair synopsis of the governing statutes, and, to my mind, they compel a different conclusion than has been reached. The earlier acts related to the regulation of warehouses, elevators, and granaries in which grain was stored. In 1897 a radical change was made in the law when the Legislature created a department for the inspection and weighing of grain and which made inspection wholly a state affair. That act, and the later revision of 1907, indicate that the Legislature thought that the business of dealing in grain, which is the principal product of the state, should be placed under state supervision, and, so a department was created designed to have complete charge of the inspection and weighing of grain with incidental regulation of warehouses in which it may be stored. It was the manifest purpose of the Legislature that the producers and dealers in grain

needed protection, and so provision was made to establish standard grades by which different qualities of grain might be designated, and also that the grain designated for sale or storage should be inspected, its quality and weight determined, and its grade fixed, to enable the seller to obtain the real value of the grain sold, and so that the purchaser may know what he is buying. It tends to standardize and give credit to the grain products of the state, protects the reputation of its grain markets, and necessarily will tend to secure better prices for the producer. To my mind the purpose of the Legislature was not to confine inspection to public warehouses or to cases where it was requested. The statute is not so limited. The first section of the act expressly provides that there shall be inspection at all railroad terminals, at all public warehouses, at all other points where the authorized inspection fees will pay the expense of inspecting and weighing the grain handled at such points, and at all other places where inspection is requested and an arrangement can be made that the officers of the state will accept, as full compensation, the fees derived from the business at such points. The provision for inspection at public warehouses is explicit, but the statute is equally explicit that there shall be inspection at the three other classes of places mentioned. The law applies to every railroad terminal in the state, and compels inspection there, although there may be no public warehouse at such terminal. Much grain may be handled and disposed of at terminal markets without passing through public warehouses, and the obvious purpose of the act was to require inspection where grain was sold or stored at this and all other places named in the act. Many of the provisions of the law are incompatible with the theory of invited inspection. The duties imposed upon the chief inspector are mandatory in character, and the language used does not indicate that he is only to act at the option of dealers or at public elevators alone. He is required to supervise the inspection of grain at all the places provided for in the act. He must establish rules and regulations, not only for the management of public warehouses, but also for the supervising, handling, inspecting, weighing, and storage of grain. Another provision which is state wide in its application, and is not limited to public warehouses or to invited inspection, is that he is required to "investigate all complaints of fraud or oppression in the grain trade, and correct the same, so far as may be in his power." Laws 1907, c. 222, § 3. This is an important function and, manifestly, is to be exercised in every branch of the grain trade, and especially as to the inspection and weighing of grain sold or stored within the state.

The provision for the punishment of those

who refuse access, or prevent the officers from gaining access, to scales, elevators, and warehouses, in order to perform their duties of inspection, indicates that the inspection in mind was compulsory rather than optional, and the same may be said respecting the provision giving a lien on the grain for the fee which is to be collected and paid by the carrier. Section 18 of the act contemplates that there shall be inspection and weighing of grain whether into or out of public warehouses, and it places in the same category with public warehouses, elevators, cars, barges, wagons, or sacks, arriving at or shipped from the points named in the first section of the act, and this is to be done by officers of the state provided for that purpose, and that if any one else assumes to act he will be subject to prosecution. No option is given any one, and nothing is said of waiting until the officer is invited to inspect the grain taken in or out of the elevators, cars, barges, or wagons. In section 14 of the act it is provided that the officers of the grain department shall have exclusive control of the weighing and inspection of grain at all the places where inspection or weighing is established, namely, at all railroad terminals, public warehouses, self-supporting places, and points where officers will accept the statutory fees for the work done. How can they have exclusive control if they must wait for an invitation before they can act? It was surely not intended that the state should keep a corps of officers at great expense waiting for permission to inspect and whose authority should be subject to the whims of dealers.

Again, a great system for the inspection and weighing of grain has been created, the fees for the service have been prescribed, a revolving fund has been provided, and the clear purpose of the Legislature was that the department expenses should be paid from the fees collected. It seems quite improbable that the Legislature intended to create such a department, supported in such a way, and then make the support of the department depend on the will or caprice of grain dealers. If there is no inspection and weighing of grain, no fees will be collected, and there will be no fund to support the department. The act was not passed for the benefit of the grain dealers alone, nor for the producers alone, but for the benefit of all interested parties and for the welfare of the whole state. If it is optional with grain dealers to have inspection or weighing of grain, it is within their power to thwart the legislative purpose by declining inspection, and in that way deprive the department of fees, which is practically the only means provided for maintaining it. Such a purpose cannot well be attributed to the Legislature.

It is argued that the Legislature, by section 23 of the act, made inspection com-

pulsory as to grain stored in public warehouses, and that, not having used equally explicit language as to inspection at other places, it must be inferred that only optional inspection was intended. A careful reading of section 23 indicates to me that the Legislature in enacting it did not have in mind and was not declaring distinctions between inspection at warehouses and at other places. It had already, in earlier sections of the act, in mandatory language, provided that there should be inspection at public warehouses and at various other places. The only inference to be drawn from those provisions was that inspection was compulsory. In section 23 the duties of a warehouseman are prescribed, and he is enjoined to receive for storage all grain tendered him that is dry and suitable for storage, and no discrimination can be made among persons who offer such grain for storage, and, incidentally, it is stated that such grain shall, in all cases, be inspected, weighed, and graded by a duly authorized inspector and weigher. The section then provides for keeping grain in separate bins apart from that of other owners, the issuance of warehouse receipts, requires inspection of grain delivered from the warehouse the same as when it is delivered to it, excuses the warehouseman from receiving grain when there is not room to store it properly or when the warehouse is necessarily closed, provides who shall pay the charges for inspection and weighing, and authorizes the addition of them to the storage charges, and provides that the chief inspector may bring an action to recover such charges. This section, as well as those preceding and following it, constitute the warehouse part of the act, and is a code of rules governing public warehouses, and evidently was not intended to limit the provisions already made for the inspection and weighing of grain. In the inspection part of the act, the Legislature had already stated that there should be inspection at public warehouses, and the clause referred to in section 23 only imposes the duty on the public warehouseman to not receive or deliver grain without inspection. I think it will be a surprise to the authors of the measure to learn that this brief clause in a section prescribing the duties of a public warehouseman is regarded as the one which gives the authority to inspect and weigh grain, and that because of it an inference may be drawn that inspection at points other than public warehouses is not compulsory. If this clause had been omitted entirely from section 23, would it have been contended or held that compulsory inspection could not be had at any place under the act, or that there could be no inspection unless an owner of grain asked for it? This is the position to which the contention of defendants leads.

Reference is made to a Missouri case, but

the statutes of the two states are quite different in their provisions. Ours is, in the main, an inspection law, while that of Missouri is essentially a warehouse act and is characterized by its title, which is, "An act providing for the organization of public warehouses and to regulate warehousing and inspection of grain in public warehouses." Even under that statute the Supreme Court of Missouri, in citing the case of *State ex inf. v. Goffee*, 192 Mo. 670, 91 S. W. 486, found language indicating that grain not in public warehouses was subject to inspection, but because the Legislature had proceeded on the assumption that a former statute provided for inspection elsewhere and was thought to be mistaken in that assumption, that, therefore, no force could be given to the language in the last act. That case cannot be regarded as an authority in this one. In my opinion our Legislature undertook to provide compulsory inspection of substantially all of the grain designed for sale in the markets or for storage within the state. It is well known that grain is no longer sold on the markets of this country unless it has been graded, inspected, and weighed, and it therefore became a question in this state whether there should be official inspection under the supervision of the state, or whether it should be left to some board of trade or other self-constituted authority. The Legislature, in my view, acted upon the theory that the interest of producers and owners of grain in the state, as well as of the general public, would be best subserved by a compulsory state inspection.

Another question upon which there is a division of opinion is: What, under the law, constitutes a public warehouse? It depends upon the interpretation of section 19 of the act, which has already been quoted, and the language is so plain and direct that it seems to me there is little room for doubt as to its meaning. An elevator or warehouse, in which there is no separation of the grain received and where all of it is stored in bulk for compensation, is unquestionably a public warehouse. One in which that or a part of that received from different owners is mixed together and stored for compensation is likewise conceded to be a public warehouse. The Legislature intended to extend the application of the act because, after naming those in which grain was stored in bulk and those in which the grain of different owners is mixed together, it added a distinct class by employing the phrase "or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved." It is said by the defendants that this phrase was only intended to explain or amplify the preceding ones, and that it related solely to the grain received from different owners. Their claim appears to be that the phrase was intended to make it clear that, however the grain of

different owners might be mixed in the elevator, if its identity could not be accurately preserved, it should be regarded as a public warehouse. It seems to me, however, that the preceding clause, in which the grain of different owners mixed together is referred to, requires no explanation. It is clear and complete of itself. Nothing is said in the discussion which makes its meaning more definite and apparent. The phrase, "or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved," if given the meaning attributed to it by the defendants, would add nothing to the preceding clause. We should not assume that unnecessary language was used by the Legislature, nor that a phrase was inserted in a section without any purpose. The mixing of the grain of different owners and the handling of the lots or parcels of grain brought in by different owners so that its identity is lost would practically amount to the same thing. Ownership of the grain, it is true, is a consideration in the preceding clause; but, after providing for the grain of different owners, the Legislature, with the evident purpose of making the definition of a public warehouse more extended and inclusive, made another class which included all lots and parcels of grain stored so that the identity of each was preserved whether owned by the same or different persons. There is just as much reason for state supervision of lots and parcels of grain purchased and brought in from different farms and stations and stored by the same owner as if they were stored by different owners. The maintenance of established grades and the keeping of different grades separated in elevators and warehouses is one of the leading ideas of the act. Many of its provisions disclose that the purpose is to prevent the mixing of grain and the deception, injury, and loss which might result from it. Provision was therefore made for establishing grades and inspecting each lot of grain to be stored or delivered in order to determine its grade. Inspection is required when it is put in the elevator as well as when it is taken out. The public is interested in the handling of grain which has been stored and which is to be sold and put into business channels, and it is in as great need of protection against the mixing of grades of grain which has been stored by the same owner as if the lots of grain had been stored by several owners. This is apparent in section 23 of the act, which defines the duties of public warehousemen. There regulations are prescribed for the storage of grain by single owners, and provision is made for keeping the same in separate bins, making it plain that the warehousemen shall not escape supervision by receiving and storing the grain of individual owners in special or separate bins. It provides that all the grain, including that stored in special bins, shall be inspected and weighed when it is delivered

from the elevator. There is a clause in that section, too, which evidences the general purpose of the act relating to warehousemen, where it provides that the warehousemen shall receive grain from persons without discrimination, and that when received it shall always "be stored with grain of a similar grade."

Counsel cite and rely on *State ex rel. Wood v. Smith*, 114 Mo. 180, 21 S. W. 493, as an authority for their interpretation of the language of the act, and it appears to support the theory for which they contend. The Missouri statute, as we have seen, differs to some extent from our own; but the definition of "public warehouses" is substantially the same. Our statute was enacted, however, before that decision was made, and therefore it cannot be claimed that the interpretation of that court was adopted by our Legislature. The decision accentuates the words "lots and parcels" employed in the section and gives the law a strained and unnatural construction. It seems clear to me that its interpretation is out of harmony with the main purposes of the act and that the reasoning of the court in support of its interpretation is wholly unconvincing. In my view the commissioner reached a correct conclusion in interpreting section 19 and in holding that the defendant elevators were public warehouses. I feel compelled, therefore, to dissent from the conclusion reached by the court on both propositions, namely, from the conclusion holding that inspection and weighing is not compulsory, and as to the definition of a "public warehouse."

I am authorized to say that Justice BENSON joins in this dissent.

SMITH, J. I concur in the dissent.

Supplemental Opinion.

PER CURIAM. This proceeding having been brought to determine under what circumstances the state grain department could inspect grain at the cost of the owner without his consent, an order was made that in doubtful cases the inspection fees should be deposited with the clerk of this court to await the decision of the question. The court decided that five of the elevators were operated as public warehouses until December 6, 1911, and were liable for inspections made prior to that time, but that otherwise the defendants were not liable for inspection charges. 87 Kan. 348, 865, 125 Pac. 104. It follows that the fees collected from these five elevators for inspections made prior to December 6, 1911, belong to the state, and that the other fees collected belong to the persons who paid them.

[4] We are asked to order that the money in the hands of the clerk belonging to the state be appropriated, so far as necessary, to the payment of the costs of the case for which the state is liable. We think such an order would be beyond our authority. The

statute provides that all fees collected for grain inspection shall be turned into the state treasury, forming a fund which has been appropriated by the Legislature to the payment of the expenses of the grain department. Laws of 1911, c. 199, §§ 2, 3. The clerk of the court was made the temporary custodian of the money collected to insure its being paid to the persons found to be entitled to it. The court has no control over it except to see that such purpose is carried out. The costs of this litigation, so far as they fall upon the plaintiff may properly be regarded as expenses of the department, but payment from the revolving fund can be made only upon vouchers verified by the chief inspector. It is unfortunate that those who are entitled to fees for services rendered in the case, for which the state is liable, must submit to delay in receiving what is justly due them, but the hardship results from the necessities of the case. Payment of the state's obligations can only be made as provided by statute, and since no specific appropriation has been made covering these expenses, the persons entitled to the fees must await the further action of the Legislature, unless arrangement can be made for their payment from the contingent fund of the department, or from some other contingent fund already appropriated.

[5] In some instances fees have been collected from the owners for compulsory inspection of grain which has passed into other hands and afterwards gone into a public elevator, being received there upon the prior inspection. It has been suggested that in such cases the fees should be turned into the state treasury. We think however that as the fees were collected without authority of law they should be returned to the person from whom they were received, leaving the state to settle with the managers of the elevators.

It is said that in some instances the owner of grain which has been inspected over his objection has derived an advantage from the certificate of inspection. The suggestion is made that in such case the fee ought not to be returned to him, and that to cover this situation the fees in the hands of the clerk should be refunded only upon the surrender of the certificates. The collections of doubtful fees were allowed with the understanding that so far as they were unauthorized they should be returned. No condition was made that the certificates of inspection should be preserved or surrendered, and in the absence of a prior notice of such a requirement we do not think it could justly be insisted upon at this time.

The clerk will pay to the state treasurer the fees collected from the five elevators indicated in the opinion for services rendered prior to December 6, 1911, and will return the other fees to the persons who paid them.

ATCHISON, T. & S. F. RY. CO. v. BOARD OF COM'RS OF RENO COUNTY.

(Supreme Court of Kansas. July 6, 1912.)

Appeal from District Court, Reno County.

Action by the Atchison, Topeka & Santa Fe Railway Company against the Board of Commissioners of Reno County. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

E. T. Foote and Prigg & Williams, all of Hutchinson, for appellant. W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and J. S. Simmons, of Hutchinson, for appellee.

PER CURIAM. The appellee sued to recover certain taxes paid under protest. The court sustained a demurrer to the answer. From this ruling the county has appealed.

The first cause of action is based upon the claim that in 1908 the county clerk raised the rate of taxation for state purposes from .9 mill on the dollar to .925 mill on the dollar, resulting in appellee being obliged to pay an additional amount upon its property. The answer justified the action of the clerk on the ground that it became necessary to provide for the payment of state taxes which had become delinquent in former years. The appellee now concedes that it was error for the court to sustain the demurrer to this part of the answer because of the provisions of section 6, c. 199, Laws of 1885 (Gen. Stat. 1909, § 9515), and previous decisions of this court. *Railway Co. v. Clark*, 60 Kan. 831, 58 Pac. 561; *Harper County v. Cole*, 62 Kan. 121, 61 Pac. 403; *Crebbin v. Weber*, 71 Kan. 445, 80 Pac. 977.

The answer to the second and third causes of action admits that Reno county for the years 1907 and 1908 levied a tax for the poor fund in addition to the amount of tax it was permitted to levy for general purposes, and the appellant asks us to reconsider and overrule the decision in *A. T. & S. F. R. Co. v. Wilhelm, Treas.*, 33 Kan. 206, 6 Pac. 273, holding that taxes levied for the support of the poor are to be regarded as current expenses of the county, and are limited by the general limitation as to amount that can be raised for general purposes, and the decision in *K. C., T. & W. Rld. Co. v. Albright, Treas.*, 33 Kan. 211, 6 Pac. 276, approving the former ruling. The appellant's argument would be of force as an appeal to the Legislature for a change in the statute, but it has failed to convince us that the former decisions, which have been followed for 27 years, should be overturned.

The judgment will be reversed, and the cause remanded, with directions to overrule the demurrer to the defense set up to the first cause of action, and for further proceedings in accordance with these views.

CHANUTE WINDOW GLASS CO. v. PIERCE.

(Supreme Court of Kansas. July 6, 1912.)

Appeal from District Court, Neosho County.

Action by the Chanut Window Glass Company against W. A. Pierce. Judgment for plaintiff, and defendant appeals. Affirmed.

T. F. Morrison, of Chanute, and D. R. Hite, of Topeka, for appellant. Farrelly & Evans, of Chanute, for appellee.

PER CURIAM. The district court properly construed the written instruments which state the engagements of the parties. The defendant desired to develop the gas resources of his land, and the plaintiff loaned him money to do

so, agreeing to accept payment in gas; but the defendant agreed to prosecute development work by drilling additional wells whenever the requirements of the plaintiff demanded. The requirements of the plaintiff demanded additional wells, the defendant failed to drill them, gas was not produced and sold according to the contract, and the note matured under the provisions of the supplemental agreement.

It is not necessary to discuss the assignments of error seriatim. Even if the third finding of fact be based upon an erroneous computation, the validity of the conclusion of law is not affected. A carbon impression of a letter written on a typewriter, made with the same stroke of the keys as the companion impression, is an original. It is not material which one is mailed and which one retained by the writer, and either one may be offered as primary evidence of the contents of the letter.

The judgment of the district court is affirmed.

STATE ex rel. DAWSON, Atty. Gen., v. CITY OF ATTICA.

(Supreme Court of Kansas. July 6, 1912.)

Appeal from District Court, Harper County. Action by the State, on the relation of John S. Dawson, Attorney General, against the City of Attica. Judgment for relator, and defendant appeals. Affirmed.

E. C. Wilcox, of Anthony, for appellant. John S. Dawson, of Topeka, and T. A. Nofziger, of Anthony, for appellee.

PER CURIAM. This court agrees with the trial court that the purpose of the mayor and council was to take into the city all of Byrnes & McIntire's addition. That was the "territory sought to be added." That territory was not so subdivided as to bring it within the power conferred by the statute. Under the decision in *Stewart v. Adams*, 50 Kan. 568, 32 Pac. 912, those tracts which were specifically described, and which were subdivided into lots or parcels of five acres or less—Berry's addition, Alcon's addition, Walker's addition, etc.—became a part of the city. The same would be true of such blocks in Byrnes & McIntire's addition as contained five acres or less, if the blocks in that addition had been named in the ordinance. Under the circumstances, however, the status of the addition was not affected.

The judgment of the district court is affirmed.

IRVIN v. METROPOLITAN ST. RY. CO.
et al.

(Supreme Court of Kansas. July 6, 1912.)

Appeal from Court of Common Pleas, Wyandotte County.

Action by C. A. Irvin against the Metropolitan Street Railway Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Angevine, Cubbison & Holt, of Kansas City, for appellant. O. L. Miller, C. A. Miller, and Samuel Maher, all of Kansas City, for appellees.

PER CURIAM. In an action to recover for personal injuries sustained by appellant while alighting from a street car, the jury returned a verdict in favor of the railway company. The negligence relied on was the starting of the car while appellant was in the act of alighting from it. On what appears to be sufficient evidence this issue was determined

against appellant. The only objections urged here are those made against the instructions.

In one the court spoke of what would be the result if appellant offered testimony in regard to getting off the car while it was in motion, where such testimony was not contradicted by the evidence of the defendant. Since the plaintiff had not offered any such testimony, the reference to it was, of course, a mistake; but as she testified positively that the car was standing still when she started to alight, the statement could not have misled the jury or prejudiced her.

Nor was there material error in the instruction holding it to be the duty of the company to hold a car still for a reasonable and sufficient length of time to allow those who desired to alight to do so. In it there was a statement that, if the car was stopped for that purpose, it was the duty of the company to not start it forward "until the plaintiff had a reasonable opportunity to alight therefrom." It is argued that this carried the idea that the car might be started while the passenger was alighting, provided she did not get off in a reasonable time. The entire charge shows plainly enough that this was not the theory of the court; and the jury could not have drawn the inference that the court meant that those in charge of the car might start it forward, even though appellant was then seen to be in the act of alighting.

Other objections are made to the instructions, which have been examined; but in none of them do we find any material error.

The judgment is affirmed.

CURTIS v. McCARTHY.

(Supreme Court of Colorado. July 1, 1912.)

1. MECHANICS' LIENS (§ 132*)—TIME OF FILING—COMPLETION OF WORK.

Work done by the contractor, at the request of the owner's agent, in order to complete the contract, putting in a new sink to take the place of a defective one, and odds and ends of work not completed, is a continuation of the previous work done under the contract as regards time for filing the lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190-207; Dec. Dig. § 132.*]

2. PRINCIPAL AND AGENT (§ 23*)—AGENCY—EVIDENCE.

A finding that the son of the owner to whom alone notice of intention to claim a lien was delivered was the recognized agent of the owner in the transaction is warranted by the admission of the owner in the pleadings that the contractor gave him the notice of intention, and evidence of the son being in possession of the property, and being engaged in accepting certain of the work and refusing to pay for other work, and of other circumstances.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 41; Dec. Dig. § 23.*]

3. MECHANICS' LIENS (§ 33*)—NATURE OF IMPROVEMENTS—WATER PIPES.

Under Rev. St. 1908, § 4025, providing for what mechanics' liens may be had, lien may be had for iron pipe for conducting water from a reservoir to a dwelling; all being on the land on which the building is constructed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 32, 33, 38; Dec. Dig. § 33.*]

Error to District Court, Garfield County; John T. Shumate, Judge.

Action by M. J. McCarthy against Leonard E. Curtis, Sr. Judgment for plaintiff. Defendant brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

J. R. Moore, of Colorado Springs, for plaintiff in error. Darrow & Rowe, of Glenwood Springs, for defendant in error.

HILL, J. Action for the enforcement of a mechanic's lien by a subcontractor and materialman for the performance of certain work and the furnishing of certain plumbing material. A personal judgment was entered against the original contractor for \$337.99, which was declared a lien against the property and foreclosure order. The owner brings the case here for review upon error.

It is claimed, first, that the lien was not filed in apt time; second, that the notice was not served upon the owner or his authorized agent as required by the lien act; third, that the plaintiff was not entitled to a lien for certain iron pipes furnished which were used to conduct the water to the pipes in the dwelling house and which were connected therewith.

[1] The lien was filed November 14, 1910. There is evidence that the last work done and material furnished by the contractor was on the preceding 15th day of October. This consisted of inserting a new sink back to take the place of a defective one, together with some other odds and ends in connection with the work that had not been finished. There is also evidence which discloses that the contractor and the agent of the owner refused to accept the work of the plumber until October the 15th, that their excuse was that the sink back was broken, and that it would have to be replaced before there would be any settlement. There is nothing which discloses that the furnishing and placing in position of the new sink back and the supplying of certain other omissions required by the terms of the contract were delayed for the purpose of extending the time within which to file the lien. The matters were done at the demand of the contractor and the agent of the owner. The court found that the date of the completion of these items was the date when the last work was done and the last material furnished. There is evidence to support this contention. Under such circumstances as above stated, the defendant cannot be heard to say that this work, done at the request of his agent in order to complete the contract, was not a continuation of the previous work done under the same contract. *Stidger v. McPhee*, 15 Colo. App. 252, 62 Pac. 332; *Lichty v. Houston Lbr. Co.*, 39 Colo. 53, 88 Pac. 846; *Rieflin v. Grafton*, 63 Wash. 387, 115 Pac. 851; *Conlee v. Clark*, 14 Ind. App. 205, 42 N. E. 762, 56 Am. St. Rep. 298; *McIntyre v. Trautner*, 63 Cal. 429.

[2] The notice of intention to claim a lien was served upon Leonard E. Curtis, Jr., the son of the owner, instead of the owner. It is claimed that the evidence is insufficient to show that he was the agent of his father,

and in this respect it fails to show a compliance with the statute. In the pleadings the defendant owner admitted that the plaintiff, McCarthy, gave him the notice of his intention to file a mechanic's lien, and that thereafter the plaintiff did file such a lien. The evidence discloses that the only notice served was that delivered to Curtis, Jr.; that the same consisted of a copy of the plaintiff's lien claim statement. Curtis, Sr., by his pleadings, admits receipt of the notice which was through service upon his son. This, to a certain extent, could be construed as admitting the agency, but, outside of this, there is testimony of facts, circumstances, and transactions which tend to establish the agency and the ratification of all such acts by the father. The son was in possession of the property. He was engaged in the acceptance of certain work upon the building and the refusal to pay for other work and other circumstances, when considered as a whole, which would justify the conclusion of the trial court that he was the recognized agent of the father in this transaction. We find no prejudicial error in this respect.

[3] The iron pipe for which the plaintiff claims no lien can attach was used for the purpose of conducting water from a reservoir to the house for domestic purposes used therein and thereabout. The distance of the reservoir from the house is not given, but from the amount of the bill it could not be far. The land upon which the building was constructed, upon which the lien was also claimed, consisted of about 20 acres. It was in the country. It is not contended that any of this pipe was used beyond the boundaries of this land. At the trial it was admitted that the material was furnished for the purposes alleged. No objections were made in the pleadings or otherwise to their all being included in the one lien and suit brought to foreclose accordingly. The land and buildings were both held for their payment. Under such circumstances, we are of opinion that under the provisions of general section 4025, Revised Statutes 1908, the plaintiff was entitled to his lien for the entire amount. *Edwards v. Derrickson*, 28 N. J. Law, 39; *Ozark v. Adams*, 73 Ark. 227, 83 S. W. 920; *Crane Co. v. Edworth Hotel, etc., Co.*, 121 Mo. App. 209, 98 S. W. 795.

The judgment is affirmed.

Affirmed.

MUSSER and GABBERT, JJ., concur.

HUMPHREY v. OGDEN.

(Supreme Court of Colorado. July 1, 1912.)

1. HUSBAND AND WIFE (§ 4934*)—INTER VIVOS—VALIDITY.

A gift by a wife to her husband of personalty, evidenced by bill of sale, executed and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

delivered by her, is valid, without a manual delivery by her of the property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 251, 256-260; Dec. Dig. § 49½.*]

2. GIFTS (§ 9*)—INTER VIVOS—PROPERTY NOT IN EXISTENCE.

Property, to be the subject of a gift inter vivos, must be in existence at the time of the making of the gift; and where a bill of sale evidencing a gift does not purport to convey personally subsequently acquired by the donor, subsequently acquired property does not pass under the gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 6, 8; Dec. Dig. § 9.*]

Error to District Court, Larimer County; Harry P. Gamble, Judge.

Action by Mabel G. Humphrey, as administratrix of Addie Ogden, deceased, against Albert B. Ogden. There was a judgment for defendant, and plaintiff brings error. Reversed in part, and remanded, with directions.

Fred W. Stow, of Ft. Collins, and Homer S. Stephens, of Eaton, for plaintiff in error. L. D. Thomason, of Ft. Collins, for defendant in error.

GABBERT, J. The subject-matter of controversy is certain articles of personal property, which plaintiff in error contends are the property of the estate of Mrs. Ogden, deceased, while defendant in error claims they belong to him. This issue of ownership was found in favor of the defendant, and judgment entered accordingly. To review this judgment the administratrix has brought the case here on error.

Defendant in error and Mrs. Ogden were husband and wife. About two months prior to her death, Mrs. Ogden gave her husband all her household goods. As evidencing this gift, she executed and delivered to him a bill of sale for all household goods belonging to her, and all her right, title, and interest in and to any other goods and chattels, of whatever kind and nature. Subsequent to the execution of the bill of sale, she purchased with her own money several articles of household furniture, and toilet and glassware, of the value of between \$60 and \$70. Plaintiff in error, as administratrix of the estate of Mrs. Ogden, brought suit against defendant to recover possession of the household furniture belonging to Mrs. Ogden when the bill of sale was executed and the personal property thereafter acquired by her above referred to. These articles constitute the subject of controversy between the parties.

[1] On behalf of the administratrix it is contended, so far as necessary to consider, that she should have been awarded a verdict and judgment, for the reasons (1) that the household furniture in existence when the bill of sale was executed was never delivered to the defendant; and (2) that the

subsequently acquired articles of personal property did not pass by the bill of sale. There is no claim upon her part that the property in controversy is necessary to be disposed of for the purpose of paying debts against the estate. In such circumstances, we think the testimony is sufficient to support the verdict and judgment rendered, in so far as it covered the personal property in existence at the time the bill of sale was executed and delivered. As applied to the testimony and the facts, the rule is that a gift of personal property, evidenced by a written instrument executed and delivered by the donor, is valid, without a manual delivery of the property. 20 Cyc. 1197.

[2] The only evidence to support the claim of the defendant that the property purchased subsequent to the execution and delivery of the bill of sale was the subject of a gift is that instrument. It did not purport to convey any property, except what was in existence at the time it was executed. Property, in order to be the subject of a gift inter vivos, must be in esse at the time the attempted gift is made. 20 Cyc. 1212.

The judgment of the district court is set aside, in so far as it awards the defendant the articles purchased by Mrs. Ogden after the execution of the bill of sale, and the cause remanded, with directions to enter judgment in favor of the plaintiff for these articles.

Reversed in part, and remanded, with directions.

MUSSER and HILL, JJ., concur.

KELSEY v. NORRIS.

(Supreme Court of Colorado. July 1, 1912.)

1. VENDOR AND PURCHASER (§ 224*)—BONA FIDE PURCHASER—QUITCLAIM DEEDS.

A purchaser for value under a quitclaim deed is as much within the protection of the recording act (Rev. St. 1908, § 694) as a purchaser under a warranty deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 469-473; Dec. Dig. § 224.*]

2. VENDOR AND PURCHASER (§ 219*)—PRIORITIES BETWEEN PURCHASERS—BURDEN OF PROOF—UNRECORDED DEEDS.

In quieting title, it is upon one claiming under an unrecorded deed to show any matters which avoid the effect of a previously recorded deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 453-460; Dec. Dig. § 219.*]

Error to District Court, Phillips County; H. P. Burke, Judge.

Action by Harrison Norris against W. D. Kelsey. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

John S. Bennett, of Holyoke, and John F. Mail, of Denver, for plaintiff in error. Munson & Munson, of Sterling, for defendant in error.

BAILEY, J. Harrison Norris, plaintiff in possession, brought suit, praying to have his title to the northwest quarter of section 5, township 6 north, range 43 west, in Phillips county, quieted, against the defendant, W. D. Kelsey. He alleges ownership in fee, and that defendant, without lawful right, claims an adverse title thereto. The defendant answered, denying all allegations of the complaint, except as to his claim of an adverse interest in the land, and sets out that he is the unqualified owner thereof, holding title by mesne conveyances from the United States, and likewise prayed that his title be quieted. There was no further plea. The facts are undisputed. The common source of title is John W. Owen, patentee from the United States. On August 13, 1903, by warranty deed, Owen conveyed the premises to the plaintiff. In that deed Charity D., wife of John, joined. This deed was recorded January 2, 1906. On December 16, 1905, Owen, by quitclaim deed, conveyed the same property, for a recited consideration of \$100, to Kelsey. This deed was recorded December 19, 1905. Norris was in possession of the land at the time of the commencement of the suit, but not at the time the defendant bought the land and recorded his deed; it was then vacant and unoccupied. Upon the issue of ownership thus tendered, and the facts as above set forth, the court found for plaintiff, and entered a judgment and decree quieting title in him, to recover which the defendant brings the case here on error.

[1] The question is, Did the subsequently executed quitclaim deed of Owen to Kelsey, by virtue of its prior recordation, have the effect of conveying to him the title to the land by force of the registry act, and thereby render inoperative the prior, but subsequently recorded, warranty deed made by the same grantor to Norris?

By section 694, Revised Statutes 1908, it is provided:

"All deeds, conveyances, agreements in writing of, or affecting title to real estate or any interest therein, and powers of attorney for the conveyance of any real estate or any interest therein, may be recorded in the office of the recorder of the county wherein such real estate is situate, and from and after the filing thereof for record in such office and not before, such deeds, bonds and agreements in writing shall take effect as to subsequent bona fide purchasers and encumbrancers by mortgage, judgment or otherwise not having notice thereof."

In *Bradbury et al. v. Davis*, 5 Colo. 235, it was held:

"A junior deed, if first recorded, has priority over a deed of older date subsequently recorded, unless the grantee in the later conveyance had notice of the prior unrecorded deed. * * * A quitclaim deed is as effectual to pass the title to real estate as any other, and the purchaser accepting

such deed, without notice of prior rights, will be as fully protected as if his deed contained full covenants of warranty."

This proposition is reaffirmed in *Houlahan v. Finance Cons. Mining Co.*, 34 Colo. 365, 82 Pac. 484, *Delta County L. & C. Co. v. Talcott*, 17 Colo. App. 316, 68 Pac. 985, and *Hallett v. Alexander*, 50 Colo. 37, 114 Pac. 490, 84 L. R. A. (N. S.) 328. These decisions establish, beyond controversy, the fact that a purchaser for value, taking title by quitclaim deed, is as much within the protection of the recording acts as a purchaser taking title through warranty deed.

[2] If the plaintiff wished to rely upon the fact, as a defense, that the defendant had notice of his prior unrecorded deed, it was incumbent upon him to establish it. This is equally true of any other fact or facts, which, if disclosed, would vitiate the quitclaim deed. The subsequent purchaser recorded his deed first. He found a clear and perfect title of record in his grantor, and had a right, the land being vacant, to rely upon such record. His deed recited a valuable consideration, and contained all the other essentials of a valid conveyance. The deed was prima facie evidence of its recited facts. It is upon the one claiming under the unrecorded deed to show matters, if such there are, which avoid and overcome the effect of the previously recorded deed. To hold otherwise would nullify the recording statute. To adjudge the unrecorded warranty deed paramount to the recorded quitclaim, where, as here, upon the question of the bona fides without notice of the purchaser under the latter deed, the record is silent, would be to say that the statute, which declares an unrecorded deed shall have no effect as to subsequent bona fide purchasers without notice, is a vain and empty thing, because an instrument which the statute renders of no effect would thus become a live and effective conveyance, against one conclusively presumed to be such a purchaser, in the absence of a contrary showing.

In addition to the authorities cited from this court to support the conclusion here reached, we also direct attention to the following from other states: *Ryder v. Bush*, 102 Ill. 338; *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 281; *Lowden v. Wilson*, 233 Ill. 340, 346, 84 N. E. 245; *Delano v. Bennett*, 90 Ill. 533; *Runyon v. Smith* (C. C.) 18 Fed. 579, 581; *Strong v. Whybark*, 204 Mo. 341, 102 S. W. 968, 12 L. R. A. (N. S.) 240, 120 Am. St. Rep. 710; *Babcock v. Wells*, 25 R. I. 23, 54 Atl. 596, 105 Am. St. Rep. 848; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Fallass v. Pierce*, 30 Wis. 443; *Mullins v. Butte Hdw. Co.*, 25 Mont. 525, 65 Pac. 1004, 87 Am. St. Rep. 430; *Bannard v. Duncan*, 79 Neb. 189, 112 N. W. 353, 126 Am. St. Rep. 661; and *Mowry v. Mowry*, 103 Cal. 314, 37 Pac. 398.

The judgment is reversed and the cause

remanded for further proceedings in conformity with the views herein expressed. Judgment reversed and cause remanded.

MUSSER and WHITE, JJ., concur.

(63 Colo. 214)

CLARKE v. PEOPLE.

(Supreme Court of Colorado. June 3, 1912.)

1. CRIMINAL LAW (§ 1167*)—APPEAL AND ERROR—HARMLESS ERROR—INFORMATION.

Where accused was convicted and sentenced under three counts of an information, and the sentences were the same and run concurrently, improper joinder of the counts was harmless, where his conviction under one count was proper and legal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103-3106; Dec. Dig. § 1167.*]

2. CRIMINAL LAW (§ 1167*)—APPEAL AND ERROR—HARMLESS ERROR—INFORMATION.

The omission of the word "feloniously" from one of three counts of an information was harmless error, where the conviction was sustainable under the other counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103-3106; Dec. Dig. § 1167.*]

3. FALSE PRETENSES (§ 7*)—WHAT CONSTITUTES.

Where a clairvoyant, by a false and fraudulent representation made with knowledge of its falsity and with intent to deceive and defraud, induced a woman to place in his care for her own protection money which he did not repay, under promise that he would repay her with interest, he was guilty of false pretenses.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.*]

4. CRIMINAL LAW (§ 371*)—ADMISSIBILITY OF EVIDENCE—SIMILAR TRANSACTIONS.

In the trial of a clairvoyant for obtaining money by false pretenses, evidence that he had been engaged in practicing similar cheats with other persons was competent as tending to prove a criminal intent, where the other transactions were so connected in time and nature that the same motive could be imputed to all.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

5. CRIMINAL LAW (§ 1169*)—APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In the trial of one for false pretenses, the admission of incompetent evidence showing other transactions by the defendant which were honest and legitimate was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

John Clarke was convicted under an information charging false pretenses, larceny, and confidence game, and he brings error. Affirmed.

J. Grattan O'Bryan, of Denver (Mel Emerson Peters, of Denver, of counsel), for plaintiff in error. Benjamin Griffith, Atty. Gen., and Charles O'Connor, First Asst. Atty. Gen., for the People.

GABBERT J. Plaintiff in error was charged in one information, in three counts, with false pretenses, larceny, and confidence game. He was also charged in four informations with the crime of confidence game, based on four different transactions. All these informations were consolidated for trial. The accused was found guilty upon each, and separate judgments and sentences pronounced, the sentences running concurrently.

[1] It is urged that the counts in the information containing three could not properly be joined, although they were based upon the same transaction, for the reason that the accused could not be guilty of both false pretenses and larceny. This proposition need not be determined. The sentences are the same, and run concurrently, and, even though the accused was erroneously convicted on some of the counts, he has not been prejudiced, if he was properly and legally convicted on any count, a question to be considered later. *Imboden v. People*, 40 Colo. 142, 90 Pac. 608.

[2] The several charges of the commission of the confidence game did not, as originally drawn, use the word "feloniously" in specifying the offense. This omission, it is claimed, rendered the informations with respect to the charge of the confidence game fatally defective. During the progress of the trial the court permitted the prosecution to amend the informations by inserting the word "feloniously." If, as contended, the absence of "feloniously" rendered the informations defective, and this defect could not be cured by amendment, then neither of these propositions need be considered, if it appears that defendant was legally convicted of the charge of false pretenses, or larceny.

[3] The sufficiency of the testimony to sustain a conviction under either information or count is challenged. We need only consider the one relating to the charge of false pretenses. As applicable to this case, a false pretense is a false and fraudulent representation made with knowledge of its falsity, with intent to deceive and defraud, and which is adapted to induce the person to whom it is made to part with something of value. 12 Ency. 804. The pretense must be calculated to deceive according to the ability or capacity of the person to whom it is made to detect the falsehood. *Id.* 816. In brief, the testimony on the subject of false pretenses is to the effect that defendant advertised as a seer and clairvoyant; that this advertisement attracted the attention of the prosecuting witness, who called on him, and, on his representations, as to what he could accomplish as an alleged seer and clairvoyant, and in order, as he claimed, to prevent another from securing her money, induced her to loan, or let him have it, which she did from time to time, relying upon his repre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

sentations that it was necessary to do so for her own protection, and that it would be repaid her, with interest. In this way defendant obtained from her about \$175, only 75 cents of which was ever repaid. There can be no question regarding the falsity of the representations made by the defendant. He certainly knew them to be false, and made them with intent to deceive and defraud the witness, and thereby did deceive and defraud her; consequently, we conclude the testimony is ample to sustain a conviction for false pretenses.

[4] Error is assigned upon the ruling of the trial court permitting testimony of similar transactions with other persons about the same time to be introduced. It was competent to show that defendant had been engaged in practicing like, or similar, cheats, as tending to prove a criminal intent, where, as in this instance, the other transactions were so connected in point of time, and so similar, that the same motive could be imputed to them all. *Housh v. People*, 24 Colo. 262, 50 Pac. 1036; *Warford v. People*, 43 Colo. 107, 96 Pac. 556. The court expressly limited this character of testimony to the question of intent, and also advised the jury that testimony of other acts which were not similar should by them be excluded.

[5] There was testimony regarding matters which the court on the objection of the defendant should have excluded, which, however, in the circumstances of this case, it appears was not prejudicial. The testimony of the prosecuting witness was not disputed, except inferentially, by the defendant, but his version of the transaction shows that he practiced deception to obtain her money, or, in effect, corroborates her statement relating to the representations made by him which induced her to part with her money. Perhaps some of the other transactions detailed were bona fide. Testimony of this character was not competent, but certainly the defendant could not be prejudiced by proof of honest and legitimate transactions. *State v. Brady*, 100 Iowa, 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER and HILL, JJ., concur.

PEOPLE v. McDONALD.

(Supreme Court of Colorado. July 1, 1912.)

1. FORGERY (§ 14*)—ELEMENTS—INJURY FROM FORGERY.

Under the statute making the false making or forging of a check with intent to defraud any person or the attempt to pass such check as genuine with intent to defraud a forgery, a person making or attempting to pass such a check with a fraudulent intent is guilty of for-

gery, although no person is actually defrauded thereby.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 49; Dec. Dig. § 14.*]

2. FORGERY (§ 19*)—UTTERING FORGED INSTRUMENT.

Where a person attempted to have cashed a forged check payable to the order of another, the fact that the check was not indorsed did not render the act any less forgery, and the exclusion of the check from evidence on the ground that it had no legal efficacy and was not the subject of forgery was error.

[Ed. Note.—For other cases, see *Forgery*, Dec. Dig. § 19.*]

3. FORGERY (§ 38*)—INTENT—EVIDENCE.

In a prosecution for attempting to pass a forged check payable to the order of another than accused, the fact that the check was not indorsed bore on the question of intent, but was not conclusive, and the intent could be proved by other evidence.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 108; Dec. Dig. § 38.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

William McDonald was acquitted of forgery, and the People bring error. Reversed.

WILLS v. ELLIOTT, Dist. Atty., John Horne Ohlles, Chief Deputy Dist. Atty., and Dewey C. Bailey, Jr., Deputy Dist. Atty., for the People.

GARRIGUES, J. 1. In this criminal case the defendant is charged in the first count of the information with attempting to pass an alleged forged bank check, and in the second count with having forged the instrument, which is as follows: "Denver, Colo., Dec. 8th, 1909. No. 816. The Central National Bank of Denver. Pay to the order of Richard Wells \$20.95/100 twenty (20) 95/100 dollars. J. A. Osner." December, 1909, defendant entered the saloon of Peterson, presented the check to his bartender, and wanted to get it cashed. The matter was referred to Peterson, who, after some conversation with the defendant, told him the signature was not genuine, and turned him over to an officer without giving him any money and without the check being indorsed.

After identifying the check and showing the circumstances under which the defendant tried to cash it, the people offered it in evidence. Defendant objected on the ground that it had no legal efficacy, and was not the subject of forgery because it was not indorsed. The objection was sustained and the district attorney, after stating that he could make no case without the check in evidence, and the court, still refusing to admit it, rested. Whereupon the court, on defendant's motion, directed the jury to return a verdict of not guilty, and discharged him. The people bring the case here to review the action of the district court.

[1] 2. Our statute provides that every person who shall falsely make or forge any check for the payment of money with intent

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

to prejudice, damage, or defraud any person, or who shall attempt to pass as true and genuine any such check, knowing it to be forged, with intent to prejudice, damage, or defraud any person, shall be deemed guilty of forgery. This statute embraces two definitions of forgery: First, the making of a false check with intent to prejudice, damage, or defraud another; and, second, attempting to pass it as true and genuine, knowing it to be false, with intent to prejudice, damage, or defraud another. It will be unnecessary in this opinion to repeat these definitions. For brevity we will speak of making the check, or attempting to pass it. Assuming that the check was not true and genuine, if the defendant made it with the above intent, he was guilty of forgery when he made it. If he attempted to pass it, he was guilty of forgery when he tried to do that. It was not necessary to constitute a completed crime that the check should be indorsed, cashed, or passed, or that any one should be actually prejudiced by it. The crime did not consist in realizing on the fraud, but in making the false check or attempting to pass it. 2 Bish. Crim. Law, § 538.

[2] 3. The district court held there was no forgery because the check was not indorsed, and refused to admit it in evidence. It was useless for the prosecution to proceed; no case could be made without the check in evidence. In this ruling the court was clearly in error. It was not necessary for the people to either allege or prove an indorsement of the check. *Santolini v. State*, 6 Wyo. 110, 42 Pac. 746, 71 Am. St. Rep. 906; *Leslie v. State*, 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2; 1 Bish. Crim. Law, § 572; 2 Bish. Crim. Law, §§ 535, 638. In the *Santolini* case, it is said: "It does not seem from the authorities that it is necessary, either in any indictment for forgery or for uttering forged paper, or for passing the same, to set out any indorsements thereon, to show the instrument to be of apparent legal efficacy; it is sufficient to charge that it is a forged writing, was uttered or passed with knowledge of the forgery, and with intent to defraud."

[3] Intent is a most material element entering into the crime of forgery, without which there can be no conviction. Indorsement is a means of collection, and might be very satisfactory and conclusive evidence of intent, but the intent of the defendant did not necessarily depend upon indorsement. The prosecution, if given an opportunity, might have shown it to the satisfaction of the jury beyond a reasonable doubt by other evidence. Because the forgery was detected before indorsement or before any one was prejudiced does not render the act any the less criminal. It was for the jury to say, in connection with all the evidence in the case, what effect they would give to defendant's

unexplained possession of, and attempt to pass a lately forged check, or, if he made any explanation, whether it was reasonable.

4. The court relied upon *Raymond v. People*, 2 Colo. App. 329, 30 Pac. 504, in holding that the check had no legal efficacy, and no one could be prejudiced by it until it was indorsed. But that is not the test. The test is whether it had apparent legal efficacy and was capable of being used so as to prejudice others. The majority opinion in that case held the city warrant was void and absolutely worthless for all purposes on its face, because it failed to state a mandatory requirement of the statute, and for this reason could not be the subject of forgery; that is, that the warrant showed upon its face that it could not be used to prejudice any one. There was no material difference of opinion on the law of forgery. It was over the use that might be made of the warrant to defraud the city that the judges differed. This check violates no statute and is not void and worthless on its face for all purposes. On the contrary, it appears to be a good and valid check, and may be used to prejudice another if it is not genuine. It is an ordinary bank check, in general use to draw against an account in a bank, and, if genuine, creates a liability. If a forgery, it might be used to prejudice, damage, or defraud others. It was not an innocent piece of paper having no tendency to deceive or prejudice any one. It was possible for it to be used to prejudice others, and, if not genuine, was a forgery without indorsement. It was the making or attempting to pass, and not the indorsement of the check, that constituted the crime. Even if it is true that it could not actually prejudice others until it was indorsed, that makes no difference, if it was capable of being used by indorsement for that purpose.

Reversed.

MUSSER and HILL, JJ., concur.

CARTWRIGHT et al. v. FRESE.

(Supreme Court of Colorado. July 1, 1912.)

VENDOR AND PURCHASER (§ 322*)—NATURE OF CONTRACT—RIGHT TO SUE.

Plaintiffs agreed in writing to sell certain land to defendant subject to the approval of the owner, who indorsed her approval on the contract. A deed running from the owner to defendant was delivered, whereupon defendant paid all the purchase price named in the contract except \$181.19, which was claimed by plaintiffs. *Held*, that the transaction was a sale between plaintiffs and defendant, and the owner having received her full price for the property, which was less than the purchase price mentioned in the contract, plaintiffs were entitled to recover the balance from the purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 944-947; Dec. Dig. § 322.*]

Error to County Court, City and County of Denver; George W. Dunn, Judge.

Suit by George E. Cartwright and others against Louis C. Frese. From a judgment denying a directed verdict for plaintiffs, they bring error. Reversed and remanded, with instructions.

Stokes & Sherman, of Denver, for plaintiffs in error.

MUSSER, J. The plaintiffs in error brought suit before a justice of the peace against the defendant in error for what they claimed was the balance due on the purchase price of real estate. A contract had been entered into between the plaintiffs and defendant similar to the one construed in Cartwright v. Ruffin, 43 Colo. 377, 96 Pac. 281. A deed running from the owner to the defendant was delivered to the latter, and he paid all the purchase price named in the contract except the amount of \$181.19 claimed by the plaintiffs. The owner indorsed her approval of the contract on the back with a receipt for \$50 on the day following its execution by plaintiffs and defendant. There is no dispute of any material fact. Plaintiffs claimed that the balance of the purchase money was theirs, to be recovered by them. The defendant claimed that the plaintiffs were agents of the owner, and that the balance belonged to and was to be recovered by the owner. The owner made no claim to the money; she having received her price in full for the property, which was less than the purchase price mentioned in the contract.

After all the testimony had been introduced, the plaintiffs moved that the court instruct the jury to bring in a verdict in their favor, which was denied. A verdict for the plaintiffs should have been directed as prayed. There is no necessity for again construing the contract unless the opinion in the case of Cartwright v. Ruffin, supra, is to be reconsidered, and there is no reason why it should be. The contract was one of purchase and sale between the plaintiffs and defendant, and the plaintiffs were clearly entitled to the balance of the purchase money. The judgment is therefore reversed.

The defendant was to pay the purchase price when the deed was delivered to him. That date does not clearly appear from the evidence. The suit in the justice court was commenced on October 4, 1909, and the money was then due. The cause is therefore remanded, with instructions to the county court to vacate its judgment and to enter another in favor of the plaintiffs for the sum of \$181.19, together with legal interest thereon from the 4th day of October, 1909, and costs.

Reversed and remanded.

GABBERT and HILL, JJ., concur.

CARNAHAN v. HUGHES.

(63 Colo. 312)

(Supreme Court of Colorado. July 1, 1912.)

1. TAXATION (§ 761*)—TAX DEED—VALIDITY—TIME OF SALE.

A tax deed, showing on its face a sale to the county for taxes on the first day of the general tax sale, is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509-1513; Dec. Dig. § 761.*]

2. TAXATION (§ 761*)—TAX DEED—VALIDITY—SALE EN MASSE.

A tax deed, showing on its face a sale of numerous noncontiguous tracts en masse for a gross sum, is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509-1513; Dec. Dig. § 761.*]

3. TAXATION (§ 805*)—LIMITATION OF ACTIONS—VOID DEED.

Rev. St. 1908, § 5783, providing that no action for the recovery of land sold for taxes shall lie, unless brought within five years after the execution and delivery of the tax deed, is not available against an action on a tax deed void on its face.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

4. TAXATION (§ 805*)—ACTION TO TRY TAX TITLE—LIMITATIONS—STATUTE.

Nor is Rev. St. 1908, § 5733, a defense to an action brought merely to quiet title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

5. ADVERSE POSSESSION (§ 82*)—COLOR OF TITLE—TAX DEED—LIMITATIONS.

The seven-year statute relating to possession of land under color and claim of title does not begin to run in favor of one claiming under a tax deed, unless the deed is recorded seven years before commencement of suit, since the deed before record does not purport to convey title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 468-471; Dec. Dig. § 82.*]

Error to District Court, Kit Carson County; W. S. Morris, Judge.

Action by D. Carnahan against Albert C. Hughes. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

P. B. Godsmann, of Denver, for plaintiff in error.

BAILEY, J. D. Carnahan, as owner in fee, brought suit, on December 31, 1907, against defendant Albert C. Hughes, to quiet title to the northeast quarter of section 8, township 9 south, range 44 west, in Kit Carson county, alleging that the defendant claims an adverse interest therein, which is unfounded and without legal right. The defendant for answer alleges that he is the owner in fee and in possession; denies all averments of the complaint, except as to his claim of ownership; and sets up four separate defenses, the second, third, fourth and fifth, respectively, under various limitation statutes. Also by cross-complaint reliance is had upon the same pleas of limitation, and also upon title under tax deed of date October 22, 1898, recorded on the 27th of November, 1901, praying to have his title quieted.

Plaintiff replied, denying the allegations of the second, third, fourth and fifth defenses, and of the cross-complaint, except that he claimed an interest in the land. He also alleges that the tax deed is void for reasons appearing on its face, in that it shows a sale of the premises for taxes to Kit Carson county on the first day of the general tax sale, and also of non-contiguous tracts of land en masse for a gross sum. At the trial it was stipulated that for ten years prior thereto, and at the commencement of the action, the land was, and yet is, vacant and unoccupied.

Plaintiff deraigned title, through mesne conveyances, from the United States. The defendant offered in evidence, to establish title, the tax deed upon which he counted in his pleadings. It was excluded because void on its face. Then he offered it in evidence to support the plea of the five-year statute of limitation, and for the same reason it was again rejected, and as well when offered in support of his plea, under claim and color of title in good faith, in connection with the payment of taxes for seven years, with possession, because of the stipulation that the land had been during this period, and yet was, vacant and unoccupied. Then he offered it, over objection, and the court admitted it, to support his plea of claim and color of title to vacant and unoccupied land, in connection with proof of the payment of taxes, as he claimed, covering a period of seven years. The court found the issues for the defendant and gave judgment quieting his title, to review which plaintiff brings the case here on error.

Upon the facts, both the limitation pleas, under our respective statutes, of claim and color of title and possession, with payment of taxes for the required time, were insufficient, because, during the entire period, the land was admittedly vacant and unoccupied.

[1-4] The tax deed upon which the defendant relied is plainly void on its face for both reasons assigned: First. It shows a sale to the county for taxes on the first day of the general tax sale; and Second. It shows the sale of numerous non-contiguous tracts en masse for a gross sum. Page v. Gillett, 47 Colo. 289, 107 Pac. 290; Empire R. & C. Co. v. Lanning, 49 Colo. 458, 462, 113 Pac. 491; Hughes v. Webster, 122 Pac. 789; and Clark v. Huff, 49 Colo. 197, 112 Pac. 542. Since this deed is void on its face, the five-year statute of limitation, section 5733, Revised Statutes 1908, was unavailable. Sayre v. Sage, 47 Colo. 559, 108 Pac. 160; Clark v. Huff, supra; Page v. Gillett, supra; and Hughes v. Webster, supra. Nor is that statute a defense to an action such as this, brought merely to quiet title. Munson v. Marks, 124 Pac. 187.

[5] Neither is the plea of the seven-year statute, under claim and color of title made in good faith to vacant and unoccupied land,

a good defense under the facts of the case, because the tax deed had been recorded less than seven years prior to the commencement of the suit. This statute does not begin to run in favor of one claiming under a tax deed until it is recorded. To make the tax deed competent to support the issue tendered it must have been recorded seven years before the suit was begun, because it conveyed no title, and does not purport to do so, until recorded; nor would it, unrecorded, support a claim of color of title. This has been flatly determined in the case of Sayre v. Sage, supra, based upon the authority of Morris et al. v. St. Louis Nat. Bank, 17 Colo. 231, 29 Pac. 802. Hughes v. Webster, supra, reaffirms this principle.

No defense pleaded was established by proof, and the finding and decree for the defendant are without legal warrant. The judgment is reversed and the cause remanded, with instructions to enter judgment for plaintiff.

Reversed and remanded with instructions.

MUSSER and WHITE, JJ., concur.

YOUNG v. PEOPLE.

(Supreme Court of Colorado. July 1, 1912.)

1. CRIMINAL LAW (§ 977*)—SENTENCE—PLEA.

Where, after a plea of nolo contendere, the court ordered the cause to be retired from the docket on payment of all costs, with leave to the people to arrest the defendant at any time and reinstate the cause, such order was not an indefinite postponement of sentence, so long as the term had not expired, and the court could pronounce sentence during the same term while the costs remained unpaid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482, 2483, 2488, 2489, 2492, 2499, 2512; Dec. Dig. § 977.*]

2. CRIMINAL LAW (§ 275*)—PLEAS—NOLO CONTENDERE.

The common-law plea of nolo contendere is allowable, under Rev. St. 1908, § 1982, authorizing criminal trials according to common-law rules, except as otherwise provided.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 635; Dec. Dig. § 275.*]

Error to District Court, Costilla County; Charles C. Holbrook, Judge.

Charles J. Young was convicted of selling liquor without a license, and he brings error. Affirmed.

E. H. Ellithorp, of San Luis, and E. C. Holt and J. W. Davidson, both of Pueblo, for plaintiff in error. Benjamin Griffith, Atty. Gen., and Theodore M. Stuart, Jr., Asst. Atty. Gen., for the People.

GARRIGUES, J. 1. April 4, 1910, three informations were filed in the district court of Costilla county against plaintiff in error, being cases numbered 130, 131, and 132 upon the docket of that court, charging him with selling liquor without a license. April 5,

1910, he pleaded guilty in No. 132, and *nolo contendere* in Nos. 130 and 131, and the court entered an order in No. 131, which, after reciting the withdrawal of the plea of not guilty, and the tender of the plea of *nolo contendere*, which was accepted, is as follows: "And said plea is accordingly now filed, and, the consequences and effects thereof being by the court here fully explained to him, he still persists therein. Thereupon it is ordered by the court that this cause be and the same is retired from the dockets of this court, upon the payment of all costs herein, with leave to the people to have an alias *capias* for the arrest of the said defendant, C. J. Young, at any time, and to reinstate this cause for further proceedings." July 12, 1910, on motion of the district attorney, the court entered an order reinstating the case, and, after examining witnesses as to the aggravation and mitigation of the offense, July 13, 1910, sentenced the defendant to pay a fine of \$200 and the costs on his plea of *nolo contendere*, and he brings the case here for review on error.

[1] 2. The only assignment we think it necessary to consider is the order entered April 5th, when the court accepted the plea of *nolo contendere*. It is claimed it has the effect of an indefinite postponement of sentence, and that the sentence passed July 13th is void on this account, under the rule announced by this court in *Grundel v. People*, 33 Colo. 191, 79 Pac. 1022, 108 Am. St. Rep. 75. In 12 Cyc. p. 354, it is said: "A plea of *nolo contendere*, which is still allowed in some jurisdictions, is an implied confession of the crime charged, and, as regards the case in which it is entered, is equivalent to a plea of guilty, except that it gives the accused the advantage of not being estopped to deny his guilt in a civil action based upon the same facts as he would be upon a plea of guilty. If accepted by the court, sentence is imposed as upon a plea of guilty."

[2] It is a common-law plea, and under section 1982, Revised Statutes of 1908, is allowable in this state. Though a plea of guilty, still we know that, in actual practice in this state, it is generally entered either with the express or tacit understanding of the district attorney that the court may enter an order dismissing the defendant out of court upon the payment of costs. But it is a plea of guilty upon which sentence may be imposed. If the order of the court had been that the defendant should be discharged out of court upon the payment of costs, and the record disclosed that he had complied with the order and was discharged, possibly there might be some merit in the contention that the court could not subsequently impose sentence. But in *State v. Burton*, 113 N. C. 655, 18 S. E. 657, and in *Re Black*, 52 Kan. 64, 34 Pac. 414, 39 Am. St. Rep. 331, it is held that any time during the term at which the de-

fendant was convicted, before execution of any part of the sentence, the court has power to change, modify, or amend its sentence in criminal cases, either in form or substance. This order was that the case be retired from the docket upon the payment of costs, but reserving the right to the people to issue an alias *capias* for the arrest of the defendant and to reinstate the case at any time for further proceedings. "At any time" would, of course, include any subsequent term of the court. If that term of court had been allowed to pass without the defendant being sentenced, it may be, under the doctrine announced by this court in the *Grundel Case*, that the order would have had the effect of an indefinite postponement of sentence. If sentence had been passed at some subsequent term of the court, then the question of indefinite postponement could be raised, and the authorities cited by plaintiff in error would be appropriate.

But in this case the record does not show that the defendant complied with the order by paying the costs and having the case dismissed. A few weeks after the order was entered, but during the same term of court, while the costs were unpaid, the court pronounced sentence upon the plea of guilty. So the order of April 5th did not result in an indefinite postponement of sentence. There was no indefinite postponement, because sentence was passed during the term, which avoids any error that might have arisen on account of indefinite postponement, had the sentence been passed at some subsequent term. The cases cited by plaintiff in error are instances of indefinite postponement of sentence wherein the sentence was passed at a subsequent term, in many instances several years afterwards, and by a different judge. No case of indefinite postponement has been cited where the sentence was pronounced during the term of court at which the defendant was convicted by the judge who tried the case.

Affirmed.

MUSSER and HILL, JJ., concur.

WOSTENBURG v. KARME.

(Supreme Court of Colorado. July 1, 1912.)

ADVERSE POSSESSION (§ 82*)—COLOR OF TITLE —TAX DEED.

A tax deed does not give color of title to a person in possession thereunder until recorded; and hence possession under such deed is not a defense to an action to recover the land, brought within seven years after the deed was recorded.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 468-471; Dec. Dig. § 82.*]

Appeal from District Court, Sedgwick County; H. P. Burke, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Action by George C. Karne against Christian Wostenburg. From a judgment for plaintiff, defendant appeals. Affirmed.

John F. Mail, of Denver, for appellant. Allen & Webster, of Denver, for appellee.

GARRIGUES, J. Plaintiff alleges that he is the owner and entitled to the immediate possession of the land in controversy, which defendant unlawfully withholds. The first defense is a denial, the second pleads actual possession under claim and color of title made in good faith and the payment of taxes for seven successive years, while the third is the same, except that it alleges the land is vacant and unoccupied. Defendant's title had its inception in and rests upon a tax deed delivered to him March 25, 1901, and recorded June 3, 1905.

The only question in the case is the validity of this tax deed. It was offered in evidence by the defendant as color of title, to which plaintiff objected upon the ground that it did not support color of title, because it had not been recorded seven years prior to bringing the suit. The objection was sustained. In this ruling the trial court was right. This court has held that the seven-year statute of limitations does not commence to run against a tax deed, relied upon as color of title, until the deed is recorded. It being only four years from the time the tax deed was recorded to the bringing of this suit, it follows that the deed does not support claim and color of title. Sayre v. Sage, 47 Colo. 560, 108 Pac. 160.

Affirmed.

MUSSER and HILL, JJ., concur.

BRUNSTEIN v. CITY OF FT. COLLINS et al.

(Supreme Court of Colorado. July 1, 1912.)

1. INJUNCTION (§ 105*)—CRIMINAL PROSECUTION—INVALIDITY OF ORDINANCE.

A court of equity will not enjoin a prosecution for the violation of a city ordinance on the ground of its invalidity, unless necessary to protect a party from oppressive and vexatious litigation, and then only after the controverted right has been determined in his favor in a previous action, since the invalidity of the ordinance may be presented as a defense to the prosecution.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

2. INJUNCTION (§ 105*)—SUBJECTS OF RELIEF—PROSECUTIONS—IRREPARABLE INJURY.

A prosecution for violating a city ordinance will not be enjoined on the ground of irreparable injury, unless it clearly appears by the complaint that such would be the result of the prosecution, since the court will not assume that the ordinance would be sustained if invalid or that city officers would continue to harass defendant with further prosecutions if acquitted on that ground.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

3. INJUNCTION (§ 105*)—SUBJECTS OF RELIEF—MULTIPLICITY OF SUITS.

Prosecution for violating a city ordinance claimed to be invalid will not be enjoined on the ground of the prevention of a multiplicity of suits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

Error to District Court, Larimer County; Harry P. Gamble, Judge.

Action for injunction by E. Brunstein against the City of Ft. Collins and others. Demurrer to complaint sustained, and complainant brings error. Affirmed.

Fred W. Stow, of Ft. Collins, Frank L. Moorhead, of Boulder, and Homer S. Stephens, of Ft. Collins, for plaintiff in error. Paul W. Lee, of Ft. Collins, for defendants in error.

HILL, J. The plaintiff in error, who was the plaintiff below, instituted this action for the purpose of restraining the officers of the city of Ft. Collins from attempting to enforce the provisions of an ordinance of that city, pertaining to soliciting and receiving orders for intoxicating liquors. The substance of his complaint necessary to consider is that he has been engaged in soliciting and receiving of persons within the city of Ft. Collins orders for spirituous and fermented liquors of all kinds, and has been and now is so engaged as agent and employé of certain persons of the city of Denver; that on June 20, 1910, there was duly passed and adopted a certain ordinance for the city of Ft. Collins which provided, among other things, that whoever shall solicit any person to purchase, or shall receive an order for sale, or shall deliver for the purpose of evading any of the provisions of the statutes concerning local option (being chapter 86 of the Revised Statutes of Colorado of 1908), any spirituous or fermented liquors or intoxicating drinks of any kind, or any article used, or sold as a beverage in the composition of which whisky, brandy, high wines, or alcohol or any spirituous or fermented liquors shall be an ingredient, at any place within the corporate limits of the city of Ft. Collins, or at any place within one mile of the corporate limits thereof, shall be deemed guilty of an offense, and upon conviction shall be fined in a sum not less than \$50 nor more than \$300; that at an election held in said city in April, 1909, there was legally submitted at all the wards included therein the proposition of whether the said political divisions should become anti-saloon territory under the provisions of the local option act approved March 25, 1907 (Laws 1907, p. 495); that, as a result of said election, the entire city became anti-saloon territory; that by the terms of the local option law after its adoption in said city all power and authority theretofore vested in the city for prohibiting, regulating, and con-

trolling the selling and giving away of intoxicating liquors, etc., was repealed and withdrawn and withheld from the city, and that all power in said matters theretofore vested in the city was suspended, and that all ordinances of the city existing at the time of the adoption of the local option law, as well as all ordinances since passed which related to said subject, became suspended; that the city authorities were divested of all right to enforce the ordinance above set forth; that the local option act has continuously been in force in said city; that the plaintiff had established an extensive business in the city in the solicitation and receiving of orders for liquors as described in the ordinance, etc., upon which he depends for his livelihood; that the defendants as executive, prosecuting, and police officers of the city threaten that they will enforce the ordinance by causing the arrest of the plaintiff for each violation thereof, and thereby force and compel him to desist and abandon said business; that he will thereby suffer great and irreparable injury and damages if said threats are carried out; that he will be compelled to quit and abandon said business; that the damage to him would be incapable of ascertainment and that he would have no redress at law; that he would be subjected to a multiplicity of suits and harassed and annoyed thereby and put to the expense and annoyance of defending them; that, unless the defendants are enjoined, they will be acting without the scope of their power and authority, and that he has no sufficient, complete, or adequate remedy at law. The prayer was for a temporary, and thereafter permanent, restraining order. The defendants demurred upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained. The plaintiff brings the case here for review upon error.

A somewhat similar ordinance to the one here being attacked was held good in the case of *Brunstein v. People ex rel. Town of Windsor*, 47 Colo. 10, 105 Pac. 857. It is conceded under the ruling in that case that this ordinance would be valid, were it not for the fact that the provisions of the local option act were brought into force in the city of Ft. Collins in April, 1909, by virtue of which fact it is alleged it thereafter became the exclusive law within the city, and that all ordinances thereafter passed concerning the question of intoxicating liquors were absolutely null and void, and that the defendants in error are without any power or authority to enforce such ordinances.

[1-3] We find it not only unnecessary, but also improper in this kind of a case, to pass upon the validity of this ordinance. In *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624, this court held that a court of equity will not, by injunction, restrain a prosecution at law when the question is the same at law as in

equity, except where it is necessary to protect a party from oppressive and vexatious litigation, and then only after the controverted right has been determined in a previous action in favor of the party applying for the injunction; that an injunction will not issue to restrain a prosecution for violation of a city ordinance on the ground that the ordinance is invalid, as the invalidity of the ordinance may be presented as a defense to the prosecution; that a prosecution for violating a city ordinance will not be enjoined on the ground of irreparable injury or to prevent a multiplicity of suits unless it clearly appears by the allegations of the complaint that such would be the result of the prosecution; that a court of equity will not assume that the court before whom the prosecution is had will sustain the ordinance, if invalid, nor that the city officers will continue to harass the defendant with further arrests if acquitted on that ground. It is nowhere alleged that this ordinance has ever been declared invalid by any court. We see no distinction between the case under consideration and the one above referred to. It was thereafter followed by this court in the cases of *Olympic Athletic Club v. Speer et al.*, 29 Colo. 158, 67 Pac. 161; and *Colorado Athletic Association v. Speer et al.*, 29 Colo. 161, 67 Pac. 1129. The reasons announced in *Denver v. Beede*, supra, are full, complete, and convincing, and all that could be given here. The question appears to be *stare decisis* in this jurisdiction.

The judgment is accordingly affirmed.
Affirmed.

MUSSER and GABBERT, JJ., concur.

AMES v. NOSTRUM.

(Supreme Court of Colorado. July 1, 1912.)

1. JUSTICES OF THE PEACE (§ 202*)—REVIEW—CERTIORARI.

A petition for certiorari to review a justice's judgment against petitioner, which alleges that, prior to and on the day of the rendition of the judgment, petitioner as defendant specially appeared before the justice and objected to the summons, on the ground that petitioner was incorrectly designated therein, and the return day thereof was a designated number of days more than the maximum time limited by law, but which does not show how petitioner was incorrectly named, and which does not allege the date of the summons, nor the return date designated therein, is insufficient to annul the judgment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 778-789; Dec. Dig. § 202.*]

2. PLEADING (§ 18*)—PERSONAL ACTIONS—REQUISITES OF PLEADINGS.

In personal actions the pleadings must allege the day, month, and year when each traversable fact occurred.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 39; Dec. Dig. § 18.*]

3. JUSTICES OF THE PEACE (§ 194*)—JUDGMENT—REVIEW—REMEDIES.

A defendant in a justice's court, who was served with summons, and who appeared before the justice prior to and on the day of the entry of the judgment, and who knew of the entry of the judgment, may not under Rev. St. 1908, § 3840, bring certiorari for the removal of the judgment to the county court, on the ground that he was improperly designated in the summons, but his remedy, if any, is by appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

Error to Summit County Court; D. W. Fall, Judge.

Certiorari by Edward Nostrum, alias Edward Norstrom, against James Ames, for the removal of a judgment of a justice's court to the county court. There was a judgment annulling the justice's judgment, and defendant brings error. Reversed and remanded.

Jos. W. Clarke, of Leadville, for plaintiff in error.

WHITE, J. November 27, 1909, plaintiff in error obtained judgment against defendant in error in the court of a justice of the peace of the county of Summit. February 23, 1910, the defendant in error filed a petition in the county court of Summit county, praying that the action in which the judgment was rendered be removed from the justice court to the county court by a writ of certiorari, which was accordingly done.

Plaintiff in error thereupon filed a motion to quash the writ of certiorari, claiming that the petition therefor was insufficient to warrant the court in issuing the same. The motion was overruled, and thereupon plaintiff asked that the cause proceed to trial de novo. The request for trial de novo was disallowed, the judgment of the justice of the peace annulled, and the costs assessed against the plaintiff, who brings the matter here for review.

[1] The petition for the writ of certiorari shows that on November 27, 1909, judgment was rendered in favor of plaintiff in error; that, prior to and on the same day the judgment was rendered, defendant in error specially appeared before the justice of the peace and objected to the summons issued in the case, upon the ground that defendant was incorrectly and improperly designated and named therein, and the return day thereof was a designated number of days more than the maximum time limited by the statute; that because of such matters "said judgment is erroneous and unjust to your petitioner; and that it was not in the power of your petitioner to appeal from said judgment in said cause, inasmuch as the taking of said appeal would consti-

tute a waiver on the part of your petitioner of the defects in said summons."

The petition is wholly insufficient. Wherein and how petitioner was incorrectly and improperly designated and named in the summons is not disclosed, and the allegation as to the return day of the summons is no more than a conclusion of the pleader. The petition neither alleged the date the summons was issued, nor the return day designated therein. It is therefore lacking in that certainty as to time, which the fundamental rules of pleading require to be alleged in reference to traversable facts.

[2] "In personal actions the pleadings must allege the time, that is, the day, month, and year when each traversable fact occurred." Andrews' Stephen's Pleading, § 194.

[3] Moreover, it is clear that it was within the power of defendant in error to take an appeal in the ordinary way. He was served with the summons and appeared before the justice prior to and on the day of entry of the judgment. The fact, if it be true, that he was improperly designated and named in the summons, is of no concern. He was as truly served with the summons as if he had been served by his right name. *Van Buren v. Posteraro*, 45 Colo. 588, 592, 102 Pac. 1067, 132 Am. St. Rep. 199. Furthermore, he knew the judgment was entered, and had every opportunity to appeal therefrom, if he desired. A petition to remove a cause from a justice of the peace to the county court by the writ of certiorari must present some sufficient reason for not resorting to appeal. *Austin v. Bush*, 11 Colo. 198, 17 Pac. 501. It must contain the essential facts the law requires to be stated therein before the writ can lawfully issue. *Section 3840, R. S. 1908; Small et al. v. Bischelberger*, 7 Colo. 563, 4 Pac. 1195.

The judgment of the county court was wrong, and is therefore reversed, and the cause remanded, with instructions to quash the writ of certiorari and set aside the proceedings thereon. Mr. Justice MUSSER and Mr. Justice BAILEY concur, the former placing his conclusion solely upon the ground that petitioner had a remedy by appeal.

Judgment reversed and remanded.

MUSSER and BAILEY, JJ., concur.

LALONDE v. NEAL.

(Supreme Court of Colorado. July 1, 1912.)

JUSTICES OF THE PEACE (§ 166*)—APPEAL—JURISDICTION OF COUNTY COURT—NECESSITY OF EVIDENCE.

Rev. St. 1908, § 3855, provides that, if it appears on an appeal to a county court from a justice that the justice had no jurisdiction of the subject-matter of the suit, it shall be dismissed. On an appeal, from a justice to a

county court, the transcript of the justice showing a dismissal as in excess of the jurisdiction was filed, but no evidence was introduced going to that fact. *Held* that, as the county court is not a court of review, its dismissal of the cause on the evidence adduced before the justice was improper.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 638-646; Dec. Dig. § 166.*]

Error to Chaffee County Court; Joseph Newitt, Judge.

Replevin by Arthur Lalonde against J. H. Neal. From a judgment of a justice for defendant, plaintiff appealed to the county court, and from the sustaining of a motion therein to dismiss he brings error. Reversed and remanded.

Harry L. McGinnis, of Buena Vista, for plaintiff in error.

HILL, J. This was a suit in replevin, brought before a justice of the peace. The judgment was for the defendant for the reason, as shown by the justice's transcript filed in the county court, that from the evidence it appeared to him, and he so found, that the value of the property replevied was in excess of \$300, upon account of which he had no jurisdiction to try the case. The plaintiff appealed to the county court. The defendant moved to strike the cause from the records for want of jurisdiction of the county court. This motion was sustained. The judge gave as his reason that it was clearly made to appear to his satisfaction from the transcript that said justice proceeded to the trial of said cause, and that the sworn evidence offered and given before him (the justice of the peace) disclosed the fact that the property sought to be replevied was largely in excess of the value of \$300; that, as the justice had no jurisdiction, the county court acquired none by appeal. There was nothing filed with the motion to support the contention that the county court was without jurisdiction. The only presumption to support it was the fact that the justice had so held from the evidence introduced in his court.

Section 3854, Revised Statutes 1908, provides that all appeals before the county court shall be heard and determined in a summary way according to the justness of the case without pleadings in writing. Section 3855, following, reads: "If it shall appear, however, that the justice had no jurisdiction of the subject-matter of the suit, the same shall be dismissed at the cost of the plaintiff." It is true that, if the justice had no jurisdiction, the county court acquired none by appeal; but upon appeal this is not to be determined by the findings of the justice's court. The county court is not a court of review. The evidence taken in the justice's court is not before the county court. Whether the justice had jurisdiction upon

account of the value of the property being in excess of \$300 is one of the matters to be determined by the county court upon evidence to be introduced in that court. *Lee v. Ralston*, 1 Colo. 5; *Downing v. Florer et al.*, 4 Colo. 209; *Behymer v. Nordloh*, 12 Colo. 352, 21 Pac. 37. The county court received no evidence as to the value of the property. It should have tried the case *de novo*, and from the evidence introduced before it have passed upon and determined the value of the property, and, if it found from the evidence that the value exceeded \$300, the action should have been dismissed; otherwise it should have been disposed of upon its merits.

The judgment is reversed, and the cause remanded.

Reversed.

MUSSER and GABBERT, JJ., concur.

WATKINS et al. v. ADAMS.

(Supreme Court of Colorado. July 1, 1912.)

1. WITNESSES (§ 152*) — COMPETENCY — TRANSACTION WITH DECEASED PERSONS.

One suing a surviving partner for services rendered under a contract of employment made with the deceased partner is incompetent, under Rev. St. 1908, § 7269, to testify to conversation with the deceased partner establishing the contract, had in the absence of the surviving partner.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 658, 659; Dec. Dig. § 152.*]

2. PARTNERSHIP (§ 247*) — FIRM LIABILITIES.

A liability for services rendered under a contract with the administratrix of a deceased partner is not a liability of the firm dissolved ipso facto by the death of the partner.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 524-528; Dec. Dig. § 247.*]

Error to Teller County Court; Thornton H. Thomas, Judge.

Action by Charles Adams against William H. Watkins and another, surviving partners of Higbee & Watkins, a copartnership. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded.

Fred L. Shaw, of Cripple Creek, for plaintiffs in error.

BAILEY, J. [1] The action is against surviving partners to recover for services said to have been rendered by plaintiff, under a contract of employment, made with the deceased member thereof. The only witness sworn was the plaintiff, who, to prove the contract and fix liability upon the partnership, was allowed to testify, over objection, to conversations between himself and the deceased partner. The contract and the terms thereof were established by these conversations alone. Objection to this testimony was made under section 7269, Revised Statutes 1908, which is as follows:

"Conversation of deceased partner—When

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

admitted.—Sec. 4. That in any action, suit or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of section one of this act, be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation."

There is no attempt to show that these conversations were had in the presence of the surviving partners or either of them, or that either had knowledge of them; indeed, there is no such claim. Under the circumstances disclosed this evidence was, by the express terms of the statute, inadmissible. The purpose of the statute is wise and wholesome, to the end that a surviving co-partner may be protected from injury and wrong, which otherwise might easily be perpetrated. Since the alleged claim is supported by improper and incompetent testimony only, the judgment in favor of plaintiff was unwarranted.

In discussing this statute in *Savard v. Herbert*, 1 Colo. App. at page 447, 20 Pac. 462, the court said:

"Section 8643, Gen. St. 1883 (R. S. 1908, § 7269), clearly indicates that where the suit is brought against any surviving partner or joint contractor, that the testimony relative to any admission or conversation by the deceased person or joint contractor shall not be admitted unless some one or more of the surviving partners or joint contractors were present at the time of the admission or conversation."

[2] The record further shows that a portion at least, but how much it does not disclose, of the judgment recovered was for services rendered after the death of Higbee, under an independent contract with Mrs. Higbee, as administratrix of the estate of her husband. Upon no theory could a liability for such service be legally fastened upon the partnership, which had been dissolved ipso facto by the death of Higbee.

For the reasons stated the judgment must be reversed. It is so ordered and the cause remanded.

MUSSER and WHITE, JJ., concur.

HANCOCK v. CENTRAL SHOE & CLOTHING CO. et al.

(Supreme Court of Colorado, June 3, 1912.)

1. LANDLORD AND TENANT (§ 116*)—CHANGE OF TENANCY—NOTICE BY TENANT.

Notice by a tenant at the expiration of a lease that its continued occupancy was a tenancy from month to month was insufficient to establish that the tenancy was different from

what it in fact was under the holdover after the termination of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 382-388, 395-400; Dec. Dig. § 116.*]

2. LANDLORD AND TENANT (§ 116*)—TERMINATION OF TERM—NOTICE TO QUIT.

Under Rev. St. 1908, § 2606, relating to notices regarding the termination of tenancies, a tenant in possession under a letting from year to year may quit at the end of any year without serving notice of his intention to do so.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 382-388, 395-400; Dec. Dig. § 116.*]

3. LANDLORD AND TENANT (§ 196*)—TERMINATION OF TENANCY—REPAIRS—CONTINUED OCCUPANCY—EFFECT.

A landlord with notice from his tenant that the leased premises would be vacated at the end of the term unless certain improvements were made, having led the tenant to believe down to the time of the termination of the term that the improvements would be made, was estopped to claim that a continued occupancy of the premises by the tenant for a reasonable time thereafter without an offer on the part of the landlord to make the improvements created an obligation on the part of the tenant to pay rent for a period beyond which the premises were actually occupied.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 737-740; Dec. Dig. § 196.*]

Error to District Court, Gilpin County; Charles McCall, Judge.

Action by Ann Hancock against the Central Shoe & Clothing Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Fullerton & Fullerton, of Central City, H. A. Hicks, of Denver, and L. J. Williams, of Central City, for plaintiff in error. Wm. C. Matthews and James M. Seright, both of Central City, for defendants in error.

GABBERT, J. The estate of Hancock, deceased, and a Mr. Jenkins, were the owners of a store building in Central City. On the 3d day of July, 1897, the executrix of the estate and Jenkins leased the premises to the Central Shoe & Clothing Company for a period of three years from the 1st day of that month, at an agreed rental of \$75 per month, payable at the end of each month. At the expiration of the lease, the lessee continued in possession, with the consent of the lessors, until the 31st day of July, 1904. Prior to vacating the premises, and on the 1st day of July, 1904, the lessee notified the lessors in writing that on or before the 31st day of the month it would vacate and give up possession of the leased premises. All rent down to the time the premises were vacated was paid by the lessee. In due time the executrix commenced suit against the lessee to recover one-half of the rental of the premises at the rate of \$75 a month for the 11 months beginning August 1, 1904. Jenkins, the other co-owner, did not join in the action; it being alleged in the complaint that he refused to do so, and that for this

reason he was made a defendant. The answer consisted of several defenses, only two of which will be considered. They are to the effect that, after the expiration of the written lease, the defendant became a tenant from month to month at an agreed rental of \$70 per month, and that in the spring of 1904 defendant requested certain improvements and repairs to be made, at the same time informing the lessors that, if they were not made, it would vacate the premises, and, as they were not made, the defendant caused the notice above mentioned to be served, and on the 31st day of July, 1904, vacated the building.

The testimony on behalf of the plaintiff was to the effect that for a considerable period prior to July 1, 1904, the agent for the premises had been collecting the rent at the rate of \$70 a month, although it appears that, when these payments were made, he insisted on giving a receipt for \$75. We do not regard this, however, as of any material moment. Giving a receipt for a different sum from that paid could not in any manner affect or change the rights of the parties. His purpose in giving such receipt, so he states, and as he advised the representative of the defendant, was to conform to the terms of the original written lease. On behalf of defendant its representative testified that, when the rent was reduced to \$70 a month, he asked the agent why he gave him a receipt for \$75, when he only received \$70, to which he replied: "There are some things you don't understand. I do that to comply with the terms of the lease." Defendant's representative said: "We have no lease. Our lease has expired some years ago. We are now monthly tenants, the same as we were before the lease was entered into." It does not appear from the testimony that the agent ever assented to the claim that the lessee was a monthly tenant.

The representative of the defendant testified that in April, 1904, he requested the agent of the lessors to make improvements in the way of a new front, and informed him that, unless this request was complied with, the defendant would vacate the building. The agent and Mr. Jenkins shortly afterwards examined the building. Jenkins seemed inclined to consider the request favorably, and stated that he would make an estimate of the cost, and let the witness know later. The lessors had a contractor measure the building and make an estimate of the cost of the proposed improvement. Afterwards the agent and witness had a conversation, in which the agent stated that Jenkins said the front could be put in for about \$250; that he had written Mrs. Hancock about the matter, and she had replied that, if her share would not exceed \$200, to go ahead, and make the repairs requested. Several times the agent and Jenkins talked with witness about the front that should be

put in. July 1st the witness called on the agent, and stated to him that he was tired of waiting, that the matter of repairs had been running along for about three months, and asked him if he had decided what he was going to do. He said no, that he had to confer further with Mrs. Hancock, and it would be several days before he could give him a definite answer. Witness then had the notice prepared and served, to which we have referred. It does not appear that the lessors ever made or offered to make the proposed repairs. On the contrary, according to the replication filed by plaintiff, their purpose, as appears from a notice they served upon the lessee, in July, 1904, was to hold it liable for rent for the period of one year from the first day of the month of that year upon the theory that it was a tenant from year to year.

The case was submitted to a jury, with the result that a verdict was rendered in favor of the defendant, on which a judgment was entered, which the plaintiff brings here for review on error.

The case was, apparently, tried on the theory that defendant, by holding over and occupying the premises after the expiration of the written lease, in the absence of a new agreement, became a tenant from year to year. This theory appears to have been adopted by both parties; and conceding, but not deciding, that this is correct, the question to determine is whether from the testimony the jury, under the instructions given by the court, was justified in returning a verdict for the defendant.

On behalf of plaintiff in error it is urged that the court erred in refusing to direct a verdict for the plaintiff, for the reason that, according to the testimony, it appeared that defendant was a tenant from year to year, and, not having given the requisite notice to terminate such tenancy prior to the 1st day of July, 1904, it became responsible for the unpaid rent for one year after that period. It may well be conceded that the testimony is not sufficient from which to infer that at the time the rent was reduced to \$70 per month the parties agreed that the tenancy should thereafter be regarded as from month to month. It does not appear that the agent of the lessors assented to such an arrangement.

[1] True, the representative of the defendant testified he informed the agent that the tenancy was a monthly one, but proof of an intention on the part of the tenant alone that the tenancy is different from what it in fact is, is not sufficient to establish that it was changed. 24 Cyc. 1033.

[2] The case, however, does not turn on this proposition alone. The court instructed the jury that if they believed from the evidence that before the 1st day of July, 1904, the tenant had notified the lessors that it wanted certain improvements made, and

that, if they were not made, the building would be vacated, and if they further found that the lessors so acted as to lead the defendant to believe that the requested improvements would be made, and that the tenant so believed, then their verdict should be for the defendant. This instruction was excepted to by plaintiff, but we think it was substantially correct. Conceding, but not deciding, because unnecessary, that a tenant who enters into a written lease with the lessor for the period of three years by continuing to occupy the premises with the consent of the lessor, and without any new agreement, becomes a tenant from year to year, then it follows that each term thus created expires by limitation at the close of each current year (*Adams v. City of Cohoes*, 53 Hun, 260, 6 N. Y. Supp. 617; *Gladwell v. Holcomb*, 60 Ohio St. 427, 54 N. E. 473, 71 Am. St. Rep. 724), so that the tenancy which the plaintiff claims existed expired by limitation on the 1st day of July, 1904, and under the statute relative to notices regarding the termination of a tenancy (section 2606, Rev. Stats.) notice to quit was not necessary to or from a tenant, whose term is, by contract, to end at a time certain.

[3] The only question remaining, then, is whether the occupation of the premises by the tenant for the month of July, 1904, bound it to pay rent for another year. The tenant had informed the agent of the lessors that, unless the improvements requested were made, the building would be vacated. We think the conduct of the lessors was such that the jury might well infer that the tenant was induced to believe that the improvements would be made, as requested. They were not. The last time the representative of the tenant called on the agent of the lessors, which was on the 1st day of July, 1904, when, according to the claim of plaintiff, a new period for one year had commenced, and asked him what they intended to do with respect to the improvements, he was told that they had not yet made up their minds, and could not give him a definite answer for a few days. The tenant then had a notice served upon the lessors that it would vacate the building on July 31st. The lessors never offered to make the improvements, but evinced the intention of holding the tenant responsible for rent for a year, without complying with its request, which, from the testimony, it can fairly be inferred the lessors had induced the tenant to believe would be complied with. In such circumstances we are of the opinion that the occupation of the premises for July, 1904, by the tenant with notice to the lessors on the first day of the month that they would be vacated at the end of that month, and were so vacated, did not bind it to pay rent for another year.

As applied to the facts of this case, we

hold that a lessor, with notice from his tenant that the leased premises will be vacated unless certain improvements are made, who leads the tenant to believe down to the time when the lease will expire by limitation that they will be made, will not be permitted to claim that the occupation of the premises by the tenant for a reasonable time after the expiration of the term without offer on the part of the lessor to make the improvements creates an obligation on the part of the tenant to pay rent for a period beyond which the premises are actually occupied. *Abeel v. McDonnell*, 39 Tex. Civ. App. 453, 87 S. W. 1066.

On behalf of the defendant, it is contended the action cannot be maintained by plaintiff for the reason that she was attempting to recover only her share of the rent, when the obligation of the defendant, if any, was a joint one to the lessors. We do not deem it necessary to consider this and other questions urged by counsel for the defendant. It appears from the practically undisputed evidence that the verdict and judgment are eminently just on the merits, and it is, therefore, unnecessary to consider either of these propositions.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER and HILL, JJ., concur.

FERRARI v. BROOKS-HARRISON FUEL CO.

(Supreme Court of Colorado. July 1, 1912.)

1. NEW TRIAL (§ 74*)—PERSONAL INJURIES—DAMAGES.

Where the damages are limited to pain, loss of sleep, physical or mental suffering, the amount fixed by the jury is in most cases controlling.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 150; Dec. Dig. § 74.*]

2. NEW TRIAL (§ 75*)—PERSONAL INJURIES—INADEQUATE DAMAGES.

Where a person receiving personal injuries, requiring the attention of a physician who dressed his wounds and who saw him again the same day and who dressed the wounds twice a day for a week or ten days and then once a day for a week, and a slight disfigurement received from the injuries would be permanent, and at the time of the injury he was in reasonably good health with an earning capacity of \$2 to \$4 a day, and on account of the accident lost some time, and his earning capacity was temporarily diminished, a verdict for \$1 was grossly inadequate necessitating a new trial under Rev. Code 1908, § 236, authorizing a new trial for inadequate damages or insufficiency of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 151, 152; Dec. Dig. § 75.*]

Error to District Court, Boulder County; James E. Garrigues, Judge.

Action by Antonio Ferrari against the Brooks-Harrison Fuel Company. There was

a judgment for plaintiff granting insufficient relief, and he brings error. Reversed and remanded for new trial.

Stark & Martin, of Denver, and A. C. Patton, for plaintiff in error. L. O. Hawkins, of Boulder, for defendant in error.

HILL, J. This action was for personal injuries resulting to the plaintiff in error from an explosion in the defendant's coal mine while the plaintiff was employed therein by the defendant as a coal miner. The verdict of the jury was for the plaintiff in the sum of \$1. He brings the case here for review upon error. The defendant's alleged negligence and the alleged contributory negligence of the plaintiff were passed upon by the jury, who found both issues in favor of the plaintiff. This entitled him to reasonable compensation for the injuries which he had sustained. The sum of \$1 awarded is not supported by any testimony, but is in conflict with all the evidence.

[1] If the plaintiff was not entitled to damages, the verdict should have been for the defendant; or if his damages were limited to pain, loss of sleep, physical or mental suffering, and similar items, the value of which cannot be accurately fixed by testimony, then the amount fixed by the jury, in most cases, is controlling. *McDonald v. Union Pacific Ry. Co. (C. C.)* 42 Fed. 579; *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265.

[2] In the case at bar, while the damages claimed included items for loss of sleep, pain, physical and mental suffering, they are not limited to these. The pleadings admit the accident and that the defendant was slightly injured, while the undisputed evidence discloses that the accident occurred; that the plaintiff received injuries therefrom which required and received the attention of a physician who reached him about an hour and a half after he was burned; that he dressed his wounds and gave him a hypodermic of morphia; that he saw him again the same day; that he dressed the wounds twice a day thereafter for a week or ten days, then once a day for another week; that during the first week the plaintiff was confined to his bed; that during the next two weeks he was up and down; that some slight disfigurement received by the burns will be permanent; that at the time of the injury the plaintiff was 37 or 38 years of age, in reasonably good health; that he had an earning capacity and was then working and earning from \$2 to \$4 a day; that upon ac-

count of this accident he lost some time, and his earning capacity, at least temporarily, was materially diminished. The evidence was in conflict as to the time lost, ranging from a minimum of three weeks to a maximum of six months.

It will thus be observed that the verdict was grossly inadequate, not supported by any evidence, and must have been rendered under the influence of passion or prejudice or by some misconception of the law or the evidence. Under such circumstances, a new trial is provided for and should have been granted under either the fifth or sixth subdivision of section 236, Revised Code 1908. See, also, *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. 632, 54 Am. Rep. 544.

In *Burns-Moore Co. v. Watson*, 45 Colo. 91, 101 Pac. 635, this court held that a capricious and arbitrary verdict unsupported by any legitimate view of the testimony cannot stand. In that case, upon any of the facts proved, the plaintiff was entitled to a very much larger or a very much less award than made. The same principle is applicable here. This plaintiff was entitled to some reasonable amount, consistent with the damages sustained, as shown by the evidence, or to nothing. Under such circumstances, a verdict like this ought not to stand. *Robeson v. Miller*, 4 Colo. App. 313, 35 Pac. 860; *Hassell I. W. Co. v. Cohen*, 36 Colo. 353, 85 Pac. 89; *Lenander v. Graves*, 45 Colo. 248, 100 Pac. 403; *Burlington Interurban Ry. Co. v. Chapman*, 123 Pac. 649; *Michalke v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.)* 27 S. W. 164; *Whitney v. City of Milwaukee*, 65 Wis. 409, 27 N. W. 39; *Kelly v. City of Rochester*, 15 N. Y. Supp. 29; *Aiello v. Aaron et al.*, 83 Misc. Rep. 580, 68 N. Y. Supp. 186; *Brown v. Foster*, 1 App. Div. 578, 37 N. Y. Supp. 502; *Smith v. Dittman*, 11 N. Y. Supp. 769; *Moseley v. Jamison*, 68 Miss. 336, 8 South. 744; *Ellsworth v. City of Fairbury*, 41 Neb. 881, 60 N. W. 336; *Barrette v. Carr & Carr*, 75 Vt. 428, 56 Atl. 93; *Fairgrieve v. Moberly*, 29 Mo. App. 141; *Welch v. McAllister*, 13 Mo. App. 89; *Chouquette v. Southern Electric R. Co.*, 152 Mo. 257, 53 S. W. 897; *Miller v. Delaware, L. & W. R. Co.*, 58 N. J. Law, 428, 33 Atl. 950.

The judgment is reversed, and the cause remanded for a new trial.

Reversed.

MUSSER and GABBERT, JJ., concur.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 40 Hun. 582.

(22 Colo. App. 426)

CASSERLEIGH et al. v. SPAR CONSOL. MINING CO.

(Court of Appeals of Colorado. June 10, 1912.)

1. COURTS (§ 213*)—JURISDICTION—SUPREME COURT—CASE RELATING TO A FREEHOLD.

An action by an owner of land to enjoin its sale under an execution and quiet his title as against the judgment creditor does not involve a freehold so as to give jurisdiction of an appeal to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 517-527; Dec. Dig. § 213.*]

2. APPEAL AND ERROR (§ 14*)—DISMISSAL OF APPEAL—RE-ENTERING ON ERROR.

On the dismissal of an appeal taken on the erroneous assumption that a freehold was involved, the Court of Appeals may under the statutes re-enter the case as pending on error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-58; Dec. Dig. § 14.*]

Hurlbut, J., dissenting in part.

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by the Spar Consolidated Mining Company against J. H. Casserleigh and another. Judgment for plaintiff, and defendants appeal. On motion to remand to Supreme Court. Motion denied, appeal dismissed, and case re-entered as pending on error.

M. B. Carpenter and F. T. Johnson, both of Denver, for appellants. Thomas, Bryant, Nye & Malburn, of Denver, for appellee.

CUNNINGHAM, J. Appellee, as plaintiff below, brought this action in the district court to remove the cloud from its title to certain mining property occasioned by the attempted lien asserted by appellant Casserleigh. It appears from the complaint that Casserleigh was attempting to subject the property involved to an execution issued on a judgment in his favor and against certain individuals. This action was brought by the mining corporation to enjoin and restrain the sheriff from selling the property under said execution, and to quiet the title of the same in the mining company as against Casserleigh's claim under the aforesaid execution. The plaintiff company, appellee here, prevailed in the court below, and this case is in this court on appeal from such judgment.

[1] Counsel for appellants have filed a motion to remand the case to the Supreme Court on the ground that, as they assert, a freehold is involved. Under the ruling in *Callbreath v. Hug*, 48 Colo. 202, 109 Pac. 947, the motion to remand must be denied.

[2] Having determined that a freehold is not involved and there appearing no other grounds under the Code warranting the appeal, the appeal will also be dismissed, and under the authority in the case of *Western Pole & Lumber Company v. City of Golden* (No. 3,386), 124 Pac. 584, recently determin-

ed by this court, the case will be re-entered as pending on error, and the clerk is hereby instructed to enter the necessary orders in the premises.

Motion to remand denied, appeal dismissed, and case re-entered as pending on error.

HURLBUT, J., dissents from so much of the opinion as pertains to the right of this court to re-enter the case as pending on error.

(22 Colo. App. 354)

PAGE et al. v. CLINE et al.†

(Court of Appeals of Colorado. May 13, 1912.)

1. TRIAL (§ 395*)—GENERAL FINDINGS—SUFFICIENCY.

A general finding in an equity case in which a cross-complaint is filed is sufficient to support a decree, especially where no complaint is made on the trial that the findings are incomplete for failure to find facts as to cross-complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. § 395.*]

2. SPECIFIC PERFORMANCE (§ 131*)—CONTRACTS ENFORCEABLE—DECREE.

A decree in a suit by a purchaser to enforce specific performance of an option contract and cancel a deed by the vendor to a third person, which directs the purchaser on tender by the vendor and the third person of deeds to pay the balance of the price fixed in the option contract, is not objectionable for failing to specify whether the vendor or the third person shall receive the unpaid price, but, in case of a dispute, the purchaser may pay the price into court and the court may determine the rights of the parties thereto.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 426-435; Dec. Dig. § 131.*]

Appeal from District Court, Delta County; Sprigg Shackelford, Judge.

Action by Ira B. Cline and another, co-partners doing business under the firm name of Cline & Hufty, against Charles W. Pace and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Merle D. Vincent, of Paonia, for appellant Pace. Goudy & Twitchell, of Denver, for appellant Curtis. Milton R. Welch, of Delta, and D. C. Beaman, of Denver, for appellees.

CUNNINGHAM, J. This action was brought in the district court of Delta county by appellees to enforce specific performance of an option contract to purchase a certain lot in the town of Paonia, and to cancel a deed made by Pace to Curtis. The option contract was signed by one Albert B. Campbell, as agent for Pace, who, at the time, owned the lot, subject to certain incumbrances, as it is said. Pace, at the time, was in the state of Washington. A telegram and a letter were forwarded to him, advising him of the option contract given by Campbell to plaintiffs. After some correspondence, Pace

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

† Rehearing denied July 3, 1912.

returned to Colorado and sold the lot, together with other real estate adjoining it, to his codefendant, Curtis. Campbell's authority to bind Pace by the option was questioned by the latter. The defendant Curtis answered separately and filed a cross-complaint wherein she alleged that Cline & Hufty, who were engaged in the real estate business, had been employed by her to purchase the lot in question of Pace for her. The case was tried without a jury. General findings were made by the court in favor of plaintiffs, and certain special findings were also made, namely, that Pace had ratified the agreement made on his behalf by Campbell with the plaintiffs; that tender had been made by the plaintiffs, under the option contract or agreement, of the balance due; that the option contract or agreement between Campbell, as Pace's agent, and the plaintiffs, had been made a matter of record before the transfer of the property by Pace to Curtis; that Curtis had full knowledge of the option given by Pace to plaintiffs, and was charged with notice thereof at the time she entered into the contract to buy the property from Pace; and that all her rights in the premises are subject to the rights of the plaintiffs. The court made no special finding or direct reference to the cross-complaint of the appellant Curtis. We have carefully examined the evidence admitted on the trial, and are of opinion that it is ample to support the findings and judgment.

[1] Counsel for appellant Curtis, however, insists that the failure of the trial court to make any finding of fact relative to defendant Curtis' rights as set out in her cross-complaint constitutes reversible error. The rule on this subject, as applicable to the cross-complaint, is in no wise different from the general rule applicable to findings of fact upon the issues raised by the complaint and the answer proper. A general finding is sufficient to support a judgment or decree. 38 Cyc. 1976, 1977. Especially is it true that a general finding will suffice in an equity case, where, as in this case, no complaint was made on the trial that the findings of the court were incomplete. "It is claimed, however, that the findings of the district court are incomplete. If this be true, it is a matter which should have been called to the attention of the court at the trial. The Code provides how a finding may be required upon a matter in controversy in an equity case; and, if appellants wanted more specific findings, they should have availed themselves of the statutory method." *Larimer & Weld Irr. Co. v. Wyatt*, 23 Colo. 487, 48 Pac. 531; 8 Enc. Pl. & Pr. 933.

[2] It is further contended by appellants that the trial court erred in directing plaintiffs (appellees), upon the tender to them of deeds by the appellants, to pay over the balance of the purchase money (provided for in

their option contract) for said lots, without specifying to which one of the appellants the same should be paid. We cannot assume that any difference will arise between the appellants as to which one the money should go to, or how it should be apportioned between them. If this difference should arise, plaintiffs may pay the money into court, there to be held until the respective rights of the appellants to the fund shall be determined in a proper proceeding, and the trial court is directed to modify its decree accordingly, should the necessity for doing so arise. But this modification of the decree, should the same be made, shall in no manner relieve the appellants from the duty of executing and delivering the deeds, as by the terms of the decree of the trial court they are directed.

The judgment of the trial court is sustained.

Affirmed.

KENT v. TREWORGY.

(Court of Appeals of Colorado. June 10, 1912.)

1. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—AUTOMOBILE ACCIDENTS—ACTION—INSTRUCTION.

Where, in an action for injuries to the rider of a bicycle from collision with an automobile, the evidence was conflicting on whether the collision was inevitable after the defendant discovered the plaintiff, it was error to instruct that the defendant was liable if he saw the plaintiff approaching on a bicycle in time to stop or slow down so as to avoid the accident; the effect of such instructions being not only to require the defendant to exercise the highest possible degree of care, instead of reasonable care, but also to make it his duty to have attempted to stop regardless of whether or not the plaintiff was in a perilous position at the time he was discovered.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

2. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREET—AUTOMOBILE ACCIDENT—QUESTION FOR JURY—REASONABLE CARE.

In an action for injuries from a collision between an automobile and a bicycle, the question whether the automobile driver failed to use reasonable care to prevent the accident and as to what constituted reasonable care under the circumstances was for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.*]

3. TRIAL (§ 234*)—INSTRUCTION—FACTS.

An instruction as to what state of facts will warrant a verdict against a certain party must include all the facts material to the rights of such party.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.*]

Appeal from District Court, City and County of Denver; George W. Allen, Judge.

Action by Carrol M. Treworgy by Eleanor Treworgy, next friend, against E. B. Kent. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Charles R. Bosworth, of Denver, for appellant. Orahood & Orahood, of Denver, for appellee.

CUNNINGHAM, J. The plaintiff, a lad 8 years of age, was, at the time of the injury complained of, riding on the handle bars of a bicycle propelled by a boy 11 years of age. While thus riding, he came in collision with an automobile which was being driven by the defendant.

[1] Complaint is made by appellant of instructions 5 and 6. These instructions read as follows: Instruction No. 5: "The court instructs the jury that in this case the defendant was bound to exercise ordinary care and prudence in the driving and management of his automobile in attempting to pass plaintiff in the public highway at the point where the accident occurred, and if you believe from the evidence in this case that just before the accident occurred defendant saw the plaintiff approaching on a bicycle, and there was sufficient time before the accident, and sufficient space intervening between plaintiff and himself to have permitted of defendant applying the brakes on the automobile and lessening its speed sufficient to avoid the accident, then it was negligence on the part of the defendant if he did not do so." Instruction No. 6: "The court instructs the jury that if you believe from the evidence in this case that the injury to plaintiff set forth in the complaint in this action was caused by defendant, and that prior to such injury defendant had sufficient time, after first seeing plaintiff approach on his bicycle, to have applied the brakes to his automobile and have stopped the same or brought it to such a slow speed as to avoid the accident, but instead of doing so made no effort to slow down the automobile, but on the contrary maintained the same speed when he first saw the plaintiff until after the injury occurred, then you may find that defendant was negligent in not so doing and that such negligence caused the injury complained of to the plaintiff." It will be seen by an examination of each of these instructions that the court advised the jury that, if the evidence disclosed that before the accident defendant saw the plaintiff approaching on a bicycle, and there was sufficient time before the accident, and sufficient space intervening between plaintiff and defendant to have permitted of defendant's applying the brakes on the automobile and thus have avoided the accident, then it was negligence on the part of the defendant if he did not so apply the brakes and stop the machine. In other words, the defendant, by this instruction, is held to the exercise of the highest possible degree of care, and, if he did not exercise the highest degree of care possible, then he is made liable as a matter of law.

[2] The defendant was only liable if he

failed to use reasonable care to prevent the accident, and what is reasonable care is always, under circumstances like those involved in this case, a matter for the determination of the jury.

Again: These instructions, as we view them, are fatally defective from yet another point of view. They advise the jury, in effect, that, if the defendant could have stopped or checked his machine *at any time after first seeing the approach of the plaintiff on his bicycle*, then he was guilty of negligence per se if he (the defendant) failed to stop the machine. If defendant's testimony be accepted, he did not and could not see the boys on the wheel in time to have stopped his machine, and he did everything possible to prevent the accident after the boys, as he said, rode out from behind the wagon immediately in front of his machine. Therefore, under all the circumstances, the instructions would be prejudicial, since they applied to a situation not supported by the evidence. If the testimony offered by plaintiff, especially that of the driver of the sand wagon, be accepted, then the defendant did see, or could readily have seen, the boys approaching on their wheel for some time before the accident, and before they were in any peril whatever. These instructions, especially No. 6, advise the jury that it was the duty of the defendant to stop as soon as he had seen the boys approaching on the wheel, wholly regardless of whether they were or were not, at the time he first saw them, in a perilous position. In *Barker v. Savage*, 45 N. Y. 191, 6 Am. Rep. 66, it is said: "It does not appear that after such contact was inevitable the defendant, in the exercise of due care, could have done anything then omitted by him to prevent the contact."

The statement of the evidence most favorable to the plaintiff and justified by the record is that whether defendant could have done anything which he omitted to do to prevent the contact after the same was inevitable is a matter in sharp dispute. Therefore the instructions on this point ought to have been so framed as to have fairly submitted this disputed question of fact to the jury. It was not incumbent on defendant to do anything until after it was apparent that a contact was inevitable, or at least highly probable. It was not his duty to stop when he first saw the boys on the wheel unless at that time it was apparent that they were in a position of peril, and then defendant's failure to stop or check his machine was not per se negligence. He would have the right to assume, until their perilous position became manifest to him, that the wheel they were riding would be turned to their right or the west side of the street, as he was turning to his right or the east side of the street; or, if because of the immature age of the boys, the defendant would have

no right to indulge in such presumption, then it was for the jury to determine whether, under all the circumstances, the defendant should be held to a knowledge of the immature age of the boys and their lack of responsibility, and it was for the jury to say, under instructions properly framed, when, if at all, it became the duty of the defendant to make reasonable effort to stop or check his machine.

[3] In other words: "When a court instructs a jury upon what state of facts a verdict must be rendered against the parties, the instruction must include all the facts material to the rights of all such parties." *Reynolds v. Hart*, 42 Colo. 155, 94 Pac. 15, and cases there cited.

We think the two instructions in this case wholly fail to square with this rule, and the case, for that reason, must be reversed. There are other alleged errors discussed in the brief and on oral argument which we have not deemed it necessary to pass upon, and as to them we express no opinion, believing that on a second trial these doubtful questions will be eliminated.

Reversed and remanded.

HURLBUT, J., having been of counsel for the plaintiff in the case below, did not participate in the opinion.

(22 Colo. App. 446)

MUNTZING et al. v. NEWSOM.

(Court of Appeals of Colorado. July 8, 1912.)

1. EVIDENCE (§ 25*)—JUDICIAL NOTICE—COUNTY SEATS.

The court will take judicial notice that a town is the county seat of a certain county.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 31-33; Dec. Dig. § 25.*]

2. MORTGAGES (§ 341*)—DEEDS OF TRUST—TRUSTEES—SUCCESSION OF TRUST.

Where the subject-matter of a deed of trust was located in Washington county, and the notes secured by it were payable at the county seat, and, in case of default of payment, it was to be sold at the door of the courthouse of that county, a provision that, on the trustee's refusal or inability to act, then the county clerk is made successor in trust, with the same powers as the trustee, gives the county clerk of Washington county authority to execute the deed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1039, 1040; Dec. Dig. § 341.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by A. D. Newsom against August Muntzing and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Egbert More, of Akron, for appellants. John F. Mail, of Denver, for appellee.

CUNNINGHAM, J. Plaintiff, appellee here, brought her action in ejectment in the district court to recover possession of the S. E. ¼ of section 14, township 2 N., range

52 W., Washington county. The only question debated in the briefs pertains to the sufficiency of a certain trustee's deed offered in evidence by the plaintiff, and admitted for the purpose of establishing her title in the land, and we shall accordingly limit our consideration of the case to this point.

[1, 2] The trustee's deed complained of was executed by G. M. Boss, county clerk of Washington county, Colo., as successor in trust. The only provision in the trust deed for a successor in trust is found in a parenthetical clause in that instrument, reading as follows: "And in case of refusal or inability to act of said second party, then county clerk is made successor in trust to said second party under this deed for the uses and purposes herein expressed with the same power as said trustee." Appellants, on the trial and in this court, base their objection to the trust deed upon the contention that it does not appear in the trust deed what county clerk, or the clerk of what county, was designated as successor in trust. In other words, they assert that the uncertainty of the party designated in the trust deed as successor in trust is so manifest that no one was authorized, as successor in trust, to execute the power of sale contained in the trust deed; and therefore the trustee's deed executed by Boss, the county clerk of Washington county, and on which the appellee relies for her title, was and is void.

A very similar question was before the Supreme Court of this state in *Killgore v. Cranmer et al.*, 35 Colo. 485, 84 Pac. 70. In the *Killgore* Case, as here, the regularity of the trustee's deed was the sole question before the court. In that case it appears from the opinion that both parties to the trust deed were residents of the county in which the land was situated, and where, by the provisions of the trust deed, the sale should take place in the event of a foreclosure. In the deed before us, the residence of the parties to the trust deed is not made to appear. In that respect the trust deed here under consideration and the trust deed before the court in the *Killgore* Case are dissimilar. But it appears from the trust deed before us (a) that the notes secured by it were payable at Akron, Colo. (and we may take judicial notice that Akron is the county seat of Washington county); (b) that the land was situated in Washington county; (c) that, in case of default in the payment of the notes, the land was to be sold at public auction at the front door of the courthouse in the county of Washington; (d) that the advertisement of the sale was to be made in a newspaper published in said county; (e) that the acknowledgment of the trust deed was made before a notary public in and for said county.

There is no occasion for us to prolong this opinion by citing and quoting the authorities

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bearing on the question that we are considering, since they will be found fully collated by Mr. Justice Maxwell, who wrote the opinion in the Killgore Case.

In the absence of any showing whatever that the county clerk of Washington county was not the party intended by the contracting parties, we hold that he was the party designated in the trust deed as the successor in trust, and that the trial court properly overruled the objection of appellants to the admission of the trustee's deed executed by that official.

The judgment of the trial court is affirmed.

(23 Colo. App. 493)

VANDERMEULEN v. BURWELL.

(Court of Appeals of Colorado. July 8, 1912.)

1. TAXATION (§ 761*)—TAX DEED—VALIDITY.

A tax deed, disclosing that the tracts conveyed were struck off to the county on the first day exposed for sale, was void upon its face.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1509-1513; Dec. Dig. § 761.*]

2. TAXATION (§ 746*)—TAX DEED—POWER TO ISSUE.

The treasurer of the city and county of Denver cannot issue a tax deed to land situated in Washington county.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1491, 1492; Dec. Dig. § 746.*]

3. TAXATION (§ 789*)—TAX DEED—EVIDENCE—QUIETING TITLE.

In a suit to quiet title against a tax deed, defendant's offer in evidence of a tax deed without any proof that the assessed valuation was less than \$250, or that the notice of the time of redemption required by statute was given, was properly rejected.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1556-1569; Dec. Dig. § 789.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Thomas F. Burwell against Daniel Vandermeulen. From a judgment for plaintiff, defendant appeals. Affirmed.

Ezra Keeler, of Akron, for appellant. Isaac Pelton, of Akron, for appellee.

SCOTT, J. This action is one to quiet title to the S. W. ¼ of section 21, township 5 S., range 52 W., in Washington county. The plaintiff alleged and proved title in himself, derived by mesne conveyances from the government.

The defendant relied on three certain tax deeds, based on as many sales of the premises for taxes. The court excluded each of these tax deeds as evidence, for the reasons hereinafter suggested, and rendered judgment for the plaintiff.

[1] The first deed is dated November 16, 1901, and is based on a sale of 1898 for the taxes of 1907. The deed recites: "And whereas, the treasurer of said county did on the 15th day of November, A. D. 1898, by virtue of the authority vested in him by law, at (an adjourned sale) the sale begun and

publicly held on the 10th day of October, A. D. 1898, separately expose to public sale, at the office of the county treasurer in the county aforesaid, in substantial conformity with the requirements of the statute in such cases made and provided, the several parcels of real property above described, for the payment of the taxes, interest and costs then due and remaining unpaid, respectively, on each of the said parcels of property as offered for sale as aforesaid; and whereas, at the time and place aforesaid, Arapahoe county, of the county of Arapahoe, and state of Colorado, having separately offered to pay the sum due on each of the said parcels, in all amounting to the sum of twenty dollars and fifty-three cents, being the whole amount of taxes, interest and costs then due and remaining unpaid on said property for the whole of each of said parcels of real property, viz.: [Here follows description of property sold, same as above set forth as property taxed], which was the least quantity bid for, and payment of said sum having been made by it to the said treasurer, the said parcels of property were separately stricken off to it at that price."

It will be seen from this that the tracts of land conveyed in this deed were struck off to the county on the first day they were exposed for sale, and that they were not, on the previous days of the sale, offered or exposed for sale. Under the uniform holdings of this court, the deed was void on its face.

[2] The second tax deed relied on by defendant was dated January 2, 1907, and based on a sale of 1902 for the taxes of 1901. The sale was to one W. T. Lambert, and was by the county treasurer of Arapahoe county. The deed was by the county treasurer of the city and county of Denver; while at its date, and for several years prior thereto, the lands conveyed were situated in the county of Washington. It was not within the power or authority of the treasurer of the city and county of Denver to issue such tax deed. Such power lay exclusively with the county treasurer of Washington county. The deed was therefore, and for this reason, void on its face. *Pollen v. Magna Charta M. & M. Co.*, 40 Colo. 89, 90 Pac. 689.

[3] The third tax deed relied on was dated June 31, 1907, and was by the county treasurer of Washington county. Objection was made to the introduction of this deed, for the reason that there was no proof that the assessed valuation was less than \$250, or that the notice required by the statute was given. The objection was sustained by the court, and the deed excluded. It was said by Mr. Justice Steele, in *Mitchell v. Trowbridge*, 47 Colo. 6, 105 Pac. 878: "The defendant having relied upon the treasurer's deed as a muniment of title, the burden was upon him to show a compliance with the law,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes.

except as to such matters as by the deed itself are made prima facie evidence by section 3902, 2 Mills' Ann. Stats. It therefore was incumbent upon him to show: (1) The assessed value of the property, and, if \$500 or over, that notice of the time of redemption had been given, as required by the statute (section 3902a, 3 Mills' Ann. Stats.). (2) Whether, at the time the notice was required to be given, the land was occupied or vacant, and, if occupied, that he had served notice upon the occupant or occupants, as well as upon the other persons described in the statute. The defendant failed to show that the assessed valuation was under \$500, and failed to show that the premises were vacant and unoccupied. The treasurer's deed therefore, was not admissible. *Richards v. Beggs*, 31 Colo. 186 [72 Pac. 1077]; *Treasurer T. W. & R. Co. v. Gregory*, 38 Colo. 212 [88 Pac. 445]."

No prejudicial error appearing in the record, the judgment is affirmed. All the Judges concurring.

HENNESSY v. HOLMES et al.

(Supreme Court of Montana. May 28, 1912.)

DEEDS (§ 69*)—MISTAKE—WARRANTY.

Where the act of grantors, in signing a warranty deed in the belief that it was a quitclaim deed, was due to their failure to read it, though they had ample opportunity to do so, they were guilty of neglect of a legal duty, and were precluded from obtaining any relief from their warranty through Rev. Codes, § 4983, providing that a mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 156-164; Dec. Dig. § 69.*]

Smith, J., dissenting.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Patrick J. Hennessy against Levi E. Holmes and another. From judgment for plaintiff and an order denying new trial, defendants appeal. Affirmed.

Jesse B. Roote and Jas. E. Murray, both of Butte, for appellants. Maury, Templeman & Davies, of Butte, for respondent.

STEWART, District Judge. This is an action to recover damages for an alleged breach of warranty contained in a deed made January 25, 1900, by Levi E. Holmes and wife to Andrew Laden, who was the grantor of the plaintiff and respondent herein. Prior to the making of the deed, Holmes and Laden negotiated for the sale and transfer of the title Holmes had in the property described in the deed. The findings of the court below are to the effect that it was understood and agreed between them that a quitclaim deed should be given and received, and that Holmes employed an attorney and in the presence of Laden directed the at-

torney to draft a quitclaim deed; that, instead of drafting a quitclaim deed, the attorney drafted a warranty deed, and the same was later signed and executed by Holmes and his wife under the belief that it was a quitclaim deed, without their having read it or having it read to them, although they had ample opportunity to do so; and that, if Holmes and wife had read the said deed before signing and delivering it, they could and would have discovered that it was not a quitclaim deed, such as they intended to give, but a warranty deed. The conclusions of law are to the effect that Holmes and wife, in failing to read said deed or make any inquiry concerning its contents before signing or delivering it, were guilty of neglect of a legal duty, are not entitled to any relief in a court of equity, and that judgment be entered for Hennessy, Laden's grantee, according to the prayer of the complaint. A judgment was entered in favor of plaintiff. Defendants have appealed from the judgment and an order denying their motion for a new trial. The only question submitted by them for decision is whether the court reached the proper conclusion upon the facts found.

Section 4983 of the Revised Codes provides that "a mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake." This provision of section 4983 is certainly not ambiguous. Its tenor is that a mistake of fact may not be availed of by the one making the mistake if the mistake be occasioned by the neglect of a legal duty. There can scarcely be any question that failing to read carefully a written instrument before uttering the same is a neglect of a legal duty.

California has an identical section with our section 4983. It is section 1577 of the California Civil Code. The Supreme Court of California had the phrase of this section under consideration in the case of *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. In that case an inexperienced old lady signed, without reading, supposedly an option for a lease, which turned out to be an agreement to sell. The court in its opinion said: "It does not appear that appellant made any statements to her, at the time the contract was signed, to mislead her; and but for the circumstances shown, and the fact of her age, her physical infirmities, and inexperience in business, we should find some difficulty in bringing the case within section 1577, Civil Code, defining mistake of fact, from which relief will be given only when 'not caused by the neglect of a legal duty on the part of the person making the mistake.' Ordinarily, it would be the legal duty of a person about to sign a conveyance of real property to read it, or have it read or explained, or have an assurance from some one upon

whose statements he had a right to rely, that it was in accordance with the previous understanding of the party."

In 1 Daniel on Negotiable Instruments, § 849, it is said: "If a party who can read a deed put before him for execution, or if, being unable to read, will not demand to have it read and explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or in law, and ordinarily, in the absence of any device to put the party off his guard, an omission to read the instrument, by one having the capacity to do so, will render him liable and put him beyond the protection of the law, although he is assured he is signing a paper of a different kind from what it really is." See, also, Herman on Estoppel & Res Adjudicata, vol. 2, § 1004.

In 13 Cyc. p. 577, it is said: "A party cannot avoid a deed executed by him, on the ground that he signed the same in ignorance of its contents, where this is due to his own carelessness or negligence. And one who is illiterate and unable to read cannot avoid a deed on this ground, where he did not require that it be read to him."

In 1 Page on Contracts, § 76, it is said: "On the other hand, if he can read or is otherwise guilty of negligence in not informing himself as to the contents of the written contract, and signs or accepts it with full opportunity of informing himself as to its contents, he cannot avoid liability on the ground that he was mistaken as to its contents, in the absence of fraud or misrepresentation. The application of this rule is clearest where the party who signs the instrument is able to read, has an opportunity to read the instrument, and merely neglects to read. Thus where A. signs a note containing a power of attorney to confess judgment, A. being able to read, and there being no fraud or misrepresentation, he cannot have relief from a judgment thereon, on the ground that he did not know that it contained a power of attorney." See, also, 20 Am. & Eng. Ency. of Law (2d Ed.) p. 831.

In the case of *Grieve v. Grieve*, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A. (N. S.) 1211, 11 Ann. Cas. 1162, a mistake was made in a written contract wherein it said that the plaintiff should have one-half of a certain ewe lamb increase; the negotiations and agreement between the parties having been that the complainant should have all the said increase. The complaining party prevailed with the trial court, but the appellate court tersely emphasized the trial court's error in this language: "The error of the court, we think, was in holding that the contract could be reformed on account of the mistake, notwithstanding the negligence of the defendants." The law of the *Grieve* case seems to have been accepted by this court in *American Mining Co. v. Basin Min. Co.*,

39 Mont. 476, 104 Pac. 525, 24 L. R. A. (N. S.) 305, where our court said: "In our opinion, the evidence in this case is clear, satisfactory, and convincing that the deeds as written did not contain the agreement actually entered into by the parties; that there was a mistake as to a material fact; that the mistake was mutual; and that it did not occur by, or result from, the negligence of the plaintiff. These are prerequisite requirements to relief, as laid down by the Supreme Court of Wyoming in the case of *Grieve v. Grieve*, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A. (N. S.) 1211, 11 Ann. Cas. 1162, and we think they are fully met by the plaintiff here." See, also, *Hawkins v. Hawkins*, 50 Cal. 538; *Metropolitan Loan Ass'n v. Esche*, 75 Cal. 513, 17 Pac. 675; *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Snelgrove v. Earl*, 17 Utah, 321, 53 Pac. 1017; *Farlow v. Chambers*, 21 S. D. 128, 110 N. W. 94; *Reed v. Coughran*, 21 S. D. 257, 111 N. W. 559; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. 185; *Valentyne v. Immigration Land Co.*, 95 Minn. 195, 103 N. W. 1028, 5 Ann. Cas. 212.

Counsel for appellants have cited sections 5029 and 7873 of our Revised Codes; but it is apparent that these sections must be read in connection with section 4983, quoted above. By reference to the latter section, it manifestly appears that freedom from neglect is the condition precedent to the right for redress from mistake. This is our interpretation of it, and this court has so held in the case of *American Min. Co. v. Basin Min. Co.*, supra. The rule is well illustrated by an excerpt from the dissenting opinion in *Kelly v. Ward* (Tex. Civ. App.) 58 S. W. 209, where it is said: "The rule is firmly established in this state that a written contract cannot be varied by parol without proof of fraud, accident, or mistake in reducing it to writing, and it is equally well settled that, if such mistake be due to the inexcusable neglect and inattention of one of the contracting parties, he is without remedy."

The conclusion of the court was correct. The judgment and order are affirmed.

Affirmed.

STEWART, Judge of the Ninth Judicial District, sat in place of HOLLOWAY, J., disqualified. BRANTLY, C. J., concurs. SMITH, J., dissents.

McCABE v. CITY OF BUTTE.

(Supreme Court of Montana. June 25, 1912.)

1. TRIAL (§ 251*)—INSTRUCTIONS—PLEADINGS—CONTRIBUTORY NEGLIGENCE.

Where in an action for injuries plaintiff's evidence is such as to justify an inference of contributory negligence, it is proper for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court to instruct the jury on that subject, though the issue is not presented by the answer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

2. MUNICIPAL CORPORATIONS (§ 806*)—DEFECTIVE STREETS—RIGHTS OF TRAVELERS.

A traveler on a public street may presume that it is in an ordinarily safe condition, and that the municipality has performed its duty to exercise ordinary diligence to make and keep the streets in a reasonably safe condition therefor, and that, when they are rendered unsafe by reason of repairs, or for any other cause, and the authorities have notice, they will warn the public by lights or other means.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1678, 1682; Dec. Dig. § 806.*]

3. MUNICIPAL CORPORATIONS (§ 806*)—DEFECTIVE STREETS—DUTY OF TRAVELER—INVESTIGATION.

A traveler on a city street is not bound to investigate to ascertain whether the streets are reasonably safe and cannot be charged with negligence if he fails to do so.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1678, 1682; Dec. Dig. § 806.*]

4. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE.

Though a street may be defective and its condition well known, it is not per se contributory negligence for a traveler to make use of it, provided he uses ordinary care.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

5. MUNICIPAL CORPORATIONS (§ 822*)—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where, in an action for injuries to a pedestrian by a defect in a city sidewalk, the court instructed that, though defendant was negligent, yet plaintiff could not recover if but for her want of ordinary care the injury would not have occurred, such charge sufficiently submitted the question of contributory negligence to the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. § 822.*]

6. DAMAGES (§ 130*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff, a married woman of middle age, while enceinte, was injured by a fall on a defective sidewalk. No bones were broken, and the bruises on her body were entirely superficial and healed rapidly. A miscarriage resulted from the accident, which was attended with physical and mental suffering, and for six months she was almost entirely disabled by weakness from attending to her duties as a housewife. During that time, she was under the care of her physician, and from November, 1910, to the date of the trial, she frequently consulted another physician, and for a portion of the time employed help in her home because of her alleged weak condition, her expenditures in that behalf amounting to \$475. In the meantime she had suffered a second and perhaps a third miscarriage, but physicians called as her witnesses were unable to express an opinion as to whether the subsequent miscarriages were a necessary or probable result of the condition induced by the injury from the fall. Both testified that her pelvic organs were in a normal and healthy condition except for lesions resulting from the birth of a fully ma-

tured child and a slightly relaxed condition of the ligaments of the uterus. *Held*, that a verdict allowing plaintiff \$10,475 was excessive and should be reduced to \$3,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 130.*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by Nellie McCabe against the City of Butte. Judgment for plaintiff, and defendant appeals. Reversed on condition.

H. Lowndes Maury, John A. Smith, and N. A. Rotering, all of Butte, for appellant. M. F. Canning and P. E. Geagan, both of Butte, for respondent.

BRANTLY, C. J. This action was brought to recover damages for a personal injury sustained by the plaintiff by a fall caused by a defect in a sidewalk along one of the streets of the defendant. It is alleged that, at the point where the accident occurred, there was, and for more than a year had been, a hole about 12 inches long, 9 inches wide, and several inches deep, rendering the walk dangerous to pedestrians; that the city authorities had failed to use ordinary care to ascertain the existence of the defect and cause it to be remedied; and that plaintiff, being without knowledge of its existence and not warned of the danger by barriers or lights, stepped into it and was thrown violently down, with the result that she was much bruised about her body, arms, and legs, was rendered unconscious, suffered displacement of her pelvic organs, resulting in a miscarriage, followed by severe hemorrhage, etc., by reason of which injuries she has been and will be incapacitated to perform her duties as housewife, and has suffered great physical and mental pain, to her damage in the sum of \$20,000. The complaint also alleges special damages in the sum of \$475 made up of reasonable and necessary expenses incurred for medical attention, nursing, etc. The answer tenders issue upon all the allegations of the complaint except the corporate capacity of defendant. There was no plea of contributory negligence. The plaintiff had verdict and judgment for \$10,475 and for costs. The defendant has appealed from the judgment and an order denying it a new trial, and has submitted for decision two questions, the first of which is based upon the refusal of the court to submit to the jury one instruction requested, and the second upon the refusal of a new trial on the ground that the verdict is excessive.

1. The instruction referred to is the following: "No extraordinary care was required of Mrs. McCabe, but, if there was the slightest want of ordinary care on her part and such contributed directly to her injury, she cannot recover in this case." It is ar-

gued by counsel for defendant that the condition of the evidence is such that the jury might have inferred want of ordinary care on the part of the plaintiff contributing directly to her injury, and hence that the defendant was entitled to have its attention called to that aspect of the case by appropriate instructions. It appears from the evidence that the plaintiff in the dusk of the evening of May 26, 1910, in company with her little daughter, was walking rapidly along Thornton avenue, a public street in general use, on her way to the house of an acquaintance residing on Gaylord street. The way by Thornton avenue was the most direct leading to the point on Gaylord street to which the plaintiff was going. To reach her destination, her purpose was to go by way of an alley intersecting Thornton avenue. At the corner of the street and alley was a hole such as is described in the complaint, due to a break in one of the boards forming the covering of the sidewalk. There was no light nor barrier to warn pedestrians of the defect. Plaintiff was about two months advanced in pregnancy. As she was about to turn the corner, she stepped into the hole and was thrown to the sidewalk.

[1] In *Nelson v. Boston & Mont., etc., Co.*, 35 Mont. 223, 88 Pac. 185, it was held that, where the condition of the evidence introduced by the plaintiff is such that it may justify an inference of contributory negligence, it is proper to instruct the jury on that subject, though the issue is not presented by the answer. Counsel cite and rely upon this case and insist that the court erred in refusing defendant's request. The contention is without merit.

[2] A traveler upon a public street has the right to presume that it is in an ordinarily safe condition, because the law enjoins upon the authorities of the municipality the duty to exercise ordinary diligence to make and keep the streets in a reasonably safe condition for public travel; and when they are rendered unsafe by reason of repairs being made therein, or have become defective or unsafe from any cause, and the authorities have notice of the condition or the circumstances are such as to warrant a presumption of notice, the duty to warn the public by lights or other means, while repairs are made, also arises.

[3] The traveler is not bound to make investigations, and he cannot be charged with negligence if he fails to do so. 7 Am. & Eng. Ency. of Law (2d Ed.) 391.

[4] Though the street may be defective and its condition be well known, yet it is not per se contributory negligence for one to make use of it, provided he uses ordinary care in doing so. *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572; 7 Am. & Eng. Ency. of Law (2d Ed.) 411.

In the opinion of the writer, the evidence

furnishes no basis for an inference of contributory negligence on the part of plaintiff. She was traveling along the walk in the ordinary way. She had a right to proceed rapidly if she chose to do so. Having no knowledge of the existence of the defect, she was not bound to make inspection in order to ascertain the existing condition. And though a woman may be pregnant, she is one of the public and has a right to the use of the streets in the same manner and with the same presumption as to their condition as other persons. While it may be said that at every stage of the period of pregnancy her coming and going should be regulated with due care to the safety of her unborn offspring, her legal obligation to foresee and provide against neglect of duty by the public authorities is not greater than that of other members of the community. If, from any point of view, the circumstances disclosed here furnished the basis for an inference of negligence on the part of plaintiff, then in every case of injury caused by a defect in a street there is a question of contributory negligence which must be submitted to the jury, whether the issue is made by the pleadings or not.

[5] But let us assume, as the trial court did, that the evidence presents a question of contributory negligence, the subject was sufficiently covered by instructions 4, 8, and 9 given by the court. The last expressly told the jury that, though the defendant had been shown to have been guilty of negligence, yet the plaintiff could not recover if, but for her want of ordinary care, the injury would not have occurred. This form of statement embodies the rule which is found in the text of Mr. Thompson in his work on Negligence (1 Thompson on Negligence, §§ 171, 173). We think it correct and entirely sufficient for all practical purposes.

[6] 2. The amount of the verdict is excessive. The plaintiff is a woman of middle age, the mother of five living children. She had no bones broken. The bruises upon her body were entirely superficial and healed rapidly. The most serious feature of her injury was the miscarriage brought about by the accident, the attendant physical and mental suffering, and the resulting condition which she insists is permanent. She was for the months intervening between the 26th of May and the 13th of the following November almost entirely disabled by weakness from attending to her duties as housewife. During all that time she was under the care of Dr. McGinn, her family physician, and a portion of the time required the attendance of a nurse. During the time intervening between November 13, 1910, and the date of the trial, she frequently consulted another physician, and for a portion of the time employed help in her home because of her alleged weak condition. Her expenditures in

this behalf amounted to \$475. In the meantime she had suffered a second and perhaps a third miscarriage.

Drs. McGinn and Anderson, called as witnesses, made an examination of her pelvic organs during the trial. Neither was able to express an opinion upon the question whether the subsequent miscarriages were a necessary or probable result of the condition induced by the injury from the fall. Both were of the opinion that in some cases the habit of miscarriage is induced by a first occurrence, thus destroying the childbearing power, but refused to express an opinion as to what was the condition of the plaintiff in this regard. Both testified that her pelvic organs were in a normal and healthy condition, except that there were lesions which had evidently been caused by the birth of a fully matured child, and a slightly relaxed condition of the ligaments of the uterus. While plaintiff is entitled to recover a substantial amount in view of the character of her injury and the attendant pain and suffering, we think the allowance made by the jury very much in excess of what would be up to the full measure of just compensation.

The cause is remanded, with directions to the district court to grant a new trial, unless within 80 days after the filing of the remittitur the plaintiff shall give her consent in writing that the judgment be reduced to \$3,000. If such consent is given, the judgment will be modified accordingly as of the date of its original entry, and together with the order denying the new trial will stand affirmed. That part of the judgment relating to the costs is not to be disturbed.

SMITH, J., concurs.

HOLLOWAY, J. I concur in the result reached, but I do not agree with all that is said in the first paragraph of the opinion above. In my judgment the trial court entertained the correct view that the evidence presented a question of contributory negligence, and this was properly submitted to the jury.

In view of the definition of negligence adopted by this court in *Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940, I think the instructions given fairly cover the question of contributory negligence, and that the instruction tendered by defendant merely emphasized the rule, without stating any different proposition of law. Under such circumstances, the trial court cannot be put in error because of the language employed to express the rule, when it appears, as it does from this record, that the jurors must have understood the principle announced by the court for their government.

WINSLOW v. DUNDOM et al.

(Supreme Court of Montana. June 25, 1912.)

1. APPEAL AND ERROR (§ 1012*)—FINDINGS—CONCLUSIVENESS.

A finding of the jury, approved by the trial judge in a suit in equity, will be accepted by the Supreme Court on appeal, unless appellant shows that the evidence preponderates against it, and, where there is a sharp conflict in the evidence involving merely the credibility of the witnesses and the weight of their testimony, the finding is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.*]

2. STATUTES (§ 226*)—CONSTRUCTION—ADOPTION OF STATUTE OF SISTER STATE.

The court in construing a statute adopted from a sister state where it has received a judicial construction will assume that the Legislature intended that the same construction should prevail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.*]

3. ASSIGNMENTS (§ 4*)—EQUITY (§ 19*)—INTERESTS ASSIGNABLE—STATUTES—CONSTRUCTION.

Rev. Codes, §§ 4454, 4591, providing that a mere possibility is not an interest, and that a mere possibility, not coupled with an interest, cannot be transferred, are declaratory of the common-law rule under which such interests are not transferable at law, but in equity transfers of such interests, if fairly made and for an adequate consideration, will be enforced.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 6; Dec. Dig. § 4.* Equity, Cent. Dig. §§ 46, 47; Dec. Dig. § 19.*]

4. VENDOR AND PURCHASER (§ 57*)—CONTRACTS—"OPTION."

An "option" is a right acquired by contract to accept or reject an offer to purchase property at a fixed price within a specified time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 87; Dec. Dig. § 57.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5000-5002; vol. 8, p. 7739.]

5. CONTRACTS (§ 147*)—CONSTRUCTION—INTENT OF PARTIES.

The court, in construing a contract, must ascertain and give effect to the intention of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

6. ASSIGNMENTS (§ 18*)—CONTRACTS ASSIGNABLE.

The rule that a contract is assignable does not apply where the right created by the contract is coupled with a liability, or where the contract involves a relation of personal confidence, or is for personal services.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 25-27; Dec. Dig. § 18.*]

7. VENDOR AND PURCHASER (§ 214*)—CONTRACTS ASSIGNABLE—OPTION.

An option for the purchase of real estate at a fixed price within a definite time is assignable by the holder of the option, where his agreement simply involves the payment in cash of the price specified in the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436, 442-448; Dec. Dig. § 214.*]

8. LANDLORD AND TENANT (§ 112*)—NONASSIGNABILITY OF LEASE — FORFEITURE — WAIVER.

A provision in a lease against assignment by the lessee without the lessor's consent is for the benefit of the lessor and he may waive a breach of the condition, and the right granted by Rev. Codes, § 7271, subd. 4, providing that an assignment by a lessee contrary to the covenants of a lease operates to terminate the lease on notice by the lessee, may be asserted or waived.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

9. LANDLORD AND TENANT (§ 112*)—BREACH OF CONDITION AGAINST NONASSIGNABILITY.

Where a lessor in a lease stipulating against assignment without his consent did not avail himself of the privilege of terminating the lease as authorized by Rev. Codes, § 7271, subd. 4, because of an assignment without his consent, he waived the right to terminate the lease on that ground.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

10. VENDOR AND PURCHASER (§ 18*)—OPTION —ACCEPTANCE.

An acceptance of an option to purchase real estate involves the actual payment or tender of the price, unless the vendor, by his conduct, excuses actual tender.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

11. SPECIFIC PERFORMANCE (§ 97*)—TENDER OF CONSIDERATION — OPTION TO PURCHASE LAND.

Where the holder of an option to purchase real estate within a specified time for a specified price notified the vendor of his intention to accept the option, and thereafter the vendor notified the holder that he withdrew the offer in the option, and would not abide thereby, an actual tender of the price was not necessary to enable the holder to assert his rights under the option, provided he was ready, able, and willing to pay the price and receive the deed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by F. D. Winslow against William Dundom, Sr., and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Belden & Dekalb, of Lewistown, for appellants. Ayers & Marshall and W. M. Blackford, all of Lewistown, for respondent.

HOLLOWAY, J. On March 17, 1908, William Dundom, Sr., and Kate Dundom, his wife, executed and delivered to Axel Anderson two certain instruments in writing. The first was a lease of real property for the term of five years. The second instrument, which refers to the same property, reads as follows: "Option. It is agreed that Axel Anderson, for value received, shall have the right to purchase my property consisting of 2,400 acres of land located in Township 10 North, 17 East, Fergus county, Montana, for a period of three years from date of this in-

strument, the price to be \$15 per acre. I agree to furnish an abstract of title to the property showing same to be free from all encumbrance. The said property to remain in the hands of the said Axel Anderson exclusively for period of time mentioned." On January 9, 1911, Anderson executed and delivered to F. D. Winslow a quitclaim deed by which he released to Winslow all his interest in the premises covered by the Dundom lease, and assigned to Winslow all his interest under the option. On January 30, 1911, Winslow notified William Dundom that he had secured the option by assignment and intended to accept the offer contained in it, and then and there prepared a deed for William and Kate Dundom to execute, and this deed was delivered to William Dundom. About March 1, 1911, William and Kate Dundom by writing notified Winslow that they withdrew the offer contained in the option agreement and would not longer abide by the same, for the reason that the option agreement was without consideration. They stated, also, that they refused to recognize any right in Winslow as assignee of Anderson. On March 10, 1911, Winslow notified both William and Kate Dundom that he was then prepared to pay the full purchase price mentioned in the option, that he desired to exercise the privilege given by the option, and demanded a deed for the property. The demand was refused, and this action was commenced by Winslow to enforce specific performance. Upon the trial the court called to its assistance a jury, to whom were submitted certain interrogatories covering the disputed questions of fact. These interrogatories were all answered by the jury in favor of plaintiff's contentions, and these findings were adopted and supplemented by other findings made by the court. A decree in favor of plaintiff was rendered and entered, and from that decree and an order denying a new trial the defendants have appealed.

[1] Without attempting to state even the substance of the evidence contained in the voluminous record, it is sufficient to say that there is substantial evidence to support every finding made by the court and jury; and, under the rule of practice in this state, those findings will be accepted in this court, unless the appellants can show that the evidence preponderates against them or some of them. *Murray v. Butte-Monitor T. Mfn. Co.*, 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132. The burden thus imposed upon the appellants they have failed to maintain. At most, the record discloses a sharp conflict in the evidence, involving a mere question of the credibility of witnesses and the weight to be given to their testimony. Under these circumstances, we accept the findings as conclusive upon the facts involved. Those facts, so far as necessary to be considered now, are (1) that there was a sufficient consideration for the option agreement; (2) that it

was not the intention of the parties that the option agreement should be personal to Anderson and not assignable; (3) that the value of the land increased greatly during the life of the option; and (4) that the plaintiff has been at all times since January 30, 1911, able and willing to pay the purchase price and receive a deed for the property involved. By other findings the lands mentioned in the option agreement are identified and certain facts established which are not seriously controverted, if controverted at all.

We have presented to us, then, the single question: Was the option agreement assignable so as to give Winslow the right to insist upon specific performance? There is not any uncertainty or ambiguity in the terms employed, and the question might well be treated as one of law; but out of abundance of caution the trial court submitted to the jury evidence touching the circumstances surrounding the making of this agreement and reflecting upon the intention of the parties to it, and the jury found that it was not the intention of the parties that the option should be personal to Anderson. Elaborate and most excellent briefs have been submitted by counsel for the respective parties, but, when the arguments are exhausted, the result is fairly characterized by Prof. Page in his article on Vendor and Purchaser, in 39 Cyc. p. 1245, as follows: "In some jurisdictions it is held that a bond to convey or other contract giving a particular person an option to purchase land within a certain time and upon certain terms and conditions is neither a chose in action nor a transmissible right of property, but a mere personal privilege in the person to whom it is given, and that it is not assignable by him, or subject to acceptance and enforcement by his heirs or personal representatives, unless it has been accepted and thereby changed into a binding contract of sale, or unless it is in terms given not only to him, but also to his assigns, heirs, personal representatives, etc. In other jurisdictions, however, it is held that an option to purchase land based upon a valuable consideration is assignable even before acceptance, and although it does not run to the assigns of the party to whom it is given, unless there is some provision or agreement making the contract a purely personal one." The conflict in the decisions arises upon the consideration of peculiar statutory provisions or upon the view entertained by the particular court of the nature of an option itself. We are bound by our own statutes, so far as they are applicable; and this court has had occasion heretofore to consider the nature of an option given for a valuable consideration, such as the one before us, and with our former determinations we are satisfied and adhere to them so far as they reflect upon the question now presented.

[2, 3] Appellants lay much stress upon the following provisions of our Revised Codes:

"Sec. 4454. A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind."

"Sec. 4591. A mere possibility, not coupled with an interest, cannot be transferred."

Section 4454 is identical in terms with section 700 of the California Civil Code, and section 4591 is identical with section 1045 of the California Civil Code. These provisions were in force in California many years before they were adopted by us in 1895, and had received construction by the highest court of that state before they became a part of our Codes. We must indulge the presumption, then, that in adopting these provisions from California our Legislature intended that the same construction should prevail in this jurisdiction as then prevailed in the state from which the sections were borrowed. State ex rel. Dolenty v. District Court, 42 Mont. 170, 111 Pac. 731. The California Code sections above were construed in *Re Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 184, wherein it is held that these sections simply state well-settled rules of common law, and, whereas at common law such intangible rights or interests as those mentioned in the sections above were incapable of being transferred, still in equity the rule was quite the contrary, and agreements for the sale of expectancies, if fairly made and for an adequate consideration, were enforced in equity. The court concludes: "It was not the intention of the Legislature, in enacting the sections of the Code just referred to, to make any change in the rule by which courts of equity were theretofore governed in dealing with this class of contracts." Assuming, without deciding, that the right acquired by Anderson under the option agreement can be properly referred to the character of rights mentioned in either section 4454 or 4591 above, we think appellants' contention is fully answered by the conclusion of the California court in the case just cited.

[4] In *Snider v. Yarbrough*, 43 Mont. 203, 115 Pac. 411, in speaking of the abstract right as distinguished from the instrument evidencing the right, this court said: "An option is a right acquired by contract to accept or reject a present offer within a limited or reasonable time." While in characterizing the instrument which evidences such right, this court in *Ide v. Lelser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17, in speaking of an option said: "It is simply a contract, by which the owner of property agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain."

[5] It is an elementary rule for the construction of contracts generally that the intention of the parties in making the con-

tract shall be ascertained, and, when ascertained, shall be enforced. This rule the trial court invoked, and properly so; and without pausing to consider whether oral evidence was admissible to show the intention, for no objection was offered to the evidence, we are confronted with this question: Is there anything in the nature of an option agreement which prevents the option holder from transferring his interest to a third party, in the absence of any evidence that the parties to the agreement in the first instance intended the right created to be personal to the option holder? No useful purpose could be served by a review of, or reference to, the conflicting decisions. There is not any reason suggested why the same rules of law which apply to contracts generally should not be invoked with respect to an option agreement, so far as the character of the latter admits of their application, and we do not know of any.

[6] While the rule is uniform that a person may contract with whom he pleases and may refuse to contract with any particular person, still the rule is equally well settled, as stated in 4 Cyc. 20, as follows: "As to assignability of private contracts, it may be stated as a general rule that rights arising out of agreements or contracts between private individuals may be assigned, in the absence of any provision or stipulation in the agreement or contract to the contrary." Certain well-recognized exceptions to that rule arise in case the right is coupled with a liability, or the contract involves the relation of personal confidence, or the contract is for personal services; and the reason for these exceptions is apparent at once. A person might be willing to employ a particular person as his confidential agent, whereas he would not be willing that some one else should perform the services for him, or he might be willing to pay a given price to a particular artist for a painting by him, whereas he would not be willing to pay the same price, or possibly any price, for a painting upon the same subject by some one else.

[7] But since the contract in question does not involve relations of personal confidence or skill, and the right is not coupled with any liability, there is not any reason why Anderson's assignee cannot perform the agreement as well as Anderson himself. It involved simply the payment in cash of the amount of the purchase price mentioned in the agreement. The rule that rights arising from contracts between private individuals are assignable, and that nonassignability is the exception, was recognized by this court in *Flinner v. McVay*, 37 Mont. 306, 96 Pac. 340, 19 L. R. A. (N. S.) 879, 15 Ann. Cas. 1175. Since it appears in this instance that it was not the intention of the parties to the agreement that the right secured to Anderson should be personal to him, and since the execution of the agreement does not involve any question of personal confidence

or skill, we think the case falls within the general rule and that the right was assignable, and that Winslow may enforce the same in a court of equity.

[8] The record discloses that the consideration for the option was the lease, which by its terms was made nonassignable without the consent of the lessors; and it is now insisted that by giving the quitclaim deed Anderson assigned the lease without his lessors' consent, thereby forfeiting his rights under it, and that in effect the lease ceased to exist and in consequence thereof the consideration for the option agreement failed, and defendants were at liberty to withdraw the offer, as they assumed to do in the written notice of March 1st. Subdivision 4 of section 7271, Revised Codes, reads as follows: "Any tenant or subtenant, assigning or subletting, or committing waste upon the demised premises, contrary to the covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall upon service of three days' notice to quit, upon the person or persons in possession, be entitled to restitution of possession of such demised premises, under the provisions of this chapter." The provision for nonassignability contained in the lease was clearly intended for the benefit of the lessors; but such right, or the breach of the condition, they could waive if they chose to do so. The statute above merely gives them a right which they could assert or not as they elected.

[9] The lease provides for its termination upon 10 days' notice from the lessors, in case of a breach by the lessee; but the record fails to show that the lessors availed themselves of the privilege, and, in the absence of such showing, "the case stands as if no restriction had been imposed, or as if the lessor had given his consent to the assignment." *Jones v. Moncrief-Cook Co.*, 25 Okl. 856, 108 Pac. 408, and cases therein cited. The violation of the covenant against assignment gave to the lessors the right to declare the lease terminated and end the term; but this right they waived by a failure to exercise it. *Garcia v. Gunn*, 119 Cal. 315, 51 Pac. 684; *Scott v. Slaughter*, 85 Tex. Civ. App. 524, 80 S. W. 643.

[10] Finally, it is urged that there never was an acceptance of the offer contained in the option agreement. It is insisted that an acceptance involved the actual payment or tender of the purchase money, and this is correct, unless the defendants by their conduct excused actual tender.

[11] The law does not require the doing of an idle act; and but for the declarations of defendants in their written notice of March 1st, and their oral declarations to the plaintiff on March 10th, plaintiff would fall by reason of his failure to make actual tender. But when the defendants notified him on March 1st that they would not abide by the option agreement, and when on March

10th they specifically told him that it was useless for him to offer them the money, as they would not accept it, they thereby released the plaintiff from the necessity of actually producing the money and offering it to them, so long as he showed himself ready, able, and willing to pay the money and receive the deed. *Long v. Needham*, 37 Mont. 408, 96 Pac. 731; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007.

We deem it unnecessary to give particular consideration to other questions presented.

The judgment and order are affirmed.
Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

HAMBACH v. WARD et al.

(Supreme Court of Washington. July 18, 1912.)

1. STATUTES (§ 120*)—TITLE—SUFFICIENCY.

Act March 18, 1909 (Laws 1909, c. 207) § 2, providing that, if any municipal corporation fail to require a contractor to give a bond to secure laborers, materialmen, etc., it shall be liable for the full amount of all debts so incurred by such contractor, is not unconstitutional for failure to express this obligation in its title, which is an act "requiring bonds from contractors contracting to do public work conditioned to pay laborers, mechanics, materialmen and others"; the purpose of the Constitution being merely to require the title to disclose the scope of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 168-172; Dec. Dig. § 120.*]

2. MUNICIPAL CORPORATIONS (§ 376*)—CONTRACTS—BONDS—STATUTES.

Under Act March 18, 1909 (Laws 1909, c. 207) § 2, providing that, if a municipal corporation shall fail to take the required bond from a municipal contractor, it shall be liable for the full amount of all debts incurred by him, where no bond was taken for debts by the contractor for public work, even though the contract with him did not comply with the necessary formal requisites, it is liable for debts incurred by the contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 911-918; Dec. Dig. § 376.*]

3. MUNICIPAL CORPORATIONS (§ 376*)—CONTRACTS—BONDS—STATUTES.

Under Act March 18, 1909 (Laws 1909, c. 207) § 2, providing that the municipality on failing to take a bond from a contractor shall be liable for all debts incurred by him, the contractor's creditors can only recover the reasonable value of goods or labor furnished, and so, while one cannot sue on a contract and recover on quantum meruit, evidence that the agreed price of goods furnished was their reasonable value is admissible.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 911-913; Dec. Dig. § 376.*]

4. MUNICIPAL CORPORATIONS (§ 376*)—CONSTRUCTION—PENAL STATUTES.

Act of March 18, 1909 (Laws 1909, c. 207) § 2, providing that a municipality shall be liable for all debts incurred by a public contractor where it has not taken a bond for the payment of such debts, is not penal, but remedial in its nature, in no way differing from

statutes giving liens upon the property of private owners.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 911-913; Dec. Dig. § 376.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by A. Hambach against H. B. Ward and the City of Edmonds. Judgment for plaintiff, and defendants appeal. Affirmed.

S. J. White, of Edmonds, for appellants. Peterson & Machride, of Seattle, for respondent.

GOSE, J. This action was brought under the provisions of the statute. Laws 1909, p. 716. It is alleged in the complaint that the plaintiff and his assignors furnished material for and performed labor upon the city hall and library building in the city of Edmonds, a city of the third class, at the instance of the defendant Ward, that Ward erected the building under a contract with the city, and that the city failed to take a bond as required by the statute. The answer admits that Ward erected the building, and that the building is the property of the city, but denies that the city entered into a contract with him for its construction. There was a judgment for the plaintiff against the city, and it has appealed.

[1] The appellants' first contention is that the title of the act is not sufficiently broad to embrace the obligation, which section 2 puts upon municipalities failing to take a bond. The title of the act is as follows: "An act requiring bonds from contractors contracting to do public work, conditioned to pay laborers, mechanics, materialmen and others." While the title might well have been more specific, we think it is sufficiently comprehensive to disclose the object of the act within the meaning of the Constitution. The purpose of the constitutional provision is to require the title of an act to call attention to the subject-matter of the legislation, so that one reading it may know what matter is being legislated upon, "and it is sufficient when it is broad enough to accomplish that purpose." *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728. See, also, *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771; *State v. Ames*, 47 Wash. 328, 92 Pac. 137; *State v. Merchant*, 48 Wash. 69, 92 Pac. 890; *State ex rel. McFadden v. Shorrock*, 55 Wash. 208, 104 Pac. 214; *National Surety Co. v. Bratnaber Lumber Co.*, 122 Pac. 337; *State ex rel. v. Superior Court*, 124 Pac. 484. This title was considered in the *Bratnaber* Case, where we said: "The act here involved, both in its title and body, relates only to securing claims by contractor's bonds, and has no reference whatever to liens. Its title we think fairly suggests all that is necessary, as to who are to be secured by such bonds in the body of the

act." A reading of these cases will disclose that this court has adopted a rule of liberal interpretation, and has declined to reject any part of an act where the title discloses its general object, and is not misleading.

[2] The contract recites that it is entered into by Ward, as the party of the first part, and the city of Edmonds, as the party of the second part, and is signed, "William Keeler, Mayor, H. V. Allen, Thomas Hall, Committee." It is contended that the contract was not legally executed, and that the city did not confer upon the committee the power to enter into the contract. These questions we need not consider. The evidence shows that the goods were furnished at their reasonable value; that they were actually used in the construction of the building; that they have not been paid for; and that the city has accepted the building, and is using one floor as a city library and the other as a city hall. In the beginning the city had an offer of a gift of \$5,000 from Mr. Carnegie, to be used in the construction of a free public library building. The offer was accepted, and the money was received and used in the construction of the building. The building was made large enough to serve the twofold purpose of a library and a city hall, and the \$5,000 was found to be inadequate for the double purpose. We think the words contained in the act, "shall contract with any person or corporation to do any work for the state, county or municipality," etc., have reference to the actual relation created rather than to the strict legal relation. The city had actual knowledge while the building was in course of construction that Ward, whether empowered to do so or not, was assuming to represent it, and, after the building was completed, it accepted it, and has since occupied it. It is not contended that the city did not have the power to enter into the contract, but the contention is that the contract was irregularly executed. The obligations flowing from a power irregularly exercised by a municipality or a municipal officer are very different from those which follow an attempt to exercise a power that does not exist in such municipality or officer. In the case at bar the city actually constructed the building through Ward, whom it recognized as a contractor. We are unwilling to announce a rule of construction which would require every person furnishing a few dollars worth of material for a public work, or performing a few dollars worth of labor thereon, to ascertain at his peril, whether the governing authorities had observed all the formalities of the law prior to entering into the contract. Such a construction would defeat the purpose of the law. As was said in *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621: "By what authority or reasoning is one selling material to a municipal contractor made the curator of public interests, and re-

quired to do independently the work of the counsel for the city as to correctness of titles, or of the engineer as to the feasibility of the construction of a sewer or its utility when constructed? What considerations remove him from the protection of the presumption of performance of official duty by which persons dealing on the faith of instruments ordinarily have the right to rely?" The better view is that, where one, assuming to be a contractor, is engaged in the prosecution of a public work, such as the authorities are authorized to carry on and with their knowledge and consent, those who furnish labor and material for the work may rely upon the presumption that the public authorities have done their duty, and assume without investigation that he is a contractor. This principle is supported by the following authorities: *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 220, 114 Pac. 457; *Fransoli v. Thompson*, 55 Wash. 259, 104 Pac. 278; *Kansas City, etc., Co. v. National Surety Co.*, 167 Fed. 496, 93 C. C. A. 132; *Bell v. Kirkland*, supra; *Aspinwall-Delafield Co. v. Borough, etc.*, 229 Pa. 1, 77 Atl. 1098; *People v. Board, etc.*, 143 App. Div. 722, 128 N. Y. Supp. 638. In the *Green Case* a taxpayer sought to enjoin the execution of a contract let by the county for the construction of a bridge. Pending the action the bridge was completed and payment made. We held that the contract had not been legally entered into, but that the county was liable to the builder for the reasonable value of the bridge. While that case does not rest upon the statute under consideration in the case at bar, it discloses the equitable view adopted by this court, where a municipality receives the benefit of a needed improvement which it had the power to make, and seeks to retain the improvement, and at the same time avoid liability for its creation. In the *Kansas City Case* a contractor's bond was given under a statute similar to our statute. The work was completed by the contractor under the supervision of the city, and then accepted and approved. The contractor failed to pay the plaintiff for material furnished for the work, and he brought suit upon the bond. The contract was held to be illegal, but a recovery upon the bond was permitted. It was there contended that the illegality of the contract extended to and vitiated the bond. In meeting this argument the court said: "The plaintiff could have established its case without any aid from the illegal contracts. It is true that it pleaded those contracts in its complaint, and introduced them as part of its case upon the trial. This, however, was not necessary. The proof of the bonds, and the nonpayment of the purchase price of the brick used in constructing the improvements referred to in the bonds, would have made out a complete case in plaintiff's favor." The manifest purpose of the statute

is to give laborers and materialmen the same protection in the absence of a bond that they would have with the bond; in short, to substitute the credit of the municipality for the bond.

[3] Authorities are cited to the effect that one cannot sue upon a contract and recover upon a quantum meruit. It is true the complaint alleges the "agreed" price of the labor and material, but the evidence admitted without objection is that the goods were delivered to the contractor at their reasonable value. Without regard to the contract price the respondent can recover only the reasonable value of the labor and goods. *F. T. Crowe & Co. v. Adkinson Const. Co.*, 121 Pac. 841.

[4] It is argued that the statute, in so far as it gives a right of action against the municipality, is penal in its nature, and must be strictly construed, and that the word "contract" must be held to mean a contract executed in conformity with all the formalities of law. The statute is not penal, but remedial in its nature. It does not differ in this respect from the statutes giving a lien upon the property of a private owner for goods furnished the contractor. In the one case the property itself is holden as security for the debt, and in the other, in the absence of a bond, the state imposes a liability upon itself and its members for the reasonable value of labor and property for which it receives a benefit. The statute is simply the recognition of an equitable obligation.

The judgment is affirmed.

CHADWICK, PARKER, and CROW, JJ., concur.

SHORES et ux. v. HUTCHINSON et al.

(Supreme Court of Washington. July 17, 1912.)

CORPORATIONS (§ 117*)—SALE OF STOCK—DECEPTION. CONSTITUTING FRAUD—RELIANCE ON REPRESENTATIONS.

Where, before a purchaser of corporate stock paid therefor, he attended stockholders' meetings at which the corporation affairs were disclosed, and at which a detailed statement of its financial condition was read showing that more capital was needed immediately to keep it a going concern, and had a conversation with the manager of its factory in which its prospects were disclosed, he could not later rescind the transaction and recover back the consideration, although the seller, who occupied no fiduciary relationship towards the purchaser, told him that stock had been recently sold for \$.90 a share, and that it was worth that, and furnished him balance sheets which may have overvalued the company's assets, since the seller's statements were mere matter of opinion, and the purchaser, having investigated the matters himself, was not justified in relying on the opinion of the seller.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by E. A. Shores and wife against Ernest Hutchinson and others. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

Gordon, Easterday & Askren, of Tacoma, for appellants. Bates, Pear & Peterson, of Tacoma, for respondents.

ELLIS, J. This is an action by E. A. Shores and wife against Ernest Hutchinson and wife to set aside a transfer and conveyance by plaintiffs to the defendants of certain improved lots in the city of Tacoma, with the household furniture therein, certain timber lands in Thurston county, and certain standing timber in Jefferson county, made in exchange for 320 shares of the capital stock of Michigan Furniture Company, hereinafter called the company. The company had a capital stock of \$150,000, divided into 1,500 shares of a par value of \$100 each. 1,255 shares of an aggregate par value of \$125,500 had been issued. The grounds upon which rescission is sought are alleged fraudulent representations by the defendants as to the amount and value of the assets of the corporation and as to the value of the stock, and misrepresentation and concealment as to the extent of its liabilities. A trial on the merits resulted in a dismissal of the action. The plaintiffs have appealed.

The evidence is voluminous and conflicting. No good purpose would be served by reviewing it in detail. It will suffice to say that, upon a careful consideration of the statement of facts, we are satisfied that the following facts were established by a fair preponderance of the evidence. In the latter part of January or early in February, 1911, the respondent Ernest Hutchinson, who had recently retired from the presidency and management of the company, desiring to dispose of his stock therein, placed it in the hands of the real estate firm of Fettig & Busselle for sale, advising them to call upon the appellant E. A. Shores, who, as it appears, had formerly evinced some interest in the concern. After considerable negotiation, which was conducted mainly if not wholly by these agents with the appellant E. A. Shores, an agreement was reached by which the 320 shares of stock were to be transferred to the appellants in exchange for the property sought to be recovered in this action. A contract evidencing this agreement was executed by the appellants and respondents on February 16, 1911. It provided that, if the respondents within 30 days from the date of the contract deliver to the appellants the 320 shares of stock duly and regularly issued to E. A. Shores, the appellants would thereupon deliver their deeds of the property to the respondents. The respondents, at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the time of the signing of the contract, delivered the stock to the appellants' attorney, and on February 18, 1911, it was transferred to the appellant E. A. Shores upon the books of the company. The stock certificate was actually delivered to Shores personally about March 10, 1911. While he testified in effect that he did not consider himself the owner of the stock until he delivered to respondents deeds of the property on March 14, 1911, it is undisputed that, between the making of the contract, February 16th, and the date of the delivery of the deeds to the respondents, March 14th, he attended several meetings of the stockholders, and was recognized by the company as the owner of the stock. At these meetings it appears that the affairs of the company were fully discussed, and at one of them, held on March 11, 1911, a detailed statement of its financial condition was read, showing that \$30,000 was immediately required to keep the company a going concern, and the appellant E. A. Shores was then appointed as a member of a committee to devise some plan for financing and reorganizing the company. He also attended an adjourned meeting of the stockholders on March 14, 1911, before delivering the deeds, at which meeting a motion was carried to endeavor to get each stockholder to pay a 30 per cent. cash assessment, or put up 50 per cent. of his stock for the purpose of raising operating capital. In the latter part of February, 1911, Shores went out to the plant and had a conversation with one Bradner, the manager of the factory, in which the management, condition, and prospects of the company were discussed, and Shores then told Bradner that the company ought to have \$20,000 at once, thus showing that he then realized that the concern was in immediate need of working capital to make it pay and to preserve a value in the stock. There was also evidence that both Shores and his son visited the plant and looked over the goods and materials on hand, and that Shores and his attorney made an examination of the stock books and records of the company. While it appears that, prior to the transfer of the stock on February 18th, the officers of the company declined to give Shores information and discouraged the purchase of the stock, after that time they accorded to him every opportunity to examine the books and look into the affairs of the company. There was also evidence that Jones, the then president of the company, and certain other stockholders advised Shores not to purchase the stock. He seems to have entertained the idea that these persons were trying to depreciate the stock in order to purchase it at a low figure themselves, and their advice merely whetted his determination to become a stockholder.

We fail to find that either the respondent Hutchinson or his agents Fettig and Bussele made any representations as to the

value of the stock or as to the affairs of the company, which could have reasonably misled the appellants as to what they were trading for, or as to its worth. Shores testified that Hutchinson told him some of the stock had been sold for 90 cents a share, and that it was worth that. While it seems to be admitted that either Hutchinson or his agents did tell Shores that stock had been sold recently at that figure, which was true, Hutchinson, Bussele, and Fettig all testified that no representation was made at any time by any of them as to the actual value of the stock. They testified that, at the time of the signing of the contract on February 16, 1911, Bussele told Shores that they placed no value on the stock because they did not know what it was worth, and that Shores answered in effect that he did not want any information from them, as he preferred to get his information "first-handed." Certain balance sheets and statements of bills payable came into Shores' hands pending the negotiations. He claims that these were given to him by Hutchinson as representing the actual cash valuations of the property, accounts, and debts of the company. The evidence is by no means plain that any of these were furnished to him by Hutchinson or his agents, but it is plain that some of them were secured by him at the meetings of the company which he attended. In any event, they were what they purported to be—mere statements made from the books of the company—and there was no evidence that they were not true statements of what the books showed. While some of these statements probably showed values in excess of the actual value of the goods on hand, we cannot believe, in view of the investigations shown to have been made by Shores and the knowledge of the actual financial condition of the company which was brought home to him prior to the closing of the transaction by the delivery of the deeds, that he was actually deceived by them or delivered his deeds on the faith of what these statements showed. It is true that the company was placed in the hands of a receiver just one month after the appellants delivered their deeds in exchange for the stock, but it seems plain that the appellants knew, or ought to have known when the deeds were delivered, that this result would follow unless the plans then pending for reorganization and raising a working capital were successful. Every one concerned, including the appellants, knew that the fate of the enterprise depended entirely upon the raising of a large working capital. With this knowledge, the appellants closed the deal and delivered their deeds.

Even if we accord absolute verity to the appellants' testimony as to the representations alleged to have been made by Hutchinson, they must be treated, in view of the relation and situation of the parties, as mere expressions of opinion, not constituting

ground for rescission. No confidential or fiduciary relation between the parties existed. They were dealing with each other at arm's length. The means of knowledge were open to the appellants. No artifice of any kind was employed to prevent them from availing themselves of these means to acquire full knowledge.

"To make representations fraudulent and therefore ground for a rescission they must be representations of material facts and not mere matters of opinion or judgment. In law one man's judgment or opinion is as good as that of another. It would be folly in a person to implicitly confide in the statements of another where both have equal means of information." Smith, *Law of Fraud*, § 126, p. 143.

"As a generalization from the authorities, the various conditions of fact and circumstance with respect to the question how far a party is justified in relying upon the representation made to him may be reduced to the four following cases, in the first three of which the party is not, while in the fourth he is, justified in relying upon the statements which are offered as inducements for him to enter upon certain conduct: (1) When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; (2) when, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; (3) when the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties; (4) but when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or the second case, then it will be presumed that he relied on the statement; he is justified in doing so." Pomeroy, *Equity Jurisprudence* (3d Ed.) § 892.

In the case before us the appellants not only had the means of knowledge, but had actual knowledge of the necessitous condition of the company before finally consummating the trade. Manifestly the case does not fall within the fourth class designated by Pomeroy, so as to give ground for rescission. It is also manifest that the appellants cannot be heard to say that they relied upon any representations made by the respondents or their agents. They entered upon an independent investigation, and there is no evidence that they were prevented from pursuing it by any act of the respondents or of their agents. In fact, if Fetting and Busselle are to be believed, when they offered to assist Shores in securing information, he declined their aid, intimating that he preferred to secure it for himself. All of this was

while the contract of exchange was still executory, and before the appellants had delivered their deeds.

"If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences, or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled." Pomeroy, *Equity Jurisprudence* (3d Ed.) § 893. See, also, Smith, *Law of Fraud*, § 75; 20 Cyc. p. 92; *Slaughter's Administrator v. Gerson*, 13 Wall. 379, 20 L. Ed. 627.

The rule announced by the foregoing authorities is exemplified in the following decisions by this court: *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *English v. Grinstead*, 12 Wash. 670, 42 Pac. 121; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Opie v. Pacific Inv. Co.*, 28 Wash. 505, 67 Pac. 231, 56 L. R. A. 778; *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; *Romaine v. Excelsior, etc., Gas Machine Co.*, 54 Wash. 41, 103 Pac. 32.

That we have gone as far as other courts in sustaining the right of aggrieved parties to rescind or claim relief against contracts induced by fraudulent representations, where there is evidence of abuse of some confidential or fiduciary relation, or where the parties are not upon an equal footing, or where the means of knowledge are not equally open to both, or where some reasonably sufficient artifice has been employed to prevent investigation, or where it is made evident that in any other way an unfair and unconscionable advantage has been taken of the complaining party, is demonstrated by the following and many other decisions: *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. Rep. 1102; *Baillie v. Parker*, 56 Wash. 358, 105 Pac. 834; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Best v. Of-field*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Jones v. Hawk*, 64 Wash. 171, 116 Pac. 642; *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903.

We have, however, never gone so far as to sustain a rescission or grant other relief

merely because the expectations of one of the parties have not been realized where the parties, as here, were dealing at arm's length, where the means of knowledge were equally open to both, where an independent investigation was actually undertaken by the complainant, where no artifice was employed to prevent its prosecution, and where the evidence of the alleged fraudulent representations was contradicted by evidence which so far as we can know, was equally credible. It is familiar law that one asserting fraud must establish it by clear and convincing evidence. A careful consideration of the whole record impels us to the conclusion that the decision of the trial court is sustained by a preponderance of the evidence.

The judgment is affirmed.

MOUNT and MORRIS, JJ., concur.

HOKO RIVER BOOM CO. v. FAIRSERVICE et al.

(Supreme Court of Washington. July 18, 1912.)

1. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE—VOID DEED.

A void deed is sufficient color of title to start the running of the statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 386-401; Dec. Dig. § 71.*]

2. TAXATION (§ 805*)—CANCELLATION OF TAX DEED—LIMITATION OF ACTIONS.

Under Laws 1907, c. 173, requiring actions to set aside or cancel tax deeds or for the recovery of lands sold for taxes to be brought within three years after the date of the deed, but providing that such act shall not apply to actions not otherwise barred on deeds theretofore issued, if commenced within one year after the passage of the act, an action to cancel a tax deed issued before the passage of that act brought within three years after the date of the deed but not within one year after the passage of that act cannot be maintained, since that act divides tax deeds into two classes, one including all deeds prior to its passage, and actions to cancel deeds of that class must be brought within one year after the passage of the act.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

3. LIMITATION OF ACTIONS (§ 6*)—VALIDITY OF STATUTE.

The Legislature has the same power to shorten an existing limitation of actions on causes already accrued as it has to create a new limitation so long as it provides for a reasonable time in which actions may be brought after the new limitation becomes effective.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 16-31; Dec. Dig. § 6.*]

4. LIMITATION OF ACTIONS (§ 4*)—VALIDITY OF STATUTE.

A statute allowing one year after its passage within which actions may be brought on causes already accrued is not invalid as fixing an unreasonably short period of limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 10, 11; Dec. Dig. § 4.*]

Department 2. Appeal from Superior Court, Clallam County; Lester Still, Judge.

Action by the Hoko River Boom Company against Alston Fairservice and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Trumbull & Trumbull, Peters & Powell, and Marion Edwards, all of Seattle, for appellant. William B. Ritchie, of Port Angeles, and Fletcher & Evans, of Tacoma, for respondents.

MORRIS, J. This appeal involves the construction of the act of 1907 (Laws 1907, c. 173), providing a limitation upon the commencement of actions to set aside or cancel deeds issued for lands sold for delinquent taxes. The judgment is based upon the sustaining of an objection to the introduction of evidence made at the commencement of the trial; and, while a number of interesting questions are discussed in the briefs as to the proper rules of law applicable to the facts alleged in the amended complaint, the whole case hinges upon whether the action is within the time provided for under the act of 1907.

[1] If it is not, even though we should conclude, as contended by appellant, that the deed was void for any of the reasons suggested on this appeal, it would avail nothing, since we have a settled rule in this state that even a void deed is color of title, starting the running of the statute of limitations. *Mary M. Miller & Sons v. Simmons*, 121 Pac. 462.

[2] The act in question provides that all actions to set aside or cancel deeds issued for taxes, or actions brought for the recovery of lands sold for delinquent taxes, must be brought within three years from the date of the deed: "Provided, this act shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act." The deed in this case was issued October 27, 1906. The statute became operative March 15, 1907, and this action was commenced October 26, 1909, within three years after the deed was issued, but more than one year after the statute became effective. Appellant contends that, inasmuch as it brought action within three years from the date of the deed, it is within time as it was not intended by this act to cut off any right of action short of three years from the date it accrued; while respondent asserts that the deed, having been issued prior to the passage of the act, is subject to the one year limitation named in the proviso. The latter seems to us to be the true and plain meaning of the law. It is evident that the law refers to two classes of deeds (1) deeds issued subsequent to March 15, 1907; (2) deeds issued prior to that date. As to the first class, the limitation is three years

from the day the deed is issued. The second class finds a limitation fixed at one year from the passage of the act. All deeds "not otherwise barred" must fall within one of these two classes, according to the date of issuance, and having found the class to which any deed belongs the language fixing the limitation of action is plain. Prior to the passage of this act the shortest limitation barring an action upon a tax deed was seven years. The Legislature did not wish to take away the right of action then existing against such deeds as were still within this seven-year limitation; neither was it desired to continue the old statute for the purpose of saving a right of action against any deed not yet barred. All such deeds were grouped in the second class, and the right of action thereon limited to one year from the passage of the act. This would extend the old limitation period to some of these deeds and shorten it as to others. But it would at the same time make a uniform class as to the right of action. This was the evident purpose of the proviso, and the only way this uniformity could be obtained. There could be no objection to the extension of the right of action as to those deeds against which the old statute had all but run.

[3] Neither could there be any valid objection in law to shortening the time as to those deeds issued just prior to the passage of the new statute, and which had approximately seven years to run before reaching the bar of the statute. The Legislature has the same right to shorten an existing limitation as it has to create a new one, so long as it provides for a reasonable time in which actions might be brought before the new bar becomes effective.

[4] It would hardly be contended that one year as fixed in this act was not a reasonable time. To hold that the three-year period first fixed by this act applies to all deeds issued within three years prior to the passage of the act as contended by appellant is to read into the statute something not there, and overlook the plain intent in the use of the word "heretofore" in the proviso. "Deeds heretofore issued" means all deeds heretofore issued, whether issued one day before or seven years before. "Actions not otherwise barred" would apply to any deed not fully seven years old March 15, 1907. But, whether one day old or lacking one day of the full seven years, they were all classed together as "deeds heretofore issued," and against which actions were then "not otherwise barred." In *McKean v. Archer* (C. C.) 52 Fed. 791, the court construed a statute of limitations reading as follows: "The following actions shall be commenced within the period herein prescribed after the cause

of action has accrued and not afterwards: * * * Fifth. Upon promissory notes, bills of exchange, and other written contracts for the payment of money hereafter executed, within ten years; Provided, that all such contracts as have been heretofore executed may be enforced under this act, within such time only as they have to run before being barred under the existing law limiting the commencement of actions, and not afterwards." 2 Gav. & H. Rev. St. Ind. 1870, p. 158, § 211, par. 5. Held, the main part of the section applied to contracts executed after the enactment of the statute, and all contracts executed prior to that time should be governed by the terms of the proviso. The dividing line is no plainer in the Indiana statute there construed than it is in our statute. In each it is the day upon which the new law became effective. In *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850, the action was brought to vacate a tax judgment and set aside a tax deed executed September 17, 1904. The action was commenced December 26, 1908, four years and three months after the execution of the deed, and more than one year after the enactment of the 1907 statute of limitation, and it was held that the action could not be maintained; that, even though the tax deed was void because based upon a void judgment, it constituted a sufficient basis for the running of the statute, and, not having been commenced within one year after the statute became effective, the action could not be maintained.

In *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780, we were called upon to determine when this statute went into effect, and, referring to different interpretations to which the limitation might be subjected, held that, in either event, as applied to that case the limitation as to the right of action would be sufficient, since in the one case it would be nine months and in the other one year, and either would be a sufficient and reasonable time. Neither of these cases from this court is strictly authoritative here, as the real point at issue, which was determinative of the appeal, did not involve the point here submitted, although it is apparent that in the *Huber* Case the court was of the opinion that an action upon a deed issued prior to the passage of this act must be brought within one year.

Believing that this action is barred, in that it was not brought within one year subsequent to the time when the act of 1907 became effective, we sustain the ruling of the court below, and the judgment is affirmed.

MOUNT, FULLERTON, and GOSE, JJ., concur. ELLIS, J., took no part.

HAYNES v. CITY OF SEATTLE.

(Supreme Court of Washington. July 29, 1912.)

1. NEGLIGENCE (§ 23*)—CHILDREN AS TRESPASSERS—ATTRACTIVE NUISANCE.

Where a boy, nine years old, who, with other boys, was playing on electric light wires loosely strung in a street in front of a schoolhouse, was caught in a coil of the wire and injured, the city, which was stringing the wires, could not escape liability, on the ground that the street was safe for persons using it for a lawful purpose, since a child of tender years meeting with an injury on the street, or on private premises, although a technical trespasser, may recover, where the thing causing the injury was left exposed or unguarded near the playgrounds of children, and was of such a character as to be alluring or attractive to children, as these wires were.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

2. NEGLIGENCE (§ 23*)—THINGS ATTRACTIVE TO CHILDREN.

The stringing of electric light wires in such a manner as to leave loosely strung wires, likely to attract children, in front of the playground of a public school, without watch or guard of any kind, was gross negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34; Dec. Dig. § 23.*]

3. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR.

In an action against a city for injuries resulting from the stringing of electric light wires, where there was abundant evidence that the city was performing the work, and this question was not contested in the court below, the admission of declarations of the foreman in charge of the work as to the city's relation thereto, if error, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051L*]

4. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR.

A case tried without a jury, and triable de novo in the Supreme Court on the record, is not reversible for errors in the admission of evidence on which no finding is, or needs to be, predicated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

5. DAMAGES (§ 131*)—EXCESSIVENESS—PERSONAL INJURIES.

Where, although the injuries suffered by a boy, nine years old, were not permanent, he was severely bruised and suffered considerably temporarily, and did not do well for a time thereafter in his studies, a verdict of \$800 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370, 371; Dec. Dig. § 131.*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

Action by Robert M. Haynes, a minor, by Manly B. Haynes, his guardian, against the City of Seattle. From a judgment for plaintiff, defendant appeals. Affirmed.

James E. Bradford and William B. Allison, for appellant. E. H. Gule, of Seattle, for respondent.

FULLERTON, J. The respondent, a minor of the age of nine years, brought this action, by his guardian, against the city of Seattle to recover for personal injuries. At the time he received his injury, the respondent was attending one of the primary public schools of the city of Seattle. The block upon which the school building was constructed abutted upon a street, known as Eleventh Avenue North, the block opening directly upon the street; no fence or barriers of any kind being erected to separate the one from the other. On the day of the accident, a force of men working for the city were engaged in stretching electric light wires on poles set on the margin of the street. One such pole was set in the street near the corner of the block on which the schoolhouse stood. In the performance of their work, the workmen placed at the foot of this pole a coil of wire, passing one end of the wire over a crossarm fastened to the top of the pole, some 35 feet from the ground. The wire was then loosely strung for some three or four blocks over other poles set along the street, where it was fastened to a cable. A team of horses was hitched to the end of the cable, and the wire strung by the horses pulling the same along, as desired. As the wire was pulled, it would unwind from the coil and pass over the crossarm. This work was going on at the time of the afternoon recess of the school, when the respondent, with boys of his age, was let out of the school building. The boys were attracted to the moving wire and gathered around the same. What happened thereafter is well described by the respondent himself in the following language: "I was playing around there, and a lot of the other boys were playing around there, too; and they grabbed hold of the wire, and were hoisting themselves up a little ways; then they would jump down from it. They did that for a while; then I did that. Then I heard the bell ring, and I jumped down and started to run for the line, get in line, and I stepped in the middle of the coil. The wire wrapped around my leg; it brought me way up, about halfway up. Then it stopped a while, and then I went over the pole. I tried to hang onto the top, but I couldn't do it; it was too strong." In the manner thus described, the respondent received the injuries for which he sues.

At the time of the accident, the employes of the city engaged in stringing the wires were all at some distance from the place of its occurrence; none of them, in fact, being close enough to be a witness thereto. The case was tried by the court, sitting without a jury, and resulted in findings to the effect that the injury was the result of negligence on the part of the city. Damages were assessed in favor of the respondent in the sum of \$800. The city appeals.

[1] The appellant challenges the sufficiency of the evidence to sustain the judgment. It contends that it is without liability for the accident, for the reason that the injured respondent was using the street, at the time of the injury, as a place in which to play, and that the city's obligation to keep its streets free from obstructions extends only to travelers thereon, or persons using them for some other lawful purpose, not to persons whose sole object is amusement or play.

Some of the cases cited by the appellant maintain this doctrine, when applied to injuries received from mere defects or obstructions in the street, although we think it may be questioned whether they state the general rule, even when thus limited. But the facts of the case at bar bring it within another principle. A child of tender years, who meets with an injury upon the streets, or upon the premises of a private owner, though a technical trespasser, may recover for such injury, if the thing causing it has been left exposed and unguarded near the playgrounds or haunts of children, and is of such a character as to be alluring or attractive to them, or such as to appeal to childish curiosity and instincts; this on the principle that children of tender years, "being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees." *Iiwaco, etc., Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169; *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 60 L. R. A. 793, 96 Am. St. Rep. 902; *McAllister v. Seattle Brewing, etc., Co.*, 44 Wash. 179, 87 Pac. 68; *Akin v. Bradley Engineering & Machinery Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; *Olson v. Gill Home Investment Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884.

[2] There can be no question as to the alluring character to the childish mind of the work here being carried on by the city's employes. The unwinding of the coil of wire in the manner in which this one was unwound was particularly so; and to do the work in front of the playground of a public school swarming with children of tender years, without watch or guard of any kind, was negligence of the grossest sort, and renders the city liable for any injury occurring by reason thereof.

[3, 4] It is next objected that the court erred in admitting in evidence the declarations of the foreman in charge of the work on behalf of the city concerning the city's relation to the work then being carried on. But whether this evidence was competent or not is of little moment as the case stands here. There was abundant evidence in the record to show that the city itself was performing the work, and that it was liable for

the injury to the respondent, if liability therefor existed against any one; there was, in fact, no contest over the question in the court below. Of course, the appellant does not contend that a case tried before the court without a jury, which is triable *de novo* in this court on the record, is reversible for errors in the admission of evidence, where no finding is, or needs be, predicated upon the erroneously admitted evidence.

[5] Finally, it is contended that the assessment of damages is excessive. But, while the boy suffered no permanent injury, he was severely bruised and suffered considerably temporarily. Moreover, it is made clear by the testimony of his teacher that he did not do well for a time thereafter in his studies, and did not pass his grade at the end of the school year. We do not therefore find the judgment excessive, and it will stand affirmed.

ELLIS and MOUNT, JJ., concur.

STATE ex rel. OLDING et al. v. STAMPFLY.
(Supreme Court of Washington. July 19, 1912.)

1. PUBLIC LANDS (§ 51*)—SCHOOL LANDS—RESERVATIONS—REGULATIONS.

School regulations of public lands are not irrevocable, nor do they confer on the future states in which they are located and to which they may be granted any rights in the land antedating their actual cession, but are subject to such laws and changes in the laws regulating the primary disposition of the soil as Congress may choose to enact.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 138, 146; Dec. Dig. § 51.*]

2. WATERS AND WATER COURSES (§ 7*)—APPROPRIATION RIGHTS—RIPARIAN SCHOOL LAND—STATUTES.

Act Cong. July 26, 1866, c. 262, § 9, 14 Stat. 253, providing that, whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes specified should be acknowledged and confirmed, and Act Cong. July 9, 1870, c. 235, § 17, 6 Stat. 218, declaring that all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, are applicable to school reserve lands, so that rights to waters riparian to school reserve lands could be acquired by appropriation in the same manner as rights in waters riparian to the public lands generally.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 2; Dec. Dig. § 7.*]

3. JUDGMENT (§ 682*)—WATER RIGHTS—CONCLUSIVENESS—PERSONS CONCLUDED.

C., having contracted to purchase certain school lands from the state, was made a party to a suit to determine water rights in a stream to which the lands were riparian, and a judgment rendered fixing the extent of his rights. Thereafter C. assigned his interest in the contract to defendant's grantor, who procured a deed to the lands direct from the state to him-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

self, and subsequently conveyed one-half of the land to defendant, together with an undivided one-half of the waters awarded to C. by such decree. Held that, though defendant's grantor derived his title direct from the state, his beneficial interest came from the contract to purchase held by C., who was a party to the action, and hence defendant's grantor, and therefore defendant, were bound by such decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1203-1206; Dec. Dig. § 682.*]

Department 2. Appeal from Superior Court, Kittitas County; Ralph Kaufman, Judge.

Contempt proceedings by the State, on the relation of John G. Olding and another, against Samuel Stampfly. Judgment for relators, and defendant appeals. Affirmed.

Pruya & Hoeffler, of Ellensburg, for appellant. Mires & Whitfield, of Ellensburg, for respondents.

FULLERTON, J. On December 1, 1891, one John Clifton entered into a contract with the state of Washington for the purchase of the southwest quarter of section 16, in township 18 north, of range 19 east, of the Willamette meridian, agreeing to pay therefor the sum of \$3,600 in 10 annual installments of \$360 each, with interest on the deferred payments at the rate of 6 per centum per annum. The lands are riparian, so to speak, to a perennial stream, known as "Nanum creek," which stream, when left in its natural state, flows over and across the lands in a well-defined channel. Clifton settled on the lands prior to the time he contracted to purchase the same from the state, and from the time of his earliest settlement used water from the stream for the purposes of irrigating them. Other settlers on lands riparian to the stream, some of whom were prior and some of whom were subsequent in time to Clifton, also used water from the stream for irrigating purposes, which use gradually increased until all the water of the stream was so taken and used. In August, 1897, differences arose between these users as to their respective rights, and an action was begun by one James Ferguson, as plaintiff, to determine such rights, in which all persons using water from the creek, or thought to have rights therein, were made parties defendant, among whom was John Clifton. Clifton answered the complaint in the action, setting up his possession of this particular quarter section and his right thereto in virtue of his contract with the state, averring that he had diverted water from Nanum creek and used the same for their irrigation as early as 1885, and laid claim to a specific quantity thereof, based on his appropriation and rights acquired thereunder. The action was subsequently tried out, and on May 6, 1901, a decree was entered therein in which the

rights of all the landowners to the use of water from the creek were adjudicated and determined; Clifton being awarded the right to divert and use for irrigating the quarter section described a fixed quantity thereof. Subsequent to the trial of the action, Clifton assigned his interests in the contract to one John Crocker who procured a deed for the lands from the state to himself on October 10, 1902. Thereafter, and on October 3, 1904, Crocker conveyed to Samuel Stampfly, the appellant in the present proceeding, the north half of such quarter section, "together with an undivided one-half of the waters awarded to the S. W. ¼ of section 16, township 18, range 19 E., by the decree entered in the case of James Ferguson v. The United States Bank et al.," being the decree hereinbefore referred to.

Subsequent to his purchase of the property, Stampfly used water from Nanum creek in excess of one-half of that awarded Clifton in the decree mentioned conveyed to him by the deed from Crocker. Proceedings in contempt were instituted against him charging him with violating the provisions of the decree, and, on a hearing had thereon, he was adjudged guilty of contempt, and sentenced to pay a fine. From the judgment and sentence, this appeal is prosecuted.

The appellant contends that the water rights appurtenant to the land purchased by him from Crocker were not legally determined by the decree in the case of Ferguson v. United States National Bank et al. Attention is called to the fact that this court has held in *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912, and *Nesathous v. Walker*, 45 Wash. 621, 88 Pac. 1032, that the common-law doctrine of riparian rights prevails in this state with reference to streams flowing across lands not public lands of the United States, and that such streams cannot be diverted from their natural courses by mere prior appropriation to the detriment of owners of such lands; and it is argued that school lands, reserved by the government of the United States for the use of the common schools of the state that may be organized out of the territory in which the reserved lands lie, are not public lands of the United States, and hence any stream to which they may be riparian is not subject to appropriation, but, on the contrary, such streams are appurtenant to the land and pass to the state with the cession of the land to the state, and from the state to its grantees, who may lawfully make such use of the streams as the rules governing riparian ownership will permit, without regard to the claims of prior appropriators; that since the land in question was school land, ceded to the state of Washington on its admission into the Union without reservation of any kind, the state took title to the land with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

all of its appurtenances, which title the appellant has since acquired; and, since the state was not estopped from claiming the water either because of prior appropriation of the same or by the terms of the decree, not by the prior appropriation, because the water was not capable of being taken by prior appropriation since the lands were not at the time public lands of the United States, and not by the decree, because the state was not a party thereto, it could convey these rights to the appellant.

But plausible as these contentions may appear, we do not think them conclusive for a number of reasons. In the first place, we cannot agree with the contention that streams of water, riparian to government lands reserved as school lands, could not be diverted by appropriation.

[1] It is true that the government has from the earliest times sought to reserve in its territories certain sections in every township of land for the benefit of the common schools of the states that may be formed out of such territories, but, in so far as we are aware, these reservations have never been thought to be irrevocable or as conferring on the future states any rights in the land antedating their actual cession to the state, but, on the contrary, have always been thought to be subject to such laws and changes in the laws regulating the primary disposition of the soil as the Congress chose to enact. It is a matter of history that it has been the custom of the people from the earliest times to go upon a stream or other source of water supply of the public domain and divert therefrom and appropriate to private uses such water as the necessities of the appropriators required, and that by another custom the rights of conflicting claimants in the same source of supply were determined by priority of diversion and use. Although the practice may not have had in its inception the recognition of the government, it early met therewith.

[2] By the act of Congress of July 26, 1866, 14 Stat. at Large, 253, it was provided that: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." And by the act of July 9, 1870, 18

Stat. at Large, p. 218, it was further provided: "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section."

These statutes, it will be observed, are general in their application and apply to all government lands. No exception is made in favor of lands reserved for the benefit of the common schools of future states, and it is clear that none was intended, but, on the contrary, it was intended that rights in waters riparian to such reserved lands could be acquired by appropriation in the same manner that such rights were acquired in waters riparian to the public lands generally. It follows therefrom that the appellant in the case at bar has no superior right to the water in question in virtue of the fact that his land was school land held in reserve by the United States for the benefit of the future state of Washington at the time the waters of Nanum creek were first appropriated for the purposes of irrigation.

[3] The conclusion we have reached on the question stated, although it denies the appellant's right to use the waters of the creek named for irrigation purposes as against prior appropriators, does not necessarily subject him to the punishment the court inflicted upon him. While he can be prevented in a proper preceeding from making use of the water as against those who have superior rights, he cannot be adjudged in contempt for so doing unless he is in privity with and bound by the decree in the Ferguson Case. As to this question, it is our opinion that he is so bound. Notwithstanding the fact that he derives his legal title through John Crocker who was the immediate grantee of the state, it is plain that the equitable title and beneficial interest in the property came to Crocker from John Clifton, the holder of the contract for the purchase of the land from the state. And since Clifton was a party to the decree and bound thereby, his assignee was likewise bound; and, being so bound, the assignee could not convey any greater interest to the appellant than he himself held. That no attempt was made to convey any greater interest than that fixed by the decree is evidenced by the deed itself. By the express terms of the deed, the quantity of water conveyed is limited to one-half the quantity of water that was awarded to John Clifton by the decree mentioned. We conclude that the appellant is bound by the decree and was justly punished for violating it. The judgment is affirmed.

ELLIS, MOUNT, MORRIS, and GOSE,
JJ., concur.

PARKER et ux. v. BURWELL et al.

(Supreme Court of Washington, July 23, 1912.)

1. TRUSTS (§ 95*) — CONSTRUCTIVE TRUST — SALE OF LAND.

Complainant, having purchased second-class tidelands at a county auditor's public sale and paid one-tenth of the price, at defendant's request, addressed a communication to the auditor, informing him that he might allow the contract to go to defendant, intending that defendant might acquire the tidelands in front of his uplands and convey the remainder to complainant. A few days later he demanded that the contract be executed in his favor, and then conveyed the property in front of defendant's uplands to him by quitclaim deed, and refused to convey to him the remaining property in controversy. The deed was accepted by defendant. The auditor, relying on the note, reported the sale to the land commissioner as having been made to defendant and returned plaintiff's check, which plaintiff promptly returned to the auditor, and demanded that the contract be issued to him. This was done, when defendant commenced an action to have himself substituted as a purchaser, in which he recovered a default judgment, which was subsequently set aside, but, notwithstanding this, a conveyance was made by the land commissioner to defendant on the mistaken belief that the judgment had become final. Held, that defendant held the land in controversy as a constructive trustee for complainant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147; Dec. Dig. § 95.*]

2. VENDOR AND PURCHASER (§ 224*) — INNOCENT PURCHASER — QUITCLAIM DEEDS.

Persons holding tidelands under quitclaim deeds from defendant were not innocent purchasers.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 469-473; Dec. Dig. § 224.*]

3. VENDOR AND PURCHASER (§ 231*) — FILING — NOTICE.

Where an original contract for the sale of certain tidelands to complainant was regularly filed for record, it was notice of complainant's rights as against persons subsequently dealing with the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-539; Dec. Dig. § 231.*]

4. LIS PENDENS (§ 24*) — NOTICE.

Where an action was instituted against a purchaser of certain tidelands by defendant to recover the same, and a lis pendens duly filed, such instrument imparted notice of the purchaser's rights to intending purchasers.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 38-40, 42-46; Dec. Dig. § 24.*]

Department 1. Appeal from Superior Court, King County; George A. Joiner, Judge.

Bill by Albert E. Parker and wife against Anson S. Burwell and others. Decree for complainants, and defendants appeal. Affirmed.

Ira Bronson, for appellants. Robert H. Evans, of Seattle, for respondents.

GOSE, J. This is a bill in equity, seeking to have it decreed that the defendants are holding certain real estate as trustees for the

plaintiffs. There was a judgment for the plaintiffs. The defendants have appealed.

[1] The land in controversy is second-class tideland, situated in Kitsap county. The case was commenced in the superior court of Kitsap county, and was by stipulation removed to King county, where it was tried. The property was sold to the respondent Albert E. Parker, hereafter called the purchaser, for its appraised value, on January 18, 1904, at a public sale regularly conducted by the county auditor of Kitsap county. The sale was made on the application of the appellant Anson S. Burwell. It was advertised to take place at 2 o'clock p. m.; but, in compliance with a request by telephone from a representative of the appellants, it was postponed until 3 o'clock, when the sale took place as stated. At the time of the sale, the purchaser paid one-tenth of the purchase price and received the auditor's receipt therefor. A representative of the appellants intended to attend the sale and bid on the property in their behalf, but did not reach the place of sale until after the property had been sold. He then had a conversation with the purchaser, and received from him the following note: "Jan. 18, 1904. Mr. Jameson: You can allow the contract to the tideland purchased by me to go to Mr. Anson S. Burwell. Albert C. Parker." He presented this note to the county auditor and gave him a check for \$75. The auditor, relying upon the note and statements made to him by the appellants' representative, reported the sale to the state land commissioner as having been made to the appellant Burwell, and returned the purchaser's check. The purchaser promptly returned the check, and demanded that the contract of sale should be issued to him. Thereafter the auditor had his report of sale returned, and reported Parker as the purchaser. The contract was thereafter, on February 9, 1904, regularly executed between the state and the purchaser. It was regularly filed for record and recorded on February 15th following. The appellant Anson S. Burwell then commenced an action in the superior court of Kitsap county against the purchaser and the state land commissioner, alleging fraud upon the part of the purchaser, and a default judgment was entered in his behalf on September 24, 1904, setting aside the sale and directing that a contract be issued to him. On December 18th the purchaser filed a motion to vacate the judgment. No action was taken on the motion until late in 1909, when it was argued and submitted. On January 19, 1910, the motion was sustained and the judgment vacated. The plaintiff in that suit thereupon caused it to be dismissed. On July 25, 1904, the appellant Burwell in connection with his suit, regularly filed a lis pendens in Kitsap county. The purchaser made the payments as provided in the contract up to September 19,

1907, when he tendered the balance due and demanded a deed. He also paid the taxes for the years 1904, 1905, and 1906, and tendered the taxes for 1907. The tender was refused, because the appellant Burwell had theretofore paid the taxes for that year. The tender of the purchaser and his demand for a deed were refused in consequence of the judgment to which we have adverted, which had been called to the attention of the land commissioner. On October 14, 1908, while the Parker contract was in full force, a deed was executed to the appellant Burwell, upon the representations of the appellants or their representatives that the judgment had become final, and that it operated as an involuntary assignment of the contract. The respondents, before the commencement of this action, tendered to the appellant Burwell the amount paid by him in procuring the deed, and, upon his refusal to accept the tender, deposited the money in the registry of the court. The Burwells, after receiving the deed, conveyed a part of the property to their coappellants by deeds of quitclaim.

The appellants contend that the note, which we have set forth, operated as an executed gift from the purchaser to the appellant Burwell. The vice of this contention is that it has no support in the evidence. Parker testified that he gave the note so that the contract of sale might be issued to the appellant Burwell, in order that he might acquire the property in front of his uplands and convey the remainder to Parker; and a reading of the record convinces us that that was his sole purpose in giving the note. A few days later he demanded that the contract be executed in his favor, and on February 9, 1904, he conveyed the property in front of the appellant Burwell's uplands to the latter by a deed of quitclaim, and refused to convey to him the property in controversy. The deed was accepted by Burwell, and the property embraced in that deed is not in litigation. It is not contended that any fiduciary relation existed between the purchaser and Burwell. Indeed, the latter testified that Parker did not represent him at the sale. It is apparent from the record that Parker never intended that the appellants should have the land in controversy. He bought it for himself at a public sale regularly conducted by the state, and received a regularly executed contract. This contract, as we have seen, was performed by him in every respect. The appellants rely upon the Parker note and the default judgment. There was no consideration for the note, and the judgment has been vacated and that suit dismissed. We think the whole controversy arose out of a misunderstanding between Parker and the appellants' representative, in a conversation which took place between them shortly after the sale and at

the time Parker wrote the note. This is made clear by affidavits made by the county auditor and a party who attended the sale shortly after this controversy arose. It is clear from the testimony of the land commissioner that the deed was executed to Burwell under a mistake of fact. The commissioner was led to believe that the judgment vacating the sale had become final. This is made clear, both by his testimony and the notations in the records of his office.

[2-4] The appellants, other than the Burwells, are not innocent purchasers. They hold through quitclaim deeds. Moreover, as we have seen, the original contract was regularly filed for record, and a lis pendens was filed in the suit of Burwell against Parker and others. These instruments imparted notice of Parker's rights to intending purchasers. The paramount equities are clearly with the respondents, and the judgment is affirmed.

FULLERTON, PARKER, and MOUNT, JJ., concur.

INTERNATIONAL CONTRACT CO. v. CITY OF SEATTLE.

(Supreme Court of Washington. July 25, 1912.)

MUNICIPAL CORPORATIONS (§ 374*)—CLAIMS—FILING—BREACH OF CONTRACT—CHARTER PROVISION.

Seattle City Charter, providing that all claims for damages against the city must be presented to the city council and filed with the clerk within 30 days from accrual of the claim, etc., is applicable to a claim for damages for the city's breach of a street improvement contract by stopping the work after claimant had incurred expense in preparing to perform the same.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by the International Contract Company against the City of Seattle. Judgment for defendant, and plaintiff appeals. Affirmed.

Preston & Thorgrimson, of Seattle, for appellant. James E. Bradford and Howard M. Findley, both of Seattle, for respondent.

CHADWICK, J. A contract was let to the appellant to do certain street work in the city of Seattle. The work was to be done under the special assessment plan, and was to be paid for in the main out of the special fund so to be raised. Appellant went to some expense in preparing for the work and, pursuant to its contract, entered upon its execution. The work was materially interrupted and finally stopped by the city on account of objections by interested property owners. A suit was brought by ap-

pellant, claiming damages for expense incurred and loss of profits. The trial court found that appellant had been actually damaged in the sum of \$1,294.08, but held that, under the charter provision relating to claims against the city, it could not recover. The provision is as follows: "All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

It is contended by appellant that its claim arises ex contractu, and, under the authority of *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385, its right of action does not depend upon filing a claim within the time limited, or at all; that the cases of *Jurey v. Seattle*, 50 Wash. 272, 97 Pac. 107, and *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, which are relied on by respondent, and which, it is evident, the trial judge followed, apply only to cases arising ex delicto. An extended discussion of the question whether the claim is one ex contractu or ex delicto is made in the briefs. This we shall not follow; for, notwithstanding the belief of the writer of this opinion that the charter was not intended to cover claims for damages arising from a breach of contract to which the city was a party, the law seems to be settled to the contrary. Construing the same charter provision, this court pronounced the decision in *Postel v. Seattle* and *Jurey v. Seattle*. We have no doubt of the intention of the court to hold, in the *Postel* Case, that all claims for damages, whether sounding in tort or contract, must be presented within the time and in the manner there provided. It is there said: "The trial court held that this section of the city's charter requires claims for damages of all kinds against the city to be presented to the city council and filed with the city clerk within 30 days after the time when such claim accrues, before an action can be commenced thereon; and, since the appellant did not file his claim until some 5 months after its accrual, it was barred by this provision of

the charter. Against this ruling, the appellant makes two contentions: First, that this provision does not apply to this character of claim; and, second, if it does so apply, it is void, because a reasonable time within which to present such claims is not allowed by it. With regard to the first question, we think there can be but little doubt that the charter provision requires claims of this character to be presented to the city council and filed with the clerk. The language used is 'all claims for damages,' and this admits of no exception." The attention of the court to the extremity of its holding was challenged by Judge Rudkin, who took occasion to dissent upon the very ground that, under this decision, claims, of whatever character, must be filed in manner and form as provided in the charter. A like ruling was made in the *Jurey* Case, where it was held that a breach of duty, the wrongful diversion of a special fund, and willful failure to collect the same sounded in tort, and that a claim must be filed within 30 days. In the *Postel*, as well as the *Jurey*, Case, the city violated a positive duty to protect the property of the citizen, and to collect and distribute to him that which was his lawful due under a positive contract. We see no difference in principle between these cases and the one at bar. Here the city stopped the work after appellant had gone to the expense of equipping itself to carry out its contract, and has as effectually destroyed the fund as was done in the *Jurey* Case.

The case of *Gluricevic v. Tacoma*, 57 Wash. 329, 106 Pac. 908, 28 L. R. A. (N. S.) 533, which was followed in *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113, is relied on by appellant. It was said in the *Gluricevic* Case that the *Postel* Case is "distinguishable." This is repeated in the *Wolpers* Case. These cases go no further, as is said in the *Wolpers* Case, than to hold that the charter provision will not be held to apply where the relation of master and servant exists.

The decision of the lower court seeming to be in harmony with previous pronouncements of this court, its judgment is affirmed.

GOSE, PARKER, and CROW, JJ., concur.

CASTOR v. MURAMOTO et al.

(Supreme Court of Washington. June 24, 1912.)
MORTGAGES (§ 401*)—FORECLOSURE—RIGHT TO
FORECLOSE—TIME—INTEREST—DEFAULT.

A note provided that the principal was payable in five years, with interest, payable annually, and if not so paid to become part of the principal and bear interest until so paid. A mortgage was given to secure the note and interest according to the terms of the note, and to be void if payments were made according to such terms; but, in case of default in principal or interest, or any part thereof, then the mortgagee could sell the premises, and out of the money retain the principal and interest,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with costs. *Held* that, on default in the payment of interest before maturity of the note, the mortgagee could declare the entire sum due and foreclose the mortgage, and was not bound to add the interest in default to the principal and forbear foreclosure until the expiration of the term of the note.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1160–1165, 1208, 1209; Dec. Dig. § 401.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Della E. Castor against Henry S. Hatch, K. Muramoto, and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with instructions.

B. W. Coiner, for appellant. Carkeek, McDonald & Kapp, of Seattle, for respondents.

MORRIS, J. In an action to foreclose a mortgage for default in the annual payment of interest, the court below sustained a demurrer to the complaint and dismissed the action, holding that under the terms of the mortgage the action was prematurely brought. This is the only question presented by the appeal.

The note for which the mortgage was given as security, and the mortgage, must, of course, be read and construed together in determining the contract of the parties and their relative rights thereunder. By the terms of the note, it is provided that the principal sum is payable on or before five years after date, "with interest from date until paid at the rate of ten per cent. per annum, interest payable annually, and if not so paid to become a part of the principal and bear interest until so paid." The mortgage recites that it is given to secure the payment of \$4,233.00, "together with interest thereon at the rate of ten per cent. per annum from date until paid, according to the terms and conditions of one certain promissory note, * * * and these presents shall be void if such payment be made according to the terms and conditions thereof. But in case default be made in the payment of the principal or interest of said promissory note or any part thereof, when the same shall become due and payable according to the terms and conditions thereof, then the said party of the second part, her executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the whole of said principal and interest, whether the same shall be then due or not, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their heirs or assigns. * * * The above-mentioned note is for \$4,233, with interest at ten per cent.

payable on or before five years, interest payable annually."

The argument in support of the demurrer is that, since the note provides that, in case of default in the payment of interest, the interest shall immediately become a part of the principal and bear like interest until paid, and contains no provision that, in case of a default in the payment of interest, the whole sum shall become due and payable, and the mortgage providing for a sale only in case default be made in the payment of the principal or interest, according to the conditions of the note, that there is no time prior to the maturity of the note when foreclosure could be had, and that appellant's only remedy, in case of default in the payment of interest, is to have the same become part of the principal and draw like interest. Such a contention, it seems to us, fails to give due consideration to the terms of the note and mortgage, when read as a whole. It is plain from the note that the interest is payable annually. If, then, it be not so paid, there is a default in the payment of interest according to the terms of the note, the mortgage provides for its foreclosure, in case of any default in the payment of interest, when the same becomes payable under the terms of the note, and the retention out of the moneys arising from the foreclosure sale of the whole of the principal and interest, whether the same shall be then due or not. If respondent's contention be true, this last provision of the mortgage is meaningless, since the only time the mortgage would be subject to foreclosure, irrespective of prior defaults in the payment of interest, would be a default in the payment of the original and the increased principal with the last annual interest at the maturity of the note, when, under all theories, all sums payable under the note and mortgage were subject to default for nonpayment. What need, then, for stipulating that, in case of a foreclosure, "the whole of said principal and interest, whether the same shall be then due or not," shall be retained? If the only foreclosure can take place subsequent to the maturity of the note, what sum is it, not then due, that is to be retained in case of a sale because of a default in the payment of principal or interest? Manifestly such a clause in this mortgage is indicative of the intention of the parties that the mortgage did stipulate for its foreclosure prior to the maturity of the note, in case of any default in the payment of the annual interest, as such a foreclosure could be the only one when the whole of the principal and interest would not be due, which situation is further illustrated by describing the note as one in which the interest is payable annually. Again, the mortgage provides for its foreclosure in case of any default in the payment of principal or interest, when the same is payable under the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

note. The note says the interest is payable annually. If the interest be not so paid, it is a default in the payment of interest, and a default subjecting the mortgage to foreclosure.

Respondent relies upon *Bank v. Doherty*, 29 Wash. 233, 69 Pac. 732, 92 Am. St. Rep. 903, *Van Loo v. Van Aken*, 104 Cal. 269, 37 Pac. 925, *Wood v. Whisler*, 67 Iowa, 676, 25 N. W. 847, and *Motsinger v. Miller*, 59 Kan. 573, 53 Pac. 869; none of these cases, nor any other that we have been able to find, supports this contention. In the *Bank Case*, it was held that a mortgage could not be foreclosed for default in the payment of interest, when the only condition for its foreclosure was contained in this provision: "Now, if the said first party shall on or before maturity pay or cause to be paid the said note with interest that may be due thereon, then the foregoing conveyance shall be null and void; otherwise to be and remain in full force and virtue"—which was construed to mean that the debt was permitted to run until the maturity of the note and mortgage, and that the mortgage should stand as security for the principal or interest, and could not be foreclosed until there was a failure to pay the note at its maturity. Manifestly this would be so when the parties fixed the maturity of the note as the only time when a default would subject the mortgage to a foreclosure. The court there says it was within the power of the parties to have provided for a foreclosure in case of any failure to pay interest, but they failed to do so; and that if the mortgage had contained a stipulation providing for its foreclosure in case of any failure "to pay said note, or the interest, or any part thereof, when due," a foreclosure might be had for default in the payment of interest.

Referring to the language of the mortgage under consideration, we find it does contain the very thing the court in the *Bank Case* says is essential to a foreclosure on default in the payment of interest. It says: "In case default be made in the payment of the principal or interest of said promissory note, or any part thereof, when the same shall become due and payable, according to the terms and conditions thereof." The note providing for the payment of interest annually, the failure to pay the interest when due is a default in the payment of interest, and a default in the payment of interest subjects the mortgage to a foreclosure. And, making this intention still plainer, comes the further stipulation that, in case of any such foreclosure, the whole of the principal and interest represented by the note shall be retained, even though it be not yet due. In order to be any sum "not yet due," the sale must be prior to the maturity of the note and mortgage. The *Bank Case*, with the authority therein cited, is in direct conflict with the ruling complained of, and is of itself sufficient to support the claim of error. The

case, however, having been argued so confidently upon the authority of the *Van Loo*, *Wood*, and *Motsinger Cases*, supra, we will review those cases and show them not to support the contention claimed.

Van Loo v. Van Aken is a California case, where the note, as in the case at bar, provided for the payment of interest annually, and, if not so paid, to draw interest the same as the principal. The mortgage, however, provided for its foreclosure only in case of default at maturity. The reasoning of the court is that the mortgage is not given to secure the payment of the note according to its terms, but only as security for the payment of the principal sum and interest on the date of the maturity of the note. The mortgage in suit contains the very provision the mortgage in that case failed to contain; and hence that case is of no value to respondent. That the rule he contends for is not the law in California, but that the rule there is as we are attempting to here announce it, is clear from the following authorities: *Brickell v. Batchelder*, 62 Cal. 623; *Maddox v. Wyman*, 92 Cal. 674, 28 Pac. 838; *Clemens v. Luce*, 101 Cal. 435, 35 Pac. 1032; *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048. In the next case, *Wood v. Whisler*, neither the notes nor mortgage provided for the payment of interest annually. They simply provided that, in case it was not so paid, it should draw interest. Manifestly, unless the notes provided for the payment of interest annually, the failure to so pay would not be a default. In the case before us, as we have before seen, the note does provide that the interest shall be paid annually. The case is not therefore in point. The next case is *Motsinger v. Miller*, from Kansas, a case similar to the *Wood Case*; the note providing that, if the interest was not paid annually, it should be added to the principal. There was, however, no provision in the note that the interest should be payable annually, and the court simply holds that the provision, "if interest be not paid annually, to become as principal," cannot be regarded as a promise to pay interest annually. It will thus be seen the case is not controlling when the note, as in the present case, contracts to pay annual interest. The court in its reasoning said: "If the interest was payable annually, the default in the payment of the same makes the whole debt, and entitles Miller to a foreclosure of his mortgage." In other words, if, as in the case at bar, the note made provision for the payment of interest annually, a foreclosure could be had for its nonpayment. That we are in full accord with the Kansas rule is plain from the reasoning of the *Motsinger Case* and from *Meyer v. Graeber*, 19 Kan. 165, where the note provided for the payment of interest, and the mortgage recited that the interest was payable annually, and, if not so paid, to be added to the principal, and that, in case of a default of any pay-

ment of principal or interest, foreclosure might be had; and it was held that the interest was to be construed as payable annually, although not as stated in the note, and that, in case of default in its payment, the mortgage might be foreclosed.

The judgment is reversed, and the case remanded, with instructions to overrule the demurrer, and for further proceedings.

FULLERTON, MOUNT, and ELLIS, JJ., concur.

(89 Wash. 408)

BICKNELL et al. v. HENRY et al.

(Supreme Court of Washington. July 29, 1912.)

1. CHATTEL MORTGAGES (§ 225*)—TRANSFER OF PROPERTY—BONA FIDE PURCHASERS—NOTICE.

A purchaser of mortgaged property having actual knowledge of the mortgage, which, although defective, was valid as between the parties, before the property was delivered or paid for, was a purchaser with notice.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 468-470; Dec. Dig. § 225.*]

2. CHATTEL MORTGAGES (§ 226*)—TRANSFER OF PROPERTY—ASSUMPTION OF MORTGAGE DEBT.

A chattel mortgagee of property whose mortgage, although defective, was good between the parties, at the request of the mortgagor, wired a purchaser that he would consent to a sale, if the amount of the mortgage was paid. The purchaser then wired the mortgagee that a third person made a claim against the property, and the mortgagee agreed to and did pay such claim. *Held*, that a promise by the purchaser to pay the amount of the mortgage was established, within the rule that a promise to pay or assume a debt must be clear, satisfactory, and convincing; and that the purchaser was liable for the amount of the mortgage.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 471; Dec. Dig. § 226.*]

3. FRAUDS, STATUTE OF (§ 28*)—ORIGINAL OR COLLATERAL PROMISE.

The promise by the purchaser was not a promise to pay the debt of another, but a promise to pay his own debt by applying the amount due from him on the mortgage.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 45; Dec. Dig. § 28.*]

Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by R. F. Bicknell and another against James Henry and others. Judgment for plaintiffs, and the defendant named appeals. Affirmed.

John E. Ryan and Grover E. Desmond, both of Seattle, for appellant. Englehart & Rigg, of North Yakima, for respondents.

MOUNT, J. Plaintiffs brought this action to recover a sum of money, alleged to be due upon a promissory note executed by defendant Homer V. Brenner, and which was alleged to have been assumed by the defendant James Henry, and to foreclose a chattel mortgage upon a band of sheep, which

mortgage was given to secure the note. The other defendants were alleged to have or claim some interest in the sheep, but that such claim was subject to plaintiffs' claim. The principal issue in the case was upon the assumption of the debt. The trial court found in favor of the plaintiffs, and entered a judgment accordingly. The defendant James Henry only has appealed.

The facts are as follows: On May 21, 1910, the plaintiffs sold and delivered to Homer V. Brenner, at Heppner, Or., a band of 2,600 sheep for \$8,250. Fifty dollars of the purchase price was paid in cash, and a note, due in seven months, secured by a chattel mortgage upon the sheep, was given by Brenner to plaintiffs for the balance. The mortgage recited that the sheep were "to be trailed to and run in Yakima county," in this state. Thereafter the sheep were driven into Yakima county, and, about the same time, namely, on the 25th day of May, 1910, the mortgage was filed for record in Yakima county. The mortgage did not contain an affidavit that it was made in good faith. The note for \$8,200 was placed for collection in the Citizens' National Bank at Baker, Or., by the plaintiffs, who reside in Chicago. On December 10, 1910, Mr. Brenner agreed to sell 2,300 of the sheep to the defendant Henry for \$4.50 per hundredweight. \$500 was paid to Brenner upon this contract of purchase by C. C. Churchill, who was agent for Mr. Henry. This contract was in writing, and provided: "Said sheep to be fat and in merchantable condition. Sheep to be delivered and weighed at Toppenish by February 1. Sheep not to be fed or watered after leaving yard at Outlook before being weighed. No sheep to be accepted by Churchill unless fat." Thereafter, on December 22, 1910, 400 head of sheep were delivered to Mr. Churchill for Mr. Henry, and the price thereof, \$2,066.40, was paid to Brenner. \$1,305 of this was thereupon applied upon the note. At this time it does not appear that Mr. Henry or his agent, Churchill, had actual notice of the mortgage. Thereafter, on February 6 and 9, 1911, the balance of the sheep were taken to the stockyards of the railway company, to be delivered to defendant Henry. His agent, Mr. Churchill, was then informed of the mortgage, and refused to receive or pay the purchase price of the sheep, without authority from the plaintiffs. Mr. Brenner then sent a telegram to Mr. Bicknell at Chicago, as follows: "Wire C. C. Churchill authority to receive sheep. Rush answer." In response to this telegram, the plaintiff Mr. Bicknell answered on the same day, February 9th, direct to Mr. Churchill, as follows: "By paying balance due Citizens' National Bank, Baker, Oregon, you have our consent to receive Brenner sheep." Mr. Churchill thereupon, on the same day, sent a telegram to the bank, as follows: "What is balance due you from Homer Bren-

ner? Wire quick." The bank replied to Churchill on the same day: "Brenner balance on note \$7,372." Mr. Churchill thereupon calculated that, with the money already paid to Brenner, and with the amount of the note, the sheep would cost him "\$88 and something" more than he had agreed to pay for them. The herder, one Mr. Verling, also had a claim of \$411 against the sheep, and refused to release them until his claim was paid. Thereupon, on February 10, 1911, Mr. Brenner sent a telegram to the plaintiff Bicknell, as follows: "Sheep lacks \$499 enough to pay herder and mortgage. Herder is holding sheep here. Wire satisfaction." Thereupon Mr. Bicknell answered to Mr. Churchill: "Will pay your draft on Bicknell & Gemmell, care Clay-Robinson Company, Chicago, for amount Brenner shortage up to \$500." Mr. Churchill then drew a sight draft upon the plaintiffs in favor of Mr. Verling for \$411, and this draft was subsequently paid by the plaintiffs. Mr. Verling released the sheep, and they were taken over by Mr. Churchill for Mr. Henry on February 10th, or the morning of the 11th, 1911. After the sheep had been delivered to Mr. Churchill, defendant Yost brought an action against Mr. Brenner and sued out a writ of attachment. The sheriff seized 460 of the sheep in possession of defendant Henry, or his agent, Mr. Churchill, and afterwards the sheriff sold the same, and they were purchased by Mr. Yost. Upon the question of Mr. Yost's interest in the sheep, the trial court concluded that defendant Yost acquired no right, title, or interest in the sheep, and that the sale by the sheriff to Mr. Yost conveyed no right, and that Yost is holding the sheep in his possession. Neither Mr. Yost nor the sheriff has appealed, and the judgment is conclusive as to them. After the sheep were delivered to defendant Henry or his agent, he refused to pay the note; whereupon this action was brought. In his answer Henry denies that he assumed and agreed to pay the note, but alleges that he purchased the sheep and owes thereon \$5,372.83, after deducting for certain expenses on account of this litigation; and that he is willing to pay this sum to whom the court shall direct.

[1, 2] Appellant argues in his brief that the chattel mortgage is void; that he is a subsequent purchaser in good faith; that his agent, Churchill, was a special agent and had no authority to assume obligations without express instructions; and that, in fact, there was no assumption of the debt by the defendant Henry or his agent. This last question is the one which controls the case. The others are mere incidental or collateral questions. As between the mortgagor and the mortgagee, the mortgage was, no doubt, a valid one. The agent of Mr. Henry knew of the mortgage before the sheep were delivered to him or paid for. He was there-

fore a purchaser with notice. He had authority to purchase the sheep, and to obligate his principal for the purchase price. There is no dispute upon that point. After he learned of the mortgage upon the sheep, he requested the mortgagor to obtain authority from the plaintiffs, who were mortgagees, to release the sheep, or to permit a delivery to the purchaser, Mr. Brenner then sent a message to Mr. Bicknell, saying: "Wire C. C. Churchill authority to receive sheep. Rush answer." The answer came: "By paying balance due to Citizens' National Bank, Baker, Oregon, you have our consent to receive Brenner sheep." Mr. Churchill then was informed of the amount, and thereupon took the sheep. It is plain that Mr. Churchill knew of the claim of the plaintiffs upon the sheep, knew the amount of the claim, and that the telegram was a refusal to permit delivery of the sheep, unless the claim was paid or assumed. He thereupon took the sheep. It is true he made no verbal or written promise to assume or pay the note; but he quietly took the sheep. He acted upon the authority of the telegram, and is bound thereby, as much so as if he had answered back in writing: "I will take the sheep and pay the note." Before he took the sheep, it appears that the herder made a claim of \$411 for herding charges. This herder refused to permit the delivery of the sheep until his claim was paid. Thereupon Mr. Churchill calculated what the purchase price of the sheep would amount to, and found that, with the payments already made to Mr. Brenner, the mortgagor, and with the amount due upon the mortgage, he would be required to pay "\$88 and something" more than he had agreed to pay for the sheep; and besides this the herder claimed \$411. Mr. Brenner then wired the mortgagee: "Sheep lack \$499 enough to pay herder and mortgage. Herder is holding sheep here. Wire satisfaction." Thereupon the mortgagors answered direct to Mr. Churchill, authorizing him to draw a draft for the shortage up to \$500. Churchill thereupon drew a draft for \$411, and the herder was therewith paid. This money was paid by the plaintiffs in order that delivery of the sheep might be made, and that the purchaser might pay or assume the amount of the note and mortgage against the sheep, viz., \$7,372.

[3] While the rule is that the promise to pay or assume a debt "must be clear, satisfactory, and convincing" (*Ordway v. Downey*, 18 Wash. 412), the facts stated above plainly bring the promise within that rule. The fact that Churchill took the sheep after the mortgagor had told him he could do so by paying the balance due upon the note and mortgage was sufficient. He could not act upon that offer and remain quiet, and then be heard to say that he did not promise to pay. As we said in *Gay v. Schaefer*, 52 Wash. 269, 100 Pac. 334: "It is not claimed

that the promise was in writing, and it is not necessary that it should be. This is not a mere promise to answer for the debt of another. The promise was made upon consideration that the respondent would consent to a transfer of the mortgaged property from Frost to the promisor. Consent was given by the respondent, and the transfer was thereupon made. The debt thereby became the debt of the promisor, and is not within the statute of frauds." The same is true in this case. Mr. Churchill did not strictly assume the debt of another. He bought the sheep and created a debt of his own and of his principal, which has not yet been paid. That debt was the promise to pay the note and mortgage held by the bank. He was dealing for his principal, Mr. Henry, directly with the plaintiffs; and it was clearly understood that he should pay for the sheep by paying the note at the bank at Baker, Or. He did not do so, but still retains the sheep and the purchase price.

The judgment was right; and it is therefore affirmed.

PARKER, ELLIS, and MORRIS, JJ., concur.

ROTS et al. v. MONOGHAN et al.
(Supreme Court of Washington. July 29, 1912.)

APPEAL AND ERROR (§ 856*)—REVIEW—VERDICT—SUFFICIENCY.

Though the propositions of law advanced by appellants be correct, the finding and judgment will not be disturbed, where there is evidence tending to support it on another theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403-3424, 3429-3434; Dec. Dig. § 856.*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Alma M. Rots and husband against J. H. Monaghan and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Vince H. Faben, for appellants. John B. Van Dyke and Josiah Thomas, both of Seattle, for respondents.

CHADWICK, J. This action was begun against the defendants to recover damages to a certain building held by them under a lease from plaintiffs, and for the loss of a part of a certain lot of furniture stored in the building, and for damages to the remainder thereof. It is alleged that the furniture was stored in a reserved part of the building, and that defendants "broke and entered * * * and destroyed and injured" it. The answer was in the main a general denial. A further defense, that defendants ceased to be tenants after the first year and surrendered the term, and that the property

was held thereafter by a corporation under a tenancy from month to month by and with the consent of plaintiffs' agent, was interposed. It was also alleged the building was out of repair at the time defendants took possession; that certain alterations were made necessary on account of the character of their business; and that they were made at defendants' expense, after plaintiffs had consented thereto. There is testimony tending to show that the building was in as good condition when defendants and their alleged successor moved out as it was when they took possession. Also that the furniture and household goods were in the building at the time. There was no direct evidence tending to show that defendants had personally appropriated any of the personal property. The case was tried before the court, without a jury, and a judgment entered in favor of defendants.

Several questions—the authority of plaintiffs' agent, defendants' surrender of the lease, and the admission of improper evidence—are discussed at some length in the briefs. But a careful reading of the record convinces us that, although the propositions of law which are advanced by appellants be resolved in their favor, there is still evidence to sustain the findings and judgment of the trial court. Therefore, treating the defendants as tenants for the full term, we hold, with the trial judge, that appellants failed to prove by a preponderance of the evidence that respondents are legally liable for the injury and destruction of appellants' property.

Finding no error, the judgment is affirmed.

GOSE, PARKER, CROW, and MOUNT, JJ., concur.

STATE v. PRIMMER.

(Supreme Court of Washington. July 29, 1912.)

CRIMINAL LAW (§ 658*)—TRIAL—REMARKS OF JUDGE.

For the judge, in the presence of the jury, after a witness has testified to facts tending to show defendant was innocent, and he has been shown her affidavit charging defendant with the crime, to order her into custody, and direct the filing of a charge of perjury against her on her own admissions, is a comment on facts, in violation of Const. art. 4, § 16.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1534½; Dec. Dig. § 658.*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Barney Primmer was convicted of crime, and appeals. Reversed, and new trial granted.

Daniel Landon, for appellant. John F. Murphy and Thomas J. L. Kennedy, both of Seattle, for the State.

PARKER, J. The defendant was convicted in the superior court of the crime of incest, from which he has appealed to this court. While several errors are assigned by counsel for appellant, the principal ground upon which a reversal of the judgment and a new trial is sought is that the trial court committed error prejudicial to appellant by remarks, in the presence of the jury, amounting to a comment upon the facts, in violation of section 16, art. 4, of our state Constitution, providing that: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Appellant was accused of committing the crime with his daughter. She was called and sworn as a witness for the state, and it was evidently expected by the prosecuting attorney that she would testify to facts showing the guilt of her father, when the following occurred during her examination in chief: **Mr. Kennedy (Deputy Prosecuting Attorney):** "Q. Directing your attention to the night of the 27th of October, were you down there at your home on Sturgis road at that time? A. Yes, sir; I was home. Q. Was your father in bed with you at that time? A. No; he was not. Q. Directing your attention to this affidavit, is that your signature, 'Josephine Primmer,' there? A. Yes, sir; I signed that paper. Q. Before Mr. White—Crawford E. White? A. Yes, sir; I said that—I said he did this because I was mad. Mr. Kennedy: I will call your honor's attention to this affidavit (handing paper to court). Q. Which is the truth, did you, or did you not, have sexual intercourse with your father? A. No; I did not. Q. You signed this affidavit before a notary? A. Yes, sir. I did. I signed it because I was mad at my father. Mr. Kennedy: Your honor, when we are through with this witness, we will ask that she remain in custody, and we will file a perjury information against her. Mr. Landon (Attorney for Defendant): I object to this. The Court: She will be retained. Mr. Landon: We except to your honor's ruling." Thereafter, during her cross-examination, the following occurred: "Mr. Kennedy: The witness seems to be perfectly willing to testify for counsel. Mr. Landon: I object to counsel's remarks; this witness has been called by the counsel himself. The Court: I understand that; but you have no right to go into anything except what is cross-examination. Call a deputy sheriff, if there is none here, to take her in custody. Mr. Landon: I object to that proceeding." Thereafter, when she was excused from the witness stand immediately upon the close of her examination, the following occurred: "The Court: The deputy sheriff will take this girl, and I ask that the prosecuting attorney file a charge of perjury against her on her own admissions. Mr. Landon: We desire an exception to the court's remarks." This all oc-

curred in the presence of the jury. The paper shown to the witness and handed to the court by the deputy prosecuting attorney was an affidavit, which purported to have been made by her, stating facts showing her father's guilt of the crime he was being tried for. The paper was not shown to the jury. It seems to us that the ordering of the witness into custody, and the remarks of the judge in connection therewith, clearly indicated his belief that the witness had committed perjury. It is insisted that the judge's remarks only indicated his belief that the witness had committed perjury in the making of the affidavit accusing her father of the crime, and was therefore favorable, rather than prejudicial, to him. If that was the intended meaning of the judge's remarks, the jury might well ask why he did not order appellant discharged. But whatever may be said of the intended meaning of the judge's remarks, they were manifestly expressions of opinion upon the credibility of the witness, who had testified to facts tending directly to show that appellant was not guilty as charged. Many decisions of the courts of other states have been called to our attention dealing with the question of trial courts commenting upon facts; but we regard them of little aid here, in the light of the mandatory provisions of our Constitution. We are of the opinion that, under our former decisions, the court's remarks in the presence of the jury upon this trial invaded the province of the jury to the prejudice of appellant; and for that reason he is entitled to a new trial. *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1068; *State v. Hyde*, 20 Wash. 234, 55 Pac. 49; *State v. Crotts*, 22 Wash. 245, 60 Pac. 408; *State v. Priest*, 32 Wash. 74, 72 Pac. 1024.

The judgment is reversed, and appellant granted a new trial.

CROW, GOSE, and CHADWICK, JJ., concur.

GREAT NORTHERN RY. CO. v. HOWER et al.

(Supreme Court of Washington. July 20, 1912.)

1. PUBLIC LANDS (§ 106*)—HOMESTEAD ENTRYMAN—DECISIONS OF LAND DEPARTMENT—CONCLUSIVENESS.

Decisions of officials of the Land Department on the questions of fact relating to the good faith of a homestead entryman, though reviewable on appeals within the Department, are conclusive on all the courts of justice, in the absence of fraud or mistake; the jurisdiction of courts of equity being limited to the correction of mistakes, to relieve against fraud, and to afford a remedy when it becomes apparent that the officials of the Department have, by an erroneous conclusion of law, given to one claimant public lands which, on the undisputed facts should have been patented to another.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

2. PUBLIC LANDS (§ 106*)—HOMESTEAD ENTRY—UNSURVEYED LAND—MISTAKE—LAND DEPARTMENT DECISIONS.

Prior to the survey of certain public land, defendant's grantor entered and constructed a cabin on what he supposed was the N. E. $\frac{1}{4}$ of a particular section. About a year later, he constructed a trail across the section and up a creek on the N. E. $\frac{1}{4}$ to reach different places on the claim, and built a barn and a stable, which he used for storing supplies. He posted on the north section line a homestead notice. After survey, it was shown that the trail, barn, and notice were in fact on the N. E. $\frac{1}{4}$, but that the cabin and most of the entryman's cultivated ground were on lot 2 of the N. W. $\frac{1}{4}$; the house being about one-quarter of a mile west of the quarter section line. Complainant railroad company's grantor selected as lieu land a tract which, when surveyed, included the N. E. $\frac{1}{4}$ of such section, and, on a contest in the Interior Department, it was held that defendant's grantor having acted in good faith, and his settlement being prior in date to the railroad company's selection, his improvements should be held to have been constructively on the N. E. $\frac{1}{4}$, and that he was entitled to the land. Held that, under the rule that the Department's findings of fact could not be questioned, its determination was not invalid, because the residence erected was too far from the land attempted to be entered to be regarded as constructively thereon.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by the Great Northern Railway Company against James A. Hower and others. Judgment for defendants, and plaintiff appeals. Affirmed.

F. V. Brown and F. G. Dorety, both of Seattle, for appellant. J. A. Coleman, of Everett, for respondents.

CROW, J. Action by the Great Northern Railway Company, a corporation, against James A. Hower and others to quiet title to land. Defendants' demurrer was sustained to the amended complaint. Thereupon plaintiff declined to plead further and appealed from an order of dismissal.

The amended complaint is too voluminous to be here set forth. The appellant railway company, as successor of the St. Paul, Minneapolis & Manitoba Railway Company, a corporation, claims the land under act of Congress of August 5, 1892 (27 Stats. at Large, p. 390, c. 382). The amended complaint alleges that on October 20, 1892, the St. Paul, Minneapolis & Manitoba Railway Company released certain lands in North Dakota; that on March 24, 1894, it selected, in lieu thereof, under said act of Congress, a certain tract of unsurveyed land in King county, Wash., which, when surveyed, was found to be the N. E. $\frac{1}{4}$ of section 2, township 27 north of range 10 east of the Willamette meridian; that it filed in the United States land office at Seattle a list, describing the land with reasonable certainty; that the land so selected was not reserved;

that no adverse claim had attached or been initiated thereto; that it was thereafter surveyed, the plat of survey being filed in the United States land office at Seattle on April 11, 1899; that when the plat was filed the selected land was found to be the N. E. $\frac{1}{4}$ of section 2, township 27 north of range 10 east, W. M.; and that on April 11, 1899, appellant's grantor filed a supplemental selection, which redescribed the land so as to make the same conform to the lines and subdivisions of the government survey.

The amended complaint further states that, on or about April 18, 1899, one Melvin J. Carter, respondents' grantor, filed in the United States land office at Seattle his written application to enter the same quarter section under the homestead laws, claiming he had settled on the land on December 1, 1893; that after various hearings and appeals the land was awarded and patented to Carter by the decision of the Secretary of the Interior; that the land officers committed error of law in awarding the land to Carter, as he had made no actual settlement in compliance with the homestead laws. Prior to the hearing of the demurrer, the following written stipulation was filed: "In passing upon the demurrer to the amended complaint, it is stipulated that the court may consider the decisions of the Land Department, referred to in the amended complaint, namely: The decision of the register and receiver of August 28, 1903; the decision of the Acting Assistant Commissioner of March 23, 1904; the decision of the register and receiver of January 21, 1905; the decision of the Acting Commissioner of June 30, 1905; the decision of the Secretary of the Interior of November 23, 1905; and that the annexed are true copies of said decisions." Copies of these decisions are attached to the stipulation.

From the allegations of the amended complaint and these decisions, it appears that the following facts relative to Carter's settlement, improvements, and claim were found by the Land Department officials: That Carter's house was located on lot 2, a portion of the N. W. $\frac{1}{4}$ of the section; that, prior to 1893, one Doolin made settlement on what is now known as lot 2; that a short distance below him one Moe also made a settlement; that Melvin J. Carter and his father, E. B. Carter, went upon the land on September 19, 1893, Melvin J. Carter buying Doolin's cabin, and E. B. Carter buying Moe's cabin; that each built a new cabin; that Melvin J. Carter claimed what he supposed was the N. E. $\frac{1}{4}$ of the section; that about a year later, with the assistance of his father, he constructed a trail across the section and up Trout creek on the N. E. $\frac{1}{4}$, for the purpose of reaching different places on the claim; that he built a barn and stable, which he used for storing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

supplies; that he posted on the north section line a homestead notice; that the trail, barn, and notice, since the survey, are shown to have been on the N. E. $\frac{1}{4}$, but that his house and most of the cultivated ground are on lot 2 in the N. W. $\frac{1}{4}$, the house being about one-quarter of a mile west of the quarter section line; that lot 2, on which both Carters were living, has been patented to the father, E. B. Carter, without protest from Melvin J. Carter; that lot 1 lies between lot 2 and the N. E. $\frac{1}{4}$, east of the former and west of the latter; that the railway company had selected the entire section; that Melvin J. Carter made no protest against the company's claim to the N. W. $\frac{1}{4}$, but allowed it to obtain a patent for lot 1 thereof; that neither Melvin J. Carter nor his father thought they were interfering one with the other; that Melvin J. Carter was claiming to the east from his home, while his father was claiming to the south from his; that Melvin had acted in good faith; that he offered to amend his application, so as to include the land upon which the government should finally determine his improvements were actually located, and drop from either the eastern or southerly boundary of his claim sufficient land to enable him to include the tracts upon which his improvements were made; that this could not be done, as a patent had been issued to the railway company for lot 1; that the N. E. $\frac{1}{4}$ should be patented to Melvin J. Carter; and that the railway company, having selected the entire section, would lose no more land than it would have lost, had Carter applied for lot 1 with a sufficient portion of the N. E. $\frac{1}{4}$ to make 160 acres.

In the opinion of the Secretary of the Interior, addressed to the Commissioner of the General Land Office, he said: "As Carter tendered his homestead application directly after the filing of the plat, presumably he still believed that his house was located on the N. E. $\frac{1}{4}$. As he is shown to have been a bona fide homestead settler upon unsurveyed land at the time the railway company made selection thereof, and subsequently has made a good compliance with the law as to residence and improvements, the Department is of opinion that his application for the tract in question should be allowed. As the railway company made selection of the entire section, it loses no more land than it would if Carter had applied for said lot 1 with sufficient in the N. E. $\frac{1}{4}$ to make 160 acres. Your office decision, holding in favor of Carter, is affirmed, and upon his perfecting his application for said N. E. $\frac{1}{4}$ of section 2, Tp. 27 N., R. 10 E., the railway company's selection thereof will be canceled." The theory upon which the patent was awarded to Melvin J. Carter was that he had acted in good faith; that his settlement was prior in date to the selection made by the railway company; that the land was

then unsurveyed; and that constructively his improvements and settlement were made on the N. E. $\frac{1}{4}$.

[1] Appellant concedes that the facts found by officers of the Land Department bearing upon the good faith of Melvin J. Carter cannot be reviewed in this action, but insists that their conclusions of law, if erroneous, may and should be here corrected. The doctrine is well established that the decisions of officials of the Land Department upon questions of fact, although reviewable upon appeals within the Department itself, are conclusive on all courts of justice, in the absence of fraud or mistake, but that courts of equity have jurisdiction to correct mistakes, to relieve against fraud, or to afford a remedy when it becomes apparent that the officials of the Land Department have, by erroneous conclusions of law, given to one claimant public land which, upon the undisputed facts, should have been patented to another. *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Quinby v. Conlan*, 104 U. S. 420, 28 L. Ed. 800; *Baldwin v. Stark*, 107 U. S. 463, 2 Sup. Ct. 473, 27 L. Ed. 528; *Gonzales v. French*, 164 U. S. 338, 17 Sup. Ct. 102, 41 L. Ed. 548; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Grays Harbor Co. v. Drumm*, 23 Wash. 706, 63 Pac. 530.

[2] There is no contention that fraud or mistake has been pleaded in this action. The officers of the Land Department found that Melvin J. Carter was residing on the land before the railway company made its selection; that, although his dwelling house was on an adjoining tract, his notice was posted on the N. E. $\frac{1}{4}$; that a portion of his improvements were thereon; that he acted in good faith; and that the railway company has sustained no actual loss, other than it would sustain had the land upon which his improvements were actually located been awarded him. These findings are not and cannot be questioned. The United States Land Department has repeatedly held that a settler constructively residing upon lands claimed by him should be permitted to acquire the title. *Talkington's Heirs v. Hempfing*, 2 L. D. 46; *Lewis C. Huling*, 10 L. D. 83; *Kendrick v. Doyle*, 12 L. D. 67; *Staples v. Richardson*, 16 L. D. 248.

Appellant, citing numerous land office decisions, concedes that the residence of a homestead and pre-emption claimant, not upon his claim, has been frequently held a sufficient compliance with the law, but insists that such decisions are not controlling here, as in each of them the residence involved was only a short distance beyond the line, was moved upon the land as soon as the mistake was discovered, and that in nearly all, if not all, such cases there were other substantial improvements on the land claimed. Appellant calls attention to the fact that in this case Carter's dwelling house was a quar-

ter of a mile distant from the land claimed, and argues that no case heretofore decided has held such a remote residence to have been a sufficient compliance with the requirements of the homestead act. In most of the cases which appellant has cited, the land had been surveyed before the settlement or improvements were made. Not only was this land unsurveyed, but the facts found and pleaded show that in places it was rough, uneven, and difficult of access. In *Keogle v. Griffith*, 13 L. D. 7, one of the cases cited by appellant, it affirmatively appeared that the claimant's improvements were about 40 rods from the land entered, yet a patent was awarded. Upon the facts before us, we conclude the decisions of the Land Department are controlling. "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." *Ard v. Brandon*, 156 U. S. 537, 543, 15 Sup. Ct. 406, 39 L. Ed. 524. The land was rightfully awarded and patented to respondents' assignor, Melvin J. Carter. The amended complaint does not state a cause of action.

The judgment is affirmed.

PARKER, CHADWICK, and GOSE, JJ.,
concur.

GRAY et ux. v. REEVES et ux.

(Supreme Court of Washington. July 19, 1912.)

1. FRAUD (§ 23*)—RELIANCE OF REPRESENTATIONS—FRIENDSHIP OF PARTIES.

When men deal as friends, and one accepts as true false representations by the other, into which, but for the relation of friendship, he would have made inquiry, the law will protect him in his trust as certainly as it will deny him relief if the personal relations of the parties are such that the dealing is at arm's length.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 20, 23; Dec. Dig. § 23.*]

2. CORPORATIONS (§ 117*)—PURCHASE OF STOCK—RESCISSION—GROUNDS.

Where the seller of mining stock represented that the stock offered was treasury stock and that the money paid for it would go to the development of the property, but in fact sold stock which he owned himself, the buyer was entitled to rescind.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 506; Dec. Dig. § 117.*]

3. CORPORATIONS (§ 121*)—PURCHASE OF STOCK—RESCISSION—DOCTRINE OF LACHES—APPLICABILITY.

A suit to rescind a purchase of mining stock for false representations of the seller is not a case involving mining property within the rule that the doctrine of laches is peculiarly applicable in cases involving mining property, since, though the subject-matter is mining stock, the corporation and its property are in no way involved.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

4. EQUITY (§ 87*)—LACHES—STATUTE OF LIMITATIONS.

Laches is akin to estoppel, and, unless some controlling equity appears, the court, sua sponte, will not apply the doctrine of laches to defeat a statute fixing a limitation within which actions may be brought.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 242-244, 395; Dec. Dig. § 87.*]

5. EQUITY (§ 71*)—LACHES—PREJUDICE FROM DELAY.

The equitable doctrine of laches is not available where nothing is shown but the lapse of time, but there must be some special circumstance in the particular case which would render its prosecution inequitable.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 204-211; Dec. Dig. § 71.*]

6. DAMAGES (§ 67*)—INTEREST—FRAUD.

Where property purchased upon false representations is such that its use or occupation is of value while in the purchaser's possession, interest will not ordinarily be allowed upon rescission, but where recovery is allowed upon the ground of fraud, and the property purchased for a money consideration is of no value to the purchaser, interest thereon will be allowed almost as a matter of course.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 135, 136; Dec. Dig. § 67.*]

Department 2. Appeal from Superior Court, Spokane County; D. H. Carey, Judge.

Action by M. C. Gray and wife against C. H. Reeves and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Myron A. Folsom and John H. Wourms, both of Spokane, for appellants. Harry A. Rhodes and Moye Wicks, both of Spokane, for respondents.

CHADWICK, J. On June 6, 1907, appellant C. H. Reeves sold to respondent M. C. Gray certain mining stock. Reeves for many years had been a practical mining man. He was a part owner in the Hercules mine, one of the famous silver-lead producers in the Cœur d'Aléne mining district. His acquaintance with Mr. Gray dates from some time in the year 1904, when Mr. Gray sold him a horse. He was the president and a stockholder in the Sunrise Mining Company, a corporation organized under the laws of Idaho, and owning ground in the immediate vicinity of the Hercules mine. Mr. Gray was, at the time of the sale, and for some time prior thereto, engaged in the business of breeding and importing fine horses. His place of business and residence was at Pullman, Wash. He had accumulated a comfortable fortune. Reeves and Gray became acquainted in 1904, as before stated, and they had become fast friends; Mr. Reeves on one occasion making Mr. Gray a present of a valuable cane as a token of his esteem. Mr. Gray testifies, and in the main he is supported by other witnesses, that on or about June 3, 1907, Mr. Reeves went to Pullman with samples of ore which he claimed came out of the Sunrise mine; that he represented that the property had passed beyond the experimental stage; that it was in good milling

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ore, and was expected to make a mine of the character and value of the Hercules; that he told him of the fortunes he had made for the Days and Mr. Paulsen and Mr. Hutton by inducing them to come into the Hercules, and that because of his friendship for Mr. Gray he intended to give him the same chance; that he was the president of the company, and that the money Gray put in would be used for development purposes; that Gray and wife, who was present and participated in the transaction, relying solely upon their faith in Mr. Reeves and having no knowledge of mines or mining, were induced to purchase 500,000 shares of the stock at 25 cents per share, for which they paid \$10,000 in cash and gave a note for \$2,500 which was paid one year after date. The testimony offered on behalf of the respondents tends to establish the following facts: (1) That Mr. Reeves represented that the mine was sufficiently developed and had ore in quantities sufficient to insure its permanence and value; (2) that the stock was nonassessable; (3) that Reeves was selling treasury stock, the proceeds of which would go for the development of the property; (4) that Reeves was getting no benefit in the way of personal profit out of the transaction; and (5) that, if respondents should become dissatisfied at any time, he would take the stock off their hands. The testimony of both sides shows that the mine is no more than a prospect, having no ore in commercial quantities in sight—"a good prospect, but not a mine"—that the stock was assessable and, in fact, assessed; that Reeves sold his own stock and at a considerable profit; and that no part of the purchase price went to the company; while upon the fifth issue the testimony of the appellant and one of his witnesses is to the effect that, while he did not promise to take the stock back, he did say that, if the Sunrise did not turn out to be a mine, he would give Mr. Gray an equal number of shares in other property. The record is long and much detail might be recited, but it would be useless to do so, for we are satisfied that the testimony clearly preponderates in favor of the respondents.

[1] A point is made that Mr. Gray was a shrewd and successful business man and ought not to have been misled by promises that, when revealed in the courtroom, seem to be unreasonable. But in this appellants have overlooked an element which disarms caution; that is, friendship. It is the duty of a chancellor to put himself in the position of the parties and test their rights and obligations by the standards of conscience. The impulse that leads men to trust those in whom they have confidence cannot be ignored by the courts. Reputation for integrity or for knowledge of a given subject would be worth nothing if its possessor could not assume that others would believe in him or accept his opinion. Hence, when men deal

as friends and the one accepts that as true which, but for the element of friendship, would put a man upon inquiry, the law will protect him in his trust as certainly as it will deny him relief if the personal relations of the parties are such that the dealing is at arm's length. Although everything that would tend to show fraud in law is denied or qualified by explanation, we have here two men; the one an experienced mining man whose connection with a mine of sensational history had made him the envy of all who had not touched hands with luck, the other, shrewd and successful in the unemotional pursuit of trade, but utterly ignorant of mines and mining. The one makes his own career, rich samples of ore, a promise of certain fortune, and the assurance that the money paid was for the benefit of the property, or, in other words, to enhance the value of the actual money invested, inducements to the trade. To say that a man who is moved to part with his money under such circumstances is to be held at arm's length is to deny sustenance to the very root of society; to make friendship a liability instead of an asset. The decree of the lower court is sustained by many decisions of this court. Most of them have been collected and may be referred to in *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183. See, also, *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *Jones v. Hawk*, 64 Wash. 171, 116 Pac. 642; *Kohl v. Taylor*, 62 Wash. 682, 114 Pac. 874, 35 L. R. A. (N. S.) 174. Moreover, it may be well questioned whether the minds of the parties ever met in the first place.

[2] Taking the case of appellants at its full worth, it may be that Mr. Gray was willing to make an investment in the property itself, to pay his money toward the development of the mine, or to make a business venture. In such cases the law would hold him to his bargain. In this case it seems clear that Mr. Gray had no intention of buying the personal stock of Mr. Reeves. He was not seeking a speculation, but an investment. We have no doubt that Mr. Reeves knew this to be so, and, when he sold him his personal stock instead of the treasury stock of the company, he cannot complain if his adversary in the trade insists upon a rescission.

[3] But it is said that respondents cannot recover under the doctrine of laches. The following cases are cited: *Upton v. Tribblecock*, 91 U. S. 45, 23 L. Ed. 203; *Cunningham v. Independence Mfg. Co.*, 58 Wash. 371, 108 Pac. 956; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678. These cases adopt the theory that the doctrine of laches is peculiarly applicable where mining property is involved. The doctrine has been applied in such cases because the character of

the property or the manner of its transfer; and all the incidents attending its use and ownership, are circumstances to be considered. But this is not a mining case. The subject-matter of the trade between the parties was indeed mining stock, but their rights and obligations in no way affect the mining corporation or its property.

[4] Where we have, as in this state, a general statute of limitations, the doctrine of laches is not applied *sua sponte*. Laches is akin to and governed by the same rules as estoppel. *Conaway v. Co-Operative Home Builders*, 65 Wash. 39, 117 Pac. 716. Appellants also rely on *Romaine v. Excelsior Machine Co.*, 54 Wash. 41, 103 Pac. 32. That case is not in point. The action was there brought against the company, and it appeared that the rights of third parties had intervened. We have said that, "unless there be some controlling equity, the court will not conjure the doctrine of laches to defeat or destroy a statute fixing a time within which actions may be brought." *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272.

[5] Nor will the doctrine avail where nothing is shown but the lapse of time. There must be some special circumstances disclosed in the instant case which would render the prosecution of the suit inequitable. *Cordiner v. Finch Inv. Co.*, 54 Wash. 574, 103 Pac. 829. It is not made to appear in this case that the rights of third parties have intervened or that the delay has misled appellants in any way.

[6] It is complained that the court erred in allowing interest. *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000, is cited among other cases as authority. Just why interest was not allowed in that case is not made clear. The allowance of interest like the recovery itself, depends upon the equities of the case. If the character of the property be such that its use or occupation is of value while in the vendee's possession, interest will not ordinarily be allowed upon rescission, but where the recovery is allowed upon the ground of fraud or deceit, and the property sold is of no value to the vendee, if the consideration be money, interest will be allowed almost as a matter of course. Where money is wrongfully obtained, it is proper to allow interest as a measure of damages. 16 Am. & Eng. Ency. Law, 1012; *Doggett v. Emerson*, Fed. Cas. No. 3,962; *Corse v. Minn. Grain Co.*, 94 Minn. 331, 102 N. W. 728; *Perkins v. Rice*, Litt. Sel. Cas. (Ky.) 218, 12 Am. Dec. 299. See, also, *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381.

Being convinced, as the trial court was, that the equities of this case lie with the respondents, we affirm the judgment of the lower court.

ELLIS, CROW, and MORRIS, JJ., concur.

McWHORTER et al. v. FORNEY BROS. & CO.

(Supreme Court of Washington. July 29, 1912.)

1. HIGHWAYS (§ 1*)—WHAT CONSTITUTES—USER.

Where roads across arid lands had been commonly traveled for more than 30 years, being used as such long before the land was patented by the government, and had for more than five years been improved by the county officials, they became highways by user.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

2. VENDOR AND PURCHASER (§ 112*)—INCUMBRANCES—RESCISSION.

Where land was sold under a contract providing for a deed with covenants against incumbrances, the existence of well-defined roads across the land, and which were a detriment rather than a benefit, constituted an incumbrance; and where the purchaser did not know that they were prescriptive highways he could rescind and recover the price paid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 199, 200; Dec. Dig. § 112.*]

Department 2. Appeal from Superior Court, Yakima County; Thomas E. Grady, Judge.

Action by L. V. McWhorter and others against Forney Bros. & Co. From a judgment for plaintiffs, defendant appeals. Affirmed.

Roberts & Udell and A. R. Peaks, for appellant. Wende & Taylor, of North Yakima, for respondents.

MOUNT, J. On January 26, 1910, plaintiffs and defendant entered into a written contract, by which the plaintiffs agreed to purchase from defendant 20 acres of land in Yakima county. The purchase price of the land was \$5,500, \$2,500 of which was paid in cash and the balance was to be paid in installments, \$1,000 on or before one year, \$1,000 on or before two years, and \$1,000 on or before three years, from the date of the contract; deferred payments to bear 8 per cent. interest per annum. Upon the payments being made, the defendants were to convey the land to the plaintiffs by a general warranty deed with an abstract of title. In December of 1910 plaintiffs tendered the whole balance due, and demanded a deed, as provided for in the contract. The defendant executed and tendered a deed, which the plaintiffs refuse to accept, for the reason that two public highways extended across the land, one of these highways being 30 feet in width, crossing the land from north to south about 300 feet west of the east line, and the other being about 15 feet in width, and crossing the land diagonally from near the southeast corner to the northwest corner, so that these roads divided the land into three irregularly shaped tracts. When the defendant tendered the deed, a demand was made by the plaintiffs that these roads

should be removed, for the reason that they constituted an incumbrance upon the land. The defendant refused to have the roads removed or vacated, and thereafter the plaintiffs tendered a quitclaim deed to the defendant, and demanded a return of the money paid upon the contract. The defendant refused to comply with this demand, and this action followed. At the trial of the case, the court found, among other facts, the following, which appear to be in accord with the evidence:

"(6) That at the time of the execution of said contract, and ever since and now, there exists over and across said land two traveled roadways, both of which had been used as a highway by the public generally, openly, notoriously, continuously, and adversely for a period of over 20 years prior to the date of said contract. * * *

"(7) That at the time of making said contract, and ever since, said land was covered with a growth of sagebrush varying from two to three feet in height, except on that portion of said land included within said roadways.

"(8) That within seven years last past the county of Yakima has spent public money on each of said roads in the construction of culverts and bridges across the same.

"(9) That, prior to the making of said contract, the plaintiffs examined said land with a view of purchasing same, and at the time of said examination the said roads and each of them were plainly visible, and were either seen by the plaintiffs, or would have been seen and observed by them by the exercise of proper diligence.

"(10) That the public acquired a prescriptive right, and there existed a prescriptive right in the public, to travel said roads and each of them at the time of making said contract.

"(11) That the existence of said prescriptive right in the public to travel said roadways and each of them depreciates the value of said land to the amount of \$50 per acre. * * *

"(12) That the plaintiffs and neither of them were aware that the public possessed a prescriptive right or any right to travel said roadways, or either of them, over and across said land at the time of the execution of said contract; and they and each of them were unaware of the possession by the public of any right whatsoever, either prescriptive or of any other character, to travel said roadways over and across said land, and were aware only of the physical existence, and not the legal existence, of said roads."

The court concluded from these findings that the roadways across the land are incumbrances, and that, the defendant having declined to remove the same, the plaintiffs were entitled to a return of the purchase money paid. The judgment was accord-

ingly entered against the defendant, and this appeal followed.

[1] Several assignments of error are made, but the argument is to the effect (1) that the evidence fails to show that these roads are lawful highways, and (2) that highways do not constitute an incumbrance on land; and therefore the defendant complied with its contract when it tendered the warranty deed to the plaintiffs. We shall notice these points briefly. The record shows that these roads are not regularly laid out roads, and that the tract of land in question is open, unimproved, arid land. But it also shows that the roads are well-defined roads, and have been commonly traveled for more than 30 years; that they were used as such long before the patent for the land was issued by the government, and that the county officers have made repairs and improvements upon these roads and upon the lands in question within the last 5 years; and that the appellant knew of these facts. It is apparent from the evidence that the county officers regarded these roads as public highways and improved them as such, and that the public used them continuously as such for many years. They therefore became highways by user. *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; *Yakima County v. Conrad*, 26 Wash. 155, 66 Pac. 411.

[2] Upon the second point, appellant argues that, if these roads are held to be highways, they do not constitute an incumbrance upon the land, because they are a benefit, and also because the plaintiffs knew of the roads at the time the contract for purchase was entered into. Many cases are cited and quoted, from among which is *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272, where the court said: "It must strike the mind with surprise that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn round on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a flood-gate of litigation would be opened, and for many years to come this kind of action would abound. These are serious considerations, and this court ought, if it can consistently with law, to check the attempt in the bud."

Appellant also relies upon the case of *Schurger v. Mooreman*, 20 Idaho, 97, 117 Pac. 122, 36 L. R. A. (N. S.) 313. We have no doubt that, where the road or highway is really a benefit to the land, it could not be

held to be an incumbrance; but where there are two roads which are shown to be a source of injury to the land, as is the case here, it is apparent that a different rule applies; or, stated in the language of Mr. Rawle, in his work on Covenants for Title (5th Ed.) p. 108: "Instead, therefore, of laying down an abstract rule, it would seem that in a certain class of cases the question of what is or is not an incumbrance should, as has already been said, be determined by reference to the subject-matter of the contract, the relation of the parties to it and to each other, the notice on the part of the purchaser, and, to some extent, the local usage and habit of the country. * * *" In other words, the question in this kind of cases becomes a mixed question of law and fact.

It appears in this case that the respondents knew that these roads were upon the land when they entered into the contract; but they did not know until later that the roads had become an incumbrance by use or prescription. The character of the country and of the roads led them to believe, and they no doubt did believe, that the roads were mere temporary roads, and could be obstructed or changed without permission of the county officers and without liability. When they subsequently discovered that the course of the roads could not be changed without permission, they demanded that the defendant remove the roads, because they constituted an incumbrance, which they really are, because the court finds that the value of the land is decreased \$50 per acre on account thereof. If the plaintiffs had known or been informed that the roads were lawful roads, or that they had been used long enough to become such at the time the contract was made, the plaintiffs might now be estopped to claim that the roads are incumbrances, but, not knowing that fact, they are not estopped.

The judgment is therefore affirmed.

MORRIS, ELLIS, GOSE, and FULLERTON, JJ., concur.

ANDERSON v. PRIESTERSBACH et ux.
(Supreme Court of Washington. July 29, 1912.)

ABSTRACTS OF TITLE (§ 3*)—LIABILITY OF ABSTRACTOR FOR NEGLIGENCE.

Where an abstractor knows that the person to whom he delivers an abstract at the expense of the owner, who ordered and paid for it, will rely upon it in making a trade or purchase, he is liable in damages to such person for any loss resulting from a material error or omission.

[Ed. Note.—For other cases, see Abstracts of Title, Cent. Dig. §§ 2-6; Dec. Dig. § 3.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by Theodore Anderson against Charles P. Priestersbach and wife. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Cooley & Horan and R. Mulvihill, for appellants. Coleman, Fogarty & Anderson, of Everett, for respondent.

CHADWICK, J. This action was brought to recover the sum of \$463.50, the price of certain abstracts made by plaintiff for defendants. The defendants answered, setting up a counterclaim for damages. A further statement of the facts is unnecessary at the present time. The legal question to be resolved is whether an abstractor, knowing that the party to whom he delivers an abstract at the instance of the owner, who ordered and paid for it, will rely upon it in making a trade or purchase of the property described therein, is liable in damages for a loss resulting from a material error or omission. The trial judge applied the rule as laid down in 1 Cyc. 215: "By the weight of authority, an abstractor is liable only to the person ordering and paying for the abstract; and, where this view obtains, the fact that an abstractor has knowledge that his abstract is to be used in a sale or loan to advise a purchaser, or a person about to lend money, does not affect the rule as to his liability." This rule is sustained by the weight, considered in numbers, of authority; but we are not willing to apply it, unless it is plain that there was no duty on the part of the abstractor to the party injured. In this case the abstractor not only knew the purpose of the abstract, but became the agent of the other party to the transaction, out of which the loss resulted, to deliver it to defendant. He knew that the trade, if made at all, would be made upon the faith of his certificate.

What is called the general rule has not been allowed to stand without strong and persistent challenge. In one of the leading cases, *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621, the doctrine was denied by Chief Justice Waite, dissenting, with whom Justices Swain and Bradley concurred. He said: "The circumstances were such as ought to have satisfied him that his certificate was to be used by Chapman in some transaction with another person as evidence of the fact certified to. * * * It seems to me that under these circumstances Ward is liable to the bank for any loss it may sustain by reason of his erroneous certificate." Like expressions are to be found in many of the cases. In some states the injustice of the rule invoked by plaintiff has been recognized by the Legislature and abrogated by statute. We are not now prepared—indeed, it is not necessary—to hold that an abstractor is liable to a third party to whom his customer presents an abstract in the procurement of

money or property. The general rule was recognized, if not expressly affirmed, in *Bremerton Development Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69, where a recovery was allowed upon our finding of strict privity of contract; but it does not follow that there are no exceptions to the rule. Indeed, they have been recognized, and, in our judgment, are as securely established as the rule itself. So where, as in this case, the facts warrant us in saying that there was a republication of the abstract to the defendant, or that it was made in his behalf, we have no hesitation in asserting that the abstracter is responsible under his certificate for the loss sustained.

"It is very well known that the owner of real estate seldom incurs the expense of procuring an abstract of the title from an abstracter, except for the purpose of thereby furnishing information to some third person or persons, who are to be influenced by the information thus provided. If the abstracter in all cases be responsible only to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless. Where the abstracter has no knowledge that some person other than this employer will rely in a pecuniary transaction upon the correctness of the abstract, the general rule that his duty extends only to his employer must be maintained. How far exceptions ought to be countenanced we will not now undertake to say; but, confining ourselves to the case before us, we are of the opinion that the facts stated in the complaint are sufficient to put the defendant to his answer. Here there was actual communication between the abstracter and the person for whose information the abstract was prepared. The appellant had refused to make the loan until he should be furnished with an abstract; and the abstracter was informed that his abstract was to be used for the particular purpose of inducing the plaintiff to make a loan, secured by mortgage, on this real estate. He delivered the abstract to the appellant for his use, and certified it to be a correct and true abstract of title. * * * We think it cannot properly be said that the appellee did not owe a duty to the appellant arising under the contract; the attending circumstances indicating that it was the understanding of all the parties that the service was to be rendered for the use and benefit of the appellant, the particular person who was to loan his money in reliance upon what the abstracter should do and represent in the premises. If such a duty did arise, the appellee was bound to the person to whom he owed the duty to perform it with reasonable care and skill. However broad and inclusive the statements of the general doctrine in the decided cases, we think that

when the facts involved and the reasons stated in the opinions, to some of which we have referred, are considered, it must be concluded that the view we take of the pleading before us is sustained by the authorities." *Brown v. Sims*, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. Rep. 308.

"The defendant knew that the abstract was made for the exclusive benefit and use of the plaintiff, and knew that the plaintiff would rely thereon, and the abstract was delivered by the defendant to the plaintiff. Under this state of facts, there can be no doubt as to the liability of the defendant." *Western Loan & Savings Co. v. Silver Bow Abstract Co.*, 31 Mont. 448, 78 Pac. 774, 107 Am. St. Rep. 435.

It is inferentially held, in *Savings Bank v. Ward*, that, had the abstracter had "any knowledge as to the purposes for which the abstract was obtained," he would have been liable to one acting upon its credit; while in other cases it has been squarely held that, where the abstracter has notice that the abstract is procured for a particular person or use, he will be held liable to such person for damages caused by his negligence or omission. *Dickle v. Nashville Abstract Co.*, 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616; *Peabody Bldg. & Loan Ass'n v. Houseman*, 89 Pa. 261, 33 Am. Rep. 757; *Equitable B. & L. Ass'n v. Bank of Commerce*, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449, and note, 12 Ann. Cas. 407; *Warvelle on Abstracts* (3d Ed.) § 9.

Other questions are raised; but, in our judgment, they rest upon disputed facts, and the case will be sent back for further proceedings in conformity with this opinion.

Judgment reversed.

MOUNT, GOSE, PARKER, and CROW, JJ., concur.

YOST v. EMPIRE STATE SURETY CO.

(Supreme Court of Washington. July 29, 1912.)

1. MUNICIPAL CORPORATIONS (§ 346*)—PUBLIC IMPROVEMENTS—BOND OF CONTRACTOR.

Where a contract for a public improvement provided that the work should be taken under one ordinance, and the surety bond was conditioned on the fulfillment of the work according to another ordinance, the variance is not fatal, where the ordinance mentioned in the contract merely ordered the improvement and provided that the expense should be met under a plan of special assessments, as provided by the second ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 346.*]

2. INSURANCE (§ 565*)—POWER OF AGENT—PRESUMPTION OF AUTHORITY.

Where a surety company held one out as an adjuster, without any notice as to limitations on his power, one treating with him in the settlement of a claim is warranted in as-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

suming that he has power to bind the corporation in the transaction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1412; Dec. Dig. § 565.*]

Department 1. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by A. M. Yost against the Empire State Surety Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John P. Hartman, of Seattle, for appellant. George W. Louttit, of Everett, for respondent.

CHADWICK, J. [1] Appellant became surety for certain contractors, who had undertaken to put in a sea gate at Edmonds. The contractors defaulted, and the work was completed by others. The concrete question before us is the liability of appellant, the surety company. It is first contended that the contract provides that the work shall be done under Ordinance No. 180; whereas the bond refers to the fulfillment of Ordinance No. 177. It is said that this is a fatal variance, because of which respondents, who performed labor and supplied materials for the work, cannot recover. Ordinance No. 180 ordered the improvement and provided that the expense should be met under a plan of special assessments, as provided by Ordinance No. 177 and the laws of the state of Washington.

Admitting that appellant was not informed as to the manner adopted for assessing the cost of the work, and this is all that was denied it by omitting reference to Ordinance No. 177, we think it would be highly technical to hold that there was a variance out of which any prejudice resulted to appellant. Its engagement was to underwrite the contract. It stipulated that the contractors would meet their engagements; and it cannot complain if the parties and the subject-matter of its engagement are sufficiently set out in the bond. We find the fact to be so.

[2] It is next contended and admitted that the right of recovery, the claimants not having filed any liens, depends upon two conditions: (1) Was one Mitchell an agent of the appellant with sufficient authority to bind appellant by his promise? and (2) Did he make such promise? It is altogether likely that, as between appellant and Mitchell, his liberty to contract on behalf of the company was limited. It is said that Mr. Mitchell was only an adjuster of claims, and had no authority to settle or promise the payment of claims in excess of \$250. We find nothing in the record that would bring this fact home to the claimants, or even put them on notice of the fact. They or their agent, acting upon the unchallenged assumption that Mr. Mitchell in all of his negotiations had full power to meet their demands, treated with appellant. He had a general au-

thority over the states of Washington, Oregon, and a part of California. His office and stationery were supplied by the defendant. On the letter heads furnished by the company, his name appeared as adjuster, without notice of limited authority, and his name so appeared upon the door of his office. After this controversy arose, he entered into a minute examination of the several claims, and promised to pay them. He sought only to reject or throw out those which the company would not be legally bound to pay. Unless the transaction be of such character as to put a party dealing with a corporation upon notice, or the duty be one that the law imposes upon those higher in authority, a party dealing with its representative is warranted in assuming that he has power to terminate the relation which he assumes to negotiate. The rule and its reason are both set forth so clearly in *Brace v. Northern Pacific Railway Co.*, 63 Wash. 417, 115 Pac. 841, that no further discussion is necessary.

We think the testimony is ample to sustain the verdict and the judgment of the court that Mr. Mitchell bound appellant to meet the demands of the plaintiff. There is some testimony to show an express promise; but the evidence to sustain an implied promise is so convincing that we think it would be unjust in the extreme if we should hold that those who, because of negotiations invited by appellant's agents, had let the time for protecting themselves under the statute go by could not recover.

Judgment affirmed.

MOUNT, GOSE, PARKER, and CROW, JJ., concur.

STATE v. TICE.

(Supreme Court of Washington. July 29, 1912.)

1. FISH (§ 3*)—RIGHT TO FISH IN PUBLIC WATERS.

There is no private right to take fish in waters of the state, except as such right is either expressly or inferentially given by the state.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 3, 4, 6-8; Dec. Dig. § 3.*]

2. CONSTITUTIONAL LAW (§ 208*) — CLASS LEGISLATION—FISH.

Laws 1911, c. 104, prohibiting, during certain periods, salmon fishing in the waters of a certain harbor and its tributaries, is not class legislation, because of such fishing in other waters not being prohibited; there being no discrimination as to persons.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

Department 1. Appeal from Superior Court, Pacific County; Sol Smith, Judge.

Charles Tice was convicted of illegal fishing, and appeals. Affirmed.

Chas. E. Miller and John A. Homer, both of South Bend, for appellant. Robt. G. Chambers, of Raymond, for respondent.

PARKER, J. The defendant was convicted in the superior court of the offense of fishing for and taking salmon from the waters of Willapa Harbor on August 10, 1911, during the closed season, in violation of the law relating to the taking of food fishes providing, among other things, as follows: "It shall be unlawful to take or fish for salmon in the waters of Willapa Harbor or its tributaries from the 15th day of March to the 15th day of April, and the 1st day of August to the 1st day of September and from the 5th day of December to the 5th day of January in each year." Laws 1911, p. 496. He has appealed to this court relying for a reversal of the judgment rendered against him upon his claim of the unconstitutionality of this law.

[1] Counsel for appellant contend, in substance, that the classification of the waters of the state by the law, for the regulation of the taking of food fishes, is arbitrary and unreasonable; that the law deprives him of liberty and property without due process of law; and that the law denies to him equal protection and privileges with others. Counsel for appellant seem to proceed upon the theory that some inherent privilege or property right belonging to him is attempted to be invaded by this law. Let us first notice the real nature of the right of appellant which it is said this law curtails. The decisions of the courts in this country so far as they have come to our notice are all in unison in holding that there is no private right in the citizen to take fish or game except as such right is either expressly or inferentially given by the state. In *State v. Snowman*, 94 Me. 99, 46 Atl. 815, 50 L. R. A. 544, 80 Am. St. Rep. 380, the court said: "The fish in the waters of the state, and the game in its forests, belong to the people of the state, in their sovereign capacity, who, through their representatives, the Legislature, have sole control thereof, and may permit or prohibit their taking." In *Smith v. State*, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404, the court said: "The individual has no natural right to take game, or to acquire property in it, and all the right he possesses or can possess in this respect is granted him by the state." In *Ex parte Maler*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129, this view is expressed in equally strong language as follows: "The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good." Among the

numerous authorities which might be cited in support of this view, the following may be noted: *Magner v. People*, 97 Ill. 320; *State v. Hume*, 52 Or. 1, 95 Pac. 808; *Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345; *Hornbeke v. White*, 20 Colo. App. 13, 76 Pac. 926; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.

[2] The doctrine of these holdings renders it plain that no private right or privilege of the appellant is invaded by this law, unless, as he contends, it grants privileges to others which are withheld from him. So far as the law relates to the right to fish in the waters of Willapa Harbor, it could hardly be seriously argued that there is any granting or withholding of privileges except as to all people upon exactly the same terms and conditions. Appellant clearly has all the rights there that any one else has under this law. But it is insisted that, since the restrictions placed by this law upon the right to take salmon from Willapa Harbor applies only to the waters of that harbor, there being other waters in the state where salmon may be taken without this same restriction as to time, the law thus becomes in effect class legislation, and as such is arbitrary and unreasonable to the extent that the court should declare it unconstitutional. Counsel's contention is in effect that this classification of territory has the same effect as the classification of persons. But it manifestly is not the latter. No decisions have come to our notice, and we think that there are none, holding that a legislature may not classify the territory within a state for the purpose of making different regulations or restrictions in different portions of the state relative to the taking of fish or game. It is easily conceivable that there may be sound reasons for such legislative classification, and this is sufficient to induce the courts to refrain from inquiring into the reasons moving the Legislature to make such classification.

In the early case of *Hayes v. Territory*, 2 Wash. T. 286, 5 Pac. 927, a game law applicable only to certain counties of the state was attacked, as being in violation of the organic law of the territory. The court there said: "The game law in question restricted hunting in five counties only. It is contended that, for this reason, it is inconsistent with that inhibition in the Organic Act which forbids the Legislature from granting special privileges. But the provisions of this game law fall without distinction upon all inhabitants of the territory. All are forbidden to hunt at certain seasons within the counties named. There is no special privilege. * * *" In the comparatively recent decision of the Supreme Court of Oregon in *Portland Fish Co. v. Benson*, 56 Or. 147, 108 Pac. 122, dealing with an or-

der of the Board of Fish Commissioners closing certain streams from fishing for a certain season, made by authority of a statute, the court said: "Again, it is urged by plaintiffs that the order of the board denies equal protection of the law to plaintiffs, in that the notice has the effect to close portions of the stream, leaving other portions of it open; but this affects the locality and not the individual. Where the stream is open, it is open to everybody, and there is no discrimination or spoliation of property. A law that operates only in a limited territory to accomplish a specific purpose does not deny equal protection of the laws, as it affects all persons equally and impartially who are similarly situated." *State v. Storey*, 51 Wash. 630, 99 Pac. 878, and *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504, are in harmony with this view.

We conclude that the judgment of the superior court must be affirmed. It is so ordered.

CROW, CHADWICK, and GOSE, JJ., concur.

(21 Idaho, 747)

ARMSTRONG v. JARRON.[†]

(Supreme Court of Idaho. May 3, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 179*)—PROPERTY SUBJECT—OWNERSHIP.

Where a final receipt is issued by the United States government upon proof being made as required by the laws of the United States, and a receiver's certificate is issued dated October 27, 1905, such land is assessable for the year 1906.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 302; Dec. Dig. § 179.*]

2. TAXATION (§ 788*)—TAX TITLES—TAX DEED AS EVIDENCE.

Under the provisions of section 1764, Rev. Codes, a tax deed duly acknowledged and approved is prima facie evidence that:

"(1) The property was assessed as required by law;

"(2) The property was equalized as required by law;

"(3) The taxes were levied in accordance with law;

"(4) The taxes were not paid;

"(5) At a proper time and place the property was sold as prescribed by law, and by the proper officer;

"(6) The property was not redeemed;

"(7) The person who executed the deed was the proper officer;

"(8) Where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.*]

3. TAXATION (§ 438*)—ASSESSMENT—ERRORS—CORRECTION.

Under the provisions of section 1784, Rev. Codes, "omissions, errors or defects in form in any assessment book, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time

prior to the delinquent sale and after the original assessment was made."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 768, 769; Dec. Dig. § 438.*]

4. TAXATION (§ 319*)—ASSESSMENT—ERRORS—CORRECTION.

Under the provisions of section 1788, Rev. Codes, "no assessment or act relating to assessment, or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law."

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 527-529, 532-534; Dec. Dig. § 319.*]

5. TAXATION (§ 789*)—TAX TITLES—TAX DEED AS EVIDENCE.

Where a tax deed is introduced in evidence, it is prima facie evidence of title, and it is incumbent upon the person attacking the tax title to prove the omission of some jurisdictional act or step which renders the tax title void, such as: First, that the land was not subject to taxation; second, that the tax against said land was paid; third, that the land has been redeemed from the tax sale in the manner provided by law; fourth, any other jurisdictional question. Where omissions and errors have been made in assessments and sales of property for delinquent taxes, and such questions are not jurisdictional and are merely legislative directions in such proceedings, and by such omissions and errors the property owner is prejudiced, then such facts may be shown to defeat the tax title.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1556-1569; Dec. Dig. § 789.*]

6. TAXATION (§ 319*)—ASSESSMENT—ERRORS—SUBSTANTIAL COMPLIANCE WITH LAW.

Where property is subject to taxation, a substantial compliance with the requirements of the law in making assessments of taxes and in the procedure under the statute leading up to the issuing of a tax deed is all that is required, and the mere failure of officials to perform the duty required of them by law cannot be taken advantage of by a property owner for the sole purpose of escaping such taxation. There must be prejudice and injury to such owner.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 527-529, 532-534; Dec. Dig. § 319.*]

7. TAXATION (§ 319*)—ASSESSMENT—STATUTORY PROVISIONS.

The findings of the trial court, to the effect that certain provisions of the statute had not been complied with relating to the assessment of property and the preparation of the records showing the same and the procedure thereon relating to the sale and the issuing of a tax certificate and tax deed, are all matters relating to omissions and errors not jurisdictional, and are merely directory as to the duties of officers, and do not of themselves render void the assessment or the validity of the certificate of sale or tax deed issued.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 527-529, 532-534; Dec. Dig. § 319.*]

Sullivan, J., dissenting.

Appeal from District Court, Nes Perce County; E. C. Steele, Judge.

Action by Francis M. Armstrong against W. C. Jarron. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

[†]For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
‡ Rehearing denied.

James B. Gordiner, of Spokane, Wash., and Daniel Needham, of Lewiston, for appellant. Fred E. Butler, of Lewiston, for respondent.

STEWART, C. J. The respondent, Francis M. Armstrong, commenced this action in the district court of Nez Perce county for the purpose of quieting his title to 160 acres of land located in said county and described as follows: The N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 30, township 32 N., range 3 W. B. M. The complaint alleges that he is the owner in fee simple of the property, and that the defendant claims an estate in said land adverse to the plaintiff, under and by virtue of a certain tax sale certificate and a tax deed which are alleged to be void. The defendant filed an answer and cross-complaint. In the answer the defendant denied the plaintiff's title to said land and denied the invalidity of the tax sale and tax deed held by the defendant. In the cross-complaint the defendant alleges that ever since the 1st day of August, 1910, he has been the owner in fee simple of the land described in the complaint under and by virtue of a tax title thereto; that said land was duly and regularly assessed in 1906 for state, county, and school taxes; that said taxes were not paid and became delinquent and the land was duly and regularly sold for delinquent taxes on the 9th day of July, 1907, and a tax sale certificate was issued to Nez Perce county; that on the 25th day of February, 1910, the county assigned said tax sale to defendant; that said land was not redeemed from the tax sale within three years from the date thereof, and in pursuance of said tax sale and said assignment of said tax certificate a tax deed for said land was regularly issued to the defendant on the 1st day of August, 1910; that said land was sold for taxes for the year 1907 and a delinquent tax sale certificate was issued which defendant redeemed; and appellant asks that the title to said land be quieted against the plaintiff and all other persons. An answer to the cross-complaint was filed by plaintiff, and the validity of defendant's tax title was denied, and it is alleged that said land was not subject to taxation for the years 1906 and 1907, as it was the property of the United States of America. It is also alleged in the answer to the cross-complaint that no certificate, as required by section 1727 of the Code, was appended to the tax roll for the year 1906; that notice was not given of the meeting of the board of equalization for the said year as required by section 1728; that the assessor did not attend the meetings of the equalization board, as required by section 1697; that the assessor did not attend the final meeting of said board, as required by section 1701; that the assessment book was not certified, as required by section 1724,

or certified at all until nearly five years after it should have been certified, the certificate being added March 7, 1911; that the delinquent tax list for 1906 was not published as required by section 1743; that no delinquent tax list was ever made or delivered, as required by sections 1739 and 1740; that no comparison of the delinquent tax with the assessment book was had, as required by section 1768; that no certificate was made or appended to the tax sales book, as required by section 1761; that publication of the delinquent tax list was not had, as required by sections 1743, 1744, 1745, 1746, 1747, and 1748; that the certificate of sale of the property for taxes was not signed by the assessor as required by section 1760, nor did the certificate of sale properly describe the land, as required by section 1759, and the tax deed does not substantially recite the matters contained in the tax sale certificate, as required by section 1763; that the auditor failed to verify any statement made by him, as required by section 1780; and finally respondent tendered with the said answer to the cross-complaint, and paid into the court for the benefit of the appellant, the sum of \$101.44 in full for all amounts paid by appellant on the purchase of the tax sale certificate and for taxes claimed to have been paid for the tax deed, all of said sums being computed with interest at the rate of 18 per cent. per annum from the time of the respective payments thereof, and \$5 as a reasonable fee for making a deed to appellant.

The cause was tried, and the court made its findings of fact and conclusions of law and adjudged that the tax deed and tax title to the land was null and void, and the title was quieted in the respondent. Certain findings of the trial court with reference to the validity of the title acquired by appellant by reason of the tax sale and the tax deed issued thereon, and upon which the trial court held the title of appellant void under said tax deed, are urged by appellant as errors upon this appeal. The court finds:

"Finding 5. That in the making up of the assessment book of Nez Perce county, state of Idaho, for the year 1906, the assessor of said county failed to append the certificate required by section 1727 of the Rev. Codes of the state of Idaho, or any certificate of any kind whatsoever.

"Finding 6. That the records and files of the office of the county auditor of Nez Perce county, state of Idaho, and the records and files of all other county officers of said county, fail to show that any notice of the meeting of the county board of equalization of said Nez Perce county, state of Idaho, was had, published, or given during the year 1906, nor do any of said records show any affidavits of publication of notice thereof, as required by section 1728 of said Codes.

"Finding 7. That the records of the meetings of the county board of equalization of said Nez Perce county, state of Idaho, for said year 1906, fail to show the attendance of the assessor of said county, at any time, during any of said meetings for said year 1906, as required by section 1697 of said Codes.

"Finding 8. That the pretended assessment book of said Nez Perce county, state of Idaho, for said year 1906, did not at the time the same was delivered, or claimed to have been delivered, by the auditor of said county to the assessor and tax collector thereof, contain the certificate required by section 1724 of said Codes, nor did said pretended assessment book for said year, at any time, contain any certificate whatever, until the 7th day of March, in the year 1911, when there was appended and added to volume 4 of said assessment book a certificate or writing * * * at the request of Cordiner & Cordiner, attorneys * * * for * * * W. C. Jarron. Said certificate or writing is in words and figures as follows: 'Certificate of Auditor to Tax Roll of 1906. State of Idaho, County of Nez Perce —ss.: I, J. R. Lydon, clerk of the board of county commissioners for Nez Perce county, state of Idaho, do solemnly swear that as such — of said board of county commissioners for Nez Perce county, Idaho, I have kept correct minutes of all of the acts of said board touching alterations in the assessment book; that all alterations agreed to and directed to be made have been made and entered in said assessment book, and that no changes or alterations have been made therein, except those authorized; and that as auditor I have reckoned the respective sums due as taxes and have added up the columns of valuations and taxes as required by law. J. R. Lydon. Subscribed and sworn to before me this 7th day of March, A. D. 1911. Daniel Needham, Probate Judge.' That the assessment book to which the certificate or writing of March 7, 1911, is appended, is the sole and only book purporting to be an assessment book of said Nez Perce county for said year 1906.

"Finding 8. That what was purported to be the delinquent tax list for the year 1906 has not been shown by the affidavit of the printer or publisher of any newspaper that said list was published, as required by sections 1748 and 6053 of said Code. That in what is purported to be a published delinquent list for delinquent taxes for said year 1906, the name 'F. M. Armstrong' is used in place of 'Francis M. Armstrong,' the name 'Francis M. Armstrong' appearing in what is purported to be the assessment book for said year 1906. That in said purported published delinquent tax list for said year 1906, and in said purported assessment book for said year 1906, all designation of the township, either in full or by abbreviation, as

to its being 'north' or 'south,' is omitted. That neither in said purported assessment book, nor in said purported delinquent tax list, nor in the purported certificate of sale claimed to have been purchased by defendant, nor in said purported tax deed heretofore mentioned, is the real property claimed to have been assessed, returned as delinquent, published as delinquent, or sold, or conveyed by said tax deed, described with sufficient certainty to locate said land, or to determine the number of acres claimed to have been assessed, returned as delinquent, sold, or conveyed by said tax deed. That in said purported published delinquent list, the real property of plaintiff and attempted to be described in said purported published delinquent list, was advertised to be sold on the 8th day of July, 1907, and sale thereof was had on the 9th day of July, 1907.

"Finding 9. That no comparison was ever made or had by the assessor of Nez Perce county, state of Idaho, by or with the auditor of said county, of the delinquent list or tax sales for said year 1906, with the original or subsequent assessment book of said year 1906, as required by section 1763 of said Codes; nor was any oath taken, written, or subscribed by the assessor or tax collector, as required by said section 1768; nor did the auditor of said Nez Perce county, state of Idaho, at any time, certify that the original tax certificates or any of them, of property sold to the county, for or on account of unpaid or delinquent taxes for said year 1906, or any copy of any tax sale certificate, in the certificate book, were or was correct as required by section 1761 of said Codes; nor was any certificate of any kind ever appended at any time to said certificate book of property sold for or on account of delinquent or unpaid taxes for said year 1906, as required by said section 1761.

"Finding 10. That the tax sale certificate, said certificate being No. 80, alleged to have been issued for sale of plaintiff's property for delinquent taxes for said year 1906, was not signed by the assessor or tax collector of said Nez Perce county, as required by section 1760 of said Code. That in lieu of the signing of such purported certificate there is appended to such purported tax sale certificate what is purported to be a facsimile rubber stamp impression of the signature of said assessor and tax collector. That in said purported tax sale certificate, plaintiff's property is attempted to be described in the following manner: 'NE 4 SW 4, N 2 SE 4, SE 4 SE 4 Sec. 30, Tp. 32 R 3 W.'

"Finding 11. That the auditor of said Nez Perce county, state of Idaho, has failed to verify any statement made by him or required to be made by him, as to any matter touching the assessment or collection of taxes for said year 1906, as required by section 1730 of said Codes."

That prior to this trial plaintiff tendered

to and deposited with the clerk for the benefit of the defendant the sum of \$101.44, the amount paid out by defendant, with full interest as provided by law, and also \$5 for making and recording tax deed and acknowledging the same.

Upon such findings of fact, the court finds as conclusions of law that: First, the plaintiff is entitled to a decree that he is the owner of the premises described in the complaint; second, that the pretended sale of said property for unpaid or delinquent taxes for the year 1906, and made on the 9th day of July, 1907, is null and void; and that the tax deed issued to defendant under said pretended sale is null and void.

From the court's findings of fact and conclusions of law, it is apparent that the trial court based his conclusions of law upon the facts found that certain provisions of the statute in relation to the assessment of real property and the collection of taxes levied against said property and the sale of said property because of nonpayment of taxes, etc., were not followed and complied with.

[1] It appears from the findings and the evidence in this case that the respondent made final proof for the land in controversy in October, 1905, and received a register's certificate on October 27, 1905, and therefore such land became assessable for the year 1906 (section 1643, Rev. Codes); that such taxes were not paid by the respondent and on the 9th day of July, 1907, said land was sold for such assessment to the county of Nez Perce, and on the 25th day of February, 1910, the certificate of sale was sold and transferred to the appellant and said land was not redeemed, and on the 1st day of August, 1910, a tax deed was made to the appellant; that the taxes for the year 1907 were not paid, and said property was sold to the county; and that on June 23, 1911, the appellant paid to the county \$36.36 for the redemption from sale for the taxes for the year 1907.

This action was commenced on November 20, 1911. There is no evidence in the record in this case as to who has been in possession of the premises at any time, except the possession of the respondent as shown by his certificate from the land office issued in October, 1905. Whether he continued in possession thereafter is not shown; neither is there any evidence to show that the appellant ever went into possession or has made any improvement on said land; neither is there any evidence as to who paid the taxes for the years 1908, 1909, or 1910; neither is there any evidence in this case that the respondent ever made any inquiry with reference to the taxation of said lands at any time after he received the final receipt from the land office up to the time this action was commenced; neither is there any evidence to show that he offered to pay any

assessment or any taxes of any kind or nature either against himself or said lands.

The trial court seems to have relied entirely upon the public records of Nez Perce county in the assessor's office and the recorder's office, and the evidence of J. R. Lydon, clerk of the district court and ex officio auditor and recorder, and who held the same office in the year 1906, and the tax sale certificate and the tax deed and the treasurer's receipt. This brings us to a consideration of such findings.

Before considering the sections of the statute referred to in each of the findings, it is proper to have in mind other provisions of the statute relating to the effect of errors or defects in assessments and the legality of assessments made by officers in making assessments and collections of taxes, and also the effect of a tax deed as evidence.

[3] Section 1784, Rev. Codes, provides:

"Omissions, errors or defects in form in any assessment book, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time prior to the delinquent sale and after the original assessment was made."

[4] Section 1788, Rev. Codes, provides:

"No assessment, or act relating to assessment, or collection of taxes is illegal on account of informality, not because the same was not completed within the time required by law."

[2] And section 1764, Rev. Codes, provides:

"The matters recited in the certificate of sale must be recited in the deed, and such deed duly acknowledged or proved is prima facie evidence that: (1) The property was assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law; (4) the taxes were not paid; (5) at a proper time and place the property was sold as prescribed by law, and by the proper officer; (6) the property was not redeemed; (7) the person who executed the deed was the proper officer; (8) where the real estate was sold to pay taxes on personal property, that the real estate belonged to the person liable to pay the tax."

[6] In referring to the latter section, in *Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511,

this court said: "It will thus be seen that the tax certificate and tax deed to which objection is made recite facts which are not necessary to recite in either. The statute makes certain matters in the deed prima facie evidence of certain facts, and conclusive evidence as to certain other facts, and requires the deed to recite the matters required to be recited in the certificate of sale," and after reciting the facts says: "From the evidence it appears that he made no inquiry about the taxes; that he never offered any payment; that he never ascertained whether the property had been sold. He permitted others to pay the taxes. He stood by and

permitted a tax deed to be issued, * * * and exercised no fixed, specific ownership over the property in controversy. His possession was casual and questionable. * * * Under all the facts in this case, we are clearly of the opinion that the appellant is not in a position to raise the constitutionality of the acts in question. The appellant is certainly guilty of such laches in paying his taxes and asserting his right and ownership to this property that he should not now be permitted to come into a court of equity and ask that such silence be permitted to inure to his benefit." Further on in the opinion this court quotes and approves the case of *Co-operative Savings & Loan Ass'n v. Green*, 5 Idaho, 660, 51 Pac. 770, in which this court, through Justice Sullivan, says: "Substantial compliance with the requirements of the law in making assessments is all that is necessary. If property is subject to taxation, it cannot escape through some technical failure of the officer to perform his duty, unless it has actually misled the party to his injury."

[5] In the case of *Wilson v. Locke*, 18 Idaho, 582, 111 Pac. 247, this court said: "We conclude that such tax deeds are prima facie evidence of the regularity of all of the proceedings from the assessment of the property, inclusive, up to the execution of the deed; but this does not prevent the owner of the property from showing a defense that any of the jurisdictional acts in the assessment or sale of the property have not been performed. There was no effort on the part of the appellant to introduce evidence tending to show that any jurisdictional act required to be done in the assessment and sale of said property had not been done by the treasurer or officer authorized to make such sale."

In the case of *McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102, this court announces the rule of law in the syllabus, as follows: "When property is the subject of taxation, and the assessment has been legally made, and there is default in the payment of such taxes, and the property is sold at tax sale in accordance with the provisions of the statute, such property cannot thereafter escape taxation through some failure of the officer to perform his duty unless it has actually misled the party to his injury."

In the case of *White Pine Mfg. Co. v. Morey*, 19 Idaho, 49, 112 Pac. 674, after referring to a number of sections of the statute requiring certain recitations to be made in tax certificates and tax deeds, this court says: "It will therefore be seen that section 1763 recognizes the substance instead of the form, and authorizes the officer to make a deed containing 'substantially the matters contained in the certificate.' Section 1764, when construed in the light of the previous section, cannot be said to require a literal verbatim copy of the certificate em-

bodied in the deed. It has been accordingly held that not all the provisions of the statute with reference to the assessment of property and the sale for taxes are mandatory, but that, on the contrary, some of those provisions are only directory." And it is further said in said opinion: "On the other hand, as above observed, the later authorities are overwhelming to the effect that, if the proceeding has been regular, and a tax sale has been made in substantial conformity with the law, the time within which the landowner may redeem is fixed and limited by the statute, and that after the expiration of such period he has no right of redemption whether a deed has issued or not."

In the case of *Stewart v. White*, 19 Idaho, 60, 112 Pac. 677, this court followed the rule announced in *Bacon v. Rice*, and cited the case of *Couts v. Cornell*, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168, and said: "It was held in effect * * * that there is an enforceable obligation to pay a general annual tax which, in a sense is legal as well as moral; and a lien therefor is established by law irrespective of the irregularities or informalities of the assessment. Even if there were some informalities in the assessment or collection of the taxes upon said land, those were all cured by the provisions of section 1788, Rev. Codes, which section is as follows: 'No assessment, or act relating to assessment, or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law.'"

[7] In finding No. 5 the court finds that the assessor of said county failed to append the certificate required by section 1727 of the Rev. Codes, or any certificate of any kind whatsoever. Section 1727, Rev. Codes, provides: "On or before the first day of July in each year the assessor must complete his assessment roll. He and his deputies must take and subscribe an affidavit in the assessment book, to be substantially as follows." Then follows the oath in which the assessor or his deputy verifies that he has made diligent inquiry and examination to ascertain all the property within the county subject to assessment, and that the same has been listed and assessed on the assessment book equally and uniformly, and that he has complied with the duties imposed upon him by law. This section is directory and not mandatory and is required for the purpose of making the assessment roll as made by the assessor verify itself as to the truth of the things contained in it, and for the purpose of showing that the assessor has performed his duties. In said section it is provided: "But the failure to take or subscribe such affidavit as required by this section shall not in any manner affect the validity of the assessment. The making of such affidavit is declared, however, to be a duty

pertaining to the office of every assessor in this state"—thus showing the intention of the Legislature to be that the failure to make the affidavit should not affect the validity of the assessment made by the assessor, but would subject the assessor to certain proceedings for failure to perform his official duties. J. R. Lydon, present clerk of the district court and ex officio auditor and recorder, and who held the same office in 1906, testifies that the affidavit required by sections 1724 and 1727 was not appended to the assessment at the time the assessment book was delivered to the tax collector, but was attached on the 7th day of March, 1911. It was an oversight. He had done it on all previous assessment rolls. This finding of the trial court, therefore, would in no way affect the validity of the tax sale or the tax deed or the appellant's title.

Finding No. 6 is to the effect that the records and files in the office of the county auditor and other county officers did not show that any notice of the meeting of the county board of equalization was published or given during the year 1906, and that the records do not show any affidavits of publication of notice as required by section 1728 of the Rev. Codes. Section 1728 provides: "As soon as completed, the assessment book, together with the statements, must be delivered to the clerk of the board of county commissioners, who must immediately give notice thereof, and of the time the board will meet to equalize assessments, by publication in a newspaper, if any is printed in the county; if none, then in such manner as the board may direct. * * *." While this section provides that the clerk of the board must give notice of the meeting of the board of equalization by publication, it does not require that such acts shall be recorded upon the records of the board or upon the records of any county officer, and the presumption is that the board complied with the law in giving notice that they met as a board of equalization, and in the absence of proof to the contrary the tax deed itself is evidence that the property was equalized as required by law.

In the case of *Gilbert v. Canyon County*, 14 Idaho, 447, 94 Pac. 1083, this court, in dealing with the record to be kept of the proceedings of the board of county commissioners, said: "This statute does not require that the board of county commissioners shall recite in their proceedings their decisions and judgments with the same precision and exactness required by courts of record. A substantial compliance with the statutes is sufficient. It was not necessary in this case for the board of commissioners to find as a fact that notice of election had been given for the statutory period, or to find that it was to the best interest of the county that a bridge be constructed. If, in fact, a notice was given, and the board proceeds with the steps required after notice, and records

such steps, it is a substantial finding of the board that the bridge was necessary and that notice was given."

The mere failure to record the facts as to the publication of such notice, in some record, would not render the meeting and action of the board of equalization void or invalidate the equalization made at a session, if held. This section is clearly directory. Under the provisions of section 1693, Rev. Codes, the board of equalization is required to meet on the second Monday in July of each year and the law gave notice to every person of such meeting. *Inland Lumber, etc., Co. v. Thompson*, 11 Idaho, 508, 83 Pac. 933, 114 Am. St. Rep. 274, 7 Ann. Cas. 862.

In finding No. 7 the trial court found that the records of the meeting of the county board of equalization for the year 1905 failed to show the attendance of the assessor of said county at any time during any of the meetings as required by section 1697 of said Codes. Lydon, clerk, testifies that the records of the board of equalization show its meeting on July 9, 1906, and its adjourning from day to day and final adjournment on the 28th day of July, and that the assessor was not present; that is, that he was not named in the proceedings as being present.

Section 1697, Rev. Codes, provides: "During the session of the board the assessor and any deputy whose testimony is needed must be present, and may make any statement or introduce and examine witnesses on questions before the board." It will be observed from the provisions of this section that the section is permissive; but the assessor is not required to be present, and no penalty is prescribed in the statute for the assessor not being present, and the statute does not require the record to show his presence.

In finding No. 8 the court finds that the assessment book of Nez Perce county for the year 1906 did not at the time the same was delivered by the auditor to the assessor contain the certificate required by section 1724, and did not contain such certificate until on the 7th day of March in the year 1911, when there was appended to the assessment book at request of counsel for appellant the following certificate of auditor of tax roll of 1906: "State of Idaho, County of Nez Perce—ss: I, J. R. Lydon, clerk of the board of county commissioners for Nez Perce county, state of Idaho, do solemnly swear that as such ——— of said board of county commissioners, for Nez Perce county, Idaho, I have kept correct minutes of all of the acts of said board touching alterations in the assessment book; that all alterations agreed to and directed to be made have been made and entered in said assessment book, and that no changes or alterations have been made therein, except those authorized; and that as auditor I have reckoned the respective sums due as taxes and have added up the columns of valuation and taxes as required by law. J. R. Lydon. Subscribed and sworn to be

fore me this 7th day of March, A. D. 1911. Daniel Needham, Probate Judge." This certificate is substantially in form with the certificate required by section 1724, Rev. Codes.

It will be seen that, at the time the assessment book was delivered to the assessor, the certificate required by the section was not attached to the assessment book. The tax deed, however, was prima facie evidence that the certificate was in fact attached to said assessment book, and the burden of proof was upon the respondent to rebut the same, and in addition to the tax deed the respondent introduced in evidence a "line" of the assessment book, being a part of the assessment roll for that year, showing that the respondent's property was regularly assessed and that the taxes on said land were unpaid and delinquent. This exhibit was a certified copy from the assessment book and its evidence that said land was assessed and placed upon the assessment book as required by law for that year, and the omission of the certificate alone was a mere informality which did not affect either the validity of the assessment or affect the validity of the appellant's title, and was sufficient to give notice to the respondent of such assessment and sale, and clearly falls within the provisions of section 1788, *supra*. *Wallapai Min. & Develop. Co. v. Territory ex rel. Denais County Treasurer*, 9 Ariz. 373, 84 Pac. 87; *Auditor General v. Sparrow*, 116 Mich. 574, 74 N. W. 881; *Auditor General v. Griffin*, 140 Mich. 427, 103 N. W. 854; *Twinting v. Finlay*, 55 Neb. 152, 75 N. W. 548; *Johnson County v. Tierney*, 56 Neb. 514, 76 N. W. 1090; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; *Wabash Ry. Co. v. People*, 138 Ill. 316, 28 N. E. 57; *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58.

Under the provisions of section 1788, the fact that the certificate required by law to be attached to the assessment book was not attached within the time fixed by law did not render the assessment illegal on account of such informality. *Stewart v. White*, *supra*; *White Pine Mfg. Co. v. Morey*, *supra*; *McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102; *Williams v. City of Caldwell*, 19 Idaho, 514, 114 Pac. 519.

In this connection we may very properly observe the proceeding in the assessment and collection of taxes is a proceeding in rem and against the property, and does not run against the person or the owner (*White Pine Mfg. Co. v. Morey*, 19 Idaho, 50, 112 Pac. 674), and under the provisions of section 1651 the tax assessed against the property of respondent became a lien on said property after the 2d day of January, 1906, and such lien had the force and effect of an execution duly levied on said land and could not be removed until the aforesaid tax was paid or said land sold in payment thereof, and the laws of the state made it the duty of the assessor and tax collector to collect the taxes by pub-

lishing the list of delinquents and selling the property in accordance with the statute. Such was done, and said property having not been redeemed, and a deed having been issued, said lien became merged in the appellant's title, and the respondent at all times under the law had notice of such assessment and lien and each step of the procedure as provided by the statute, and the certificate to the assessment roll would in no way have given him any further information, with reference to the assessment or the sale of the same.

The next finding, which is numbered the same as the former in the record, embraces a number of independent propositions:

First, that the court finds that the publishing of the delinquent tax list for the year 1906 was not shown by the affidavit of the printer or publisher of any newspaper as required by sections 1748 and 6053, Rev. Codes. Neither of these sections requires that the publishing of the delinquent tax list shall be shown by the affidavit of either the printer or the publisher; consequently, the failure to show the publication by affidavit is not proof that the list was not published. In this case, however, it is proven that the delinquent tax list was published in the manner and form provided by law, and the affidavit of the publishing of the delinquent list was made and filed by the tax collector with the county auditor in pursuance of the provisions of section 1748, Rev. Codes.

Second, in said finding the court found that in the publishing of the delinquent list for the year 1906 the name "F. M. Armstrong" is used, whereas in the assessment book the name "Francis M. Armstrong" is used. There is no contention on the part of respondent that the name F. M. Armstrong does not designate himself, or that he was in any manner misled to his prejudice by the name F. M. Armstrong rather than the name Francis M. Armstrong. It further appears that F. M. Armstrong is the name of the person delinquent; therefore in using the name F. M. Armstrong in said delinquent tax list the tax collector published the name of the person delinquent and complied with the provisions of section 1743, Rev. Codes. This statute with reference to the use of the name of the owner or supposed owner of the land is directory; therefore, even though there had been a mistake in the reference to the name of the owner of the land, such error would not have been material and would not affect the appellant's title to the land in controversy. *White Pine Mfg. Co. v. Morey*, 19 Idaho, 50, 112 Pac. 674. This defect, however, is further cured by the provisions of section 1789 of the Codes, which provides as follows: "When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner or supposed owner, or other mistake relating to the ownership thereof, affects the sale or renders

it void or voidable." This seems to dispose of this question entirely.

Third, the court found that there was no designation of the township as to its being north or south of the base line. In the assessment as shown by the exhibit, the same being a transcript of the assessment book, showing the assessment of said land to respondent, the tract of land in controversy is described according to the government survey, and evidence shows that all townships in Nez Perce county are north of the base line; therefore there could be only one township 32, range 3 east of Boise meridian in Nez Perce county, and said township would be north of the base line because all townships in Nez Perce county are north of the base line; therefore the omission to state whether the township was north or south of the base line was immaterial and could in no way mislead the respondent. In this same connection, this court will take judicial notice that all townships in Nez Perce county are situated north of the base line. Section 5950, Rev. Codes. *Stanton v. Hotchkiss*, 157 Cal. 652, 108 Pac. 864.

Fourth, in said finding the court finds that the evidence is not sufficient because the land in controversy is not described with sufficient certainty in the assessment book or in the delinquent tax list or in the certificate of sale or in the tax deed to locate the land or to determine the number of acres assessed or sold. Said land is described as follows: "Lying and being in the county of Nez Perce and described thus: The NE $\frac{1}{4}$, SW $\frac{1}{4}$ —N $\frac{1}{2}$, SE $\frac{1}{4}$ —SE $\frac{1}{4}$, SE $\frac{1}{4}$ —Sec. 30, Twp. 32, N. R. 3 W. B. M." We think the description is in accordance with the government survey and clearly means the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ in section 30, township 32 N., range 3 W. of Boise meridian, thus clearly describing a tract of land containing 160 acres according to government survey. *Stanton v. Hotchkiss*, 157 Cal. 652, 108 Pac. 864; *Washington Timber, etc., Co. v. Smith*, 34 Wash. 630, 76 Pac. 267. The land is described in the tax sale certificate as follows:

Fractions or other descriptions.	Sec. or Lot	Twp.	Range or Blk.
4 4 2 4 4 4 NE SW N SE SE SE	30	32	3 W.

The land is described in the published delinquent list as follows: "Armstrong, F. M. Northeast quarter southwest quarter, north half southeast quarter, southeast quarter southeast quarter section thirty, township thirty-two, range three W. B. M. Total taxes \$25.50."

The aforesaid description not only describes the land clearly and accurately, but also specifies and designates the number of acres. Section 1787 of the Rev. Codes pro-

vides: "In the assessment of land, advertisement and sale thereof for taxes, initial letters, abbreviations and figures may be used to designate the township, range, section or parts of section, lot or block, and kind of improvement or personal property in the extension thereof." This section clearly specifies and authorizes the use of figures, initial letters, and the abbreviations such as were used in these various descriptions, and this method of description is clearly recognized by courts in passing upon this question. *Saranac Land & Timber Co. v. Roberts*, 177 U. S. 318, 20 Sup. Ct. 642, 44 L. Ed. 786; *Am. & Eng. Ency. of Law* (2d Ed.) vol. 27, p. 684; *Black on Tax Titles* (2d Ed.) § 112. This court, in the case of *Oregon Short Line R. Co. v. Irrigation District*, 16 Idaho, 578, 102 Pac. 904, recognizes the foregoing rule. Many cases might be cited showing similar designations to be sufficient, a few of which we cite: *Stanton v. Hotchkiss*, supra; *Washington Timber Co. v. Smith*, supra; *Jenkins v. McTigue* (C. C.) 22 Fed. 148; *Chestnut v. Harris*, 64 Ark. 580, 43 S. W. 977, 62 Am. St. Rep. 213; *Bandow v. Wolven*, 20 S. D. 445, 107 N. W. 204; *Stoddard v. Lyon*, 18 S. D. 207, 99 N. W. 1116; *Herod v. Carter*, 81 Kan. 236, 106 Pac. 32; *Law v. People*, 80 Ill. 268.

It is sufficient to say in this case, however, that the respondent offers no evidence whatever to show that he was in any way misled by reason of the description of said land, either in the assessment or in the publishing of the notice of sale or in the tax certificate or the deed. In this finding the court found, first, that the land was advertised to be sold on the 8th day of July, 1907, and was sold on the 9th day of July. The deed of appellant shows that the time of the sale of the land was continued from the 8th day of July until the 9th day of July in accordance with the provisions of sections 1750 and 1751 of the Rev. Codes. This cures any discrepancy in the date.

In finding No. 9 the court finds that the evidence does not show that the assessor attended at the office of the auditor with the delinquent tax list or tax sale certificates for the year 1906 and compared the delinquent list with the original or subsequent assessment book or that oath was taken by the assessor or tax collector as required by section 1768, or that his delinquent tax certificate record contained a correct copy of the tax sale certificates issued for the year 1906. We are clearly of the opinion that the tax deed rebuts the contention of the appellant, and further that the affidavits provided for by said section are required for the information of the officers and to guide the tax collector in keeping a correct account of the taxes and in no manner affect the property rights of the owner of property assessed. *McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102; *Davis v. Pacific Imp. Co.*, 137

Cal. 245, 70 Pac. 16; Cooley's Const. Limitations (7th Ed.) p. 113.

Finding No. 10: That the evidence is insufficient to show that the assessor and tax collector signed the tax certificate upon which the tax deed is based as required by section 1760. This objection is based upon the fact that the tax certificate was signed by using a rubber stamp. We think the tax deed is presumptive proof that the tax certificate was signed by the tax collector, and that this evidence is also corroborated by the testimony of the tax collector, which is as follows: "Q. Look at the instrument I now hand you and state what it is. A. Tax sale certificate. Q. What number? A. No. 80. Q. For what year? A. 1906. Q. Who has the custody of that certificate? A. I have. Q. State how it is signed. A. Signed by J. M. Williams, Assessor and Ex Officio Tax Collector."

The fact that the signature of the assessor was attached to the certificate with a rubber stamp instead of writing the name of the assessor, when it clearly appears that it was the intention in using such stamp to sign the name of the assessor, would not invalidate the instrument. As said by this court in *Bacon v. Rice*, 14 Idaho, 107, 93 Pac. 511: "Substantial compliance with the requirements of the law in making assessments is all that is required." Also other cases previously cited. This is not a jurisdictional requirement and in no way affects the validity of the sale of the property. The correct rule, and the one which has been recognized by this court, is: That where a tax deed is introduced in evidence it is prima facie evidence of title, and it is incumbent upon the person attacking the tax title to prove the omission of some jurisdictional act or step which renders the tax title void, such as: First, that the land was not subject to taxation; second, that the tax against said land was paid; third, that the land has been redeemed from the tax sale in the manner provided by law; fourth, any other jurisdictional question. But where omissions and errors have been made in assessments and sales of property for delinquent taxes, and such questions are not jurisdictional and are merely legislative directions in such proceedings, and by such omissions and errors the property owner is prejudiced, then such facts may be shown to defeat the tax title. This latter question has been discussed and passed upon in the decision recently made by this court in the case of *Parsons v. Wrble*, 21 Idaho, 695, 123 Pac. 638. We also cite in this connection: *McGowan v. Elder*, 19 Idaho, 153, 113 Pac. 102; *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58; *Straus v. Foxworth* (N. M.) 117 Pac. 831; *McCready v. Sexton & Son*, 29 Iowa, 856, 4 Am. Rep. 214; *Lucas v. Purdy*, 142 Iowa, 359, 120 N. W. 1063, 24 L. R. A. (N. S.) 1294, 19 Ann. Cas. 974; *De Tre-*

ville v. Smalls, 98 U. S. 521, 25 L. Ed. 174; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112, and notes.

It will be seen that the findings of the trial court were not sufficient to justify the conclusion of law made by the trial court to the effect that the tax deed was void and that the appellant acquired no title by reason of the same. The evidence in this case shows that the land in controversy was subject to and was duly and regularly assessed for taxes for the year 1906; that the taxes so assessed and levied were not paid and became delinquent; that said land was regularly and in accordance with law sold for such delinquent taxes by the tax collector of said county; that such land was not redeemed from the tax sale within three years from the date thereof; that a tax deed was issued and delivered to the appellant on the 1st day of August, 1910; that the respondent had failed to show that any of the omissions or errors which occurred in the assessment and sale of said land for delinquent taxes in any way misled him or that said respondent was in any way injured by such errors.

The record in this case shows that the findings of fact are based upon specific sections of the statute, and the conclusions of law are founded upon these findings. The judgment is based upon the findings of fact and the conclusions of law, and it is in this respect that this court has considered the questions involved in this case. We have not undertaken to discuss or construe other sections of the Code with reference to the collection of revenue, for the reason that the trial court's findings do not refer to such sections.

The judgment is reversed, and the cause remanded. Costs awarded to appellant.

AILSHIE, J., concurs.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by my Associates and shall briefly state my views upon one point in the case.

Under the provisions of section 1739, Rev. Codes, the tax collector is required to make up, and on the fourth Monday of January deliver to the county auditor, a complete delinquent list of all property and persons then owing taxes and must deliver his assessment roll to the auditor to remain on file in his office. This statute clearly contemplates that a delinquent list must be made, and I think it contemplates a different and separate list from the regular assessment roll. Section 1742, Rev. Codes, provides that after settlement with the tax collector the auditor must charge the tax collector with the amount of taxes due on the delinquent tax list with 10 per cent. added thereto, and deliver the delinquent list, duly certified, to such tax collector. The record in the case at bar shows

that the requirements of that statute have never been complied with. No delinquent list was ever made, and if we concede that the original assessment roll extended as and for a delinquent list was sufficient, such delinquent list was never certified by the county auditor. All tax sales are made exclusively under statutory authority or power. In 2 Cooley on Taxation (3d Ed.) p. 912, the author states as follows: "The power which the state confers to assess and levy taxes does not of itself include a power to sell lands in enforcing collection, but the power to sell must be expressly given. The officer who makes the sale sells something he does not own, and which he can have no authority to sell except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail, the power is never created. If one of them fails, it is as fatal as if all failed. Defects in the conditions to a statutory authority cannot be aided by the courts; if they have not been observed, the courts cannot dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with." And again, on page 927, that noted jurist states: "In some of the states a list of delinquent lands is made out and properly certified by the state auditor, or some other designated officer of the state, to whom the returns of delinquent taxes have been made, and this list is transmitted to the county or township official who by law is intrusted with the duty of making sales, and constitutes his warrant for doing so. In other states the statutes make other special provisions for the purpose. Whatever list, certificate, or warrant is prescribed by the statute is to be looked upon as in the nature of process, and it is indispensable that the officer should have it before taking any steps towards making a sale."

Under the provisions of our statute, the tax collector has no authority to proceed and sell property for delinquent taxes until he has received the delinquent list, properly certified. That is his warrant or process for making the sale. In this case a delinquent list with the proper certificate was never made and delivered to the tax collector, and any attempted sale by him was void, for without such delinquent list and certificate he had no warrant or process on which to base a delinquent sale.

It is contended by counsel for appellant that, under the provisions of the statute (section 1649), every tax has the effect of a judgment against the person, and every lien created thereby has the force and effect of an execution, and that the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold in payment

thereof. While that is true, the tax collector has no authority to sell property for delinquent taxes until he has received the delinquent list properly certified. That is his process. The law makes certain judgments rendered by the district court a lien upon the property of the judgment debtor; but who would contend that, even though it is made a lien, the sheriff could proceed and sell without an execution?

In *Kepley v. Scully*, 185 Ill. 52, 57 N. E. 187, the court held that, where a clerk's certificate is made by statute the process under which the property is sold for taxes, when the certificate is not made until after the sale, the sale is void.

In *McGhee v. Sampselle*, 47 W. Va. 352, 34 S. E. 815, the law provides that the sheriff shall append to a list of delinquent lands a prescribed affidavit, and it is held that if he omits to do so the sale is void. In *Mullins v. Shaw*, 77 Miss. 900, 28 South. 958, the court holds that the assessment roll is the warrant of the tax collector for collecting the taxes. *Kelly v. Craig*, 27 N. C. 129; *Frazier v. Prince*, 8 Okl. 253; 58 Pac. 751; *Morrow v. Smith*, 8 Okl. 267, 61 Pac. 366; *Asper v. Moon*, 24 Utah, 241, 67 Pac. 409; *Lamb v. Farrell* (C. C.) 21 Fed. 5.

The delinquent list, properly certified, as provided by said section 1742, is the process or warrant and the only process or warrant upon which the tax collector is authorized to proceed and sell property for delinquent taxes. Where a delinquent list, properly certified, constitutes the warrant or authority for the sale, the tax collector has no authority to proceed and make a sale without the list so certified. As well might a sheriff proceed to sell lands to satisfy a judgment without an execution. All of the provisions of the revenue statute certainly ought not to be construed to be merely directory and left to the option of the officer whether he will comply with the law or not.

It is suggested in the majority opinion that a mere failure on the part of officials to perform the duty required of them by law cannot be taken advantage of by a property owner for the sole purpose of escaping taxation. There is nothing in the record to show that the respondent has attempted to take advantage of the mere failure of officials to perform their duties for the sole purpose of avoiding the payment of his taxes. He came into court and tendered the full amount of taxes paid by the appellant with 18 per cent. interest thereon from the time the money was paid, and under the law he could not escape the payment of the taxes. In other words, the respondent is not seeking to evade the payment of his taxes, and it is unfair to him to intimate that he is seeking to do so.

The judgment of the trial court ought to be affirmed.

HARSHBARGER v. MURPHY.

(Supreme Court of Idaho. July 5, 1912.)

*(Syllabus by the Court.)***EVIDENCE (§ 129*)—ADMISSIBILITY OF EVIDENCE—SIMILAR ACTS.**

In an action to recover damages for personal injuries alleged to have been sustained by reason of an assault and battery by the defendant upon the plaintiff, it was not error for the court to admit evidence of the intoxication of the defendant at the time of the assault, and that he had assaulted another person shortly before he committed the battery upon the defendant, and also had assaulted another person shortly thereafter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-393, 395-398; Dec. Dig. § 129.*]

Appeal from District Court, Bannock County; Alfred Budge, Judge.

Action by M. M. Harshbarger against Joseph Murphy. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. E. Gray and C. O. Pierce, both of Pocatello, for appellant. A. H. McConnell and Soule & Soule, for respondent.

SULLIVAN, J. This is an appeal from a judgment recovered because of the alleged willful, wrongful, and reckless assaulting and beating of the plaintiff by the defendant. The answer contains a general denial of the allegations of the complaint. The cause was tried by the court with a jury, and verdict and judgment rendered and entered in favor of the plaintiff, for the sum of \$500. A motion for a new trial was made and overruled by the court, and this appeal is from the order denying a new trial.

The only question presented for determination on this appeal involves the ruling of the court in admitting certain evidence as to the conduct of the appellant, Murphy, immediately preceding and immediately following the assault in question. It is contended by appellant that the admission of such testimony prejudiced the minds of the jury against the defendant, and that it is a well-settled rule, in a damage suit similar to the one at bar, that the plaintiff cannot introduce evidence showing that the defendant was drunk at the time he assaulted the plaintiff and that defendant assaulted other persons before and after the acts complained of.

The evidence shows that the defendant was intoxicated at the time in question, and that he was pursuing a riotous, belligerent, boisterous, and drunken line of conduct. The plaintiff introduced evidence to show that the defendant at the time he made the assault was in a state of intoxication. The defendant denied that he was intoxicated, and there is a substantial conflict in the evidence upon both of said issues. The evidence introduced and objected to as to defendant's conduct tended to corroborate

plaintiff's evidence as to defendant's intoxication. It was competent to show that the defendant was intoxicated, and that he was in a belligerent frame of mind, and that he had assaulted persons immediately before and after the assault committed upon the plaintiff. It was held, in *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287, that in an action for assault and battery, which defendant denies, not only the fact of his drunkenness at the time, but the extent and effect thereof, are admissible to increase the probability of his having committed the assault. The rule in regard to allowing similar circumstances, or the evidence of them, to be introduced on a trial, is stated in 17 Cyc. p. 283, as follows: "That a fact existed or event occurred at a particular time cannot be shown by evidence that another fact existed or event occurred at another time, unless the two facts or occurrences are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars."

An issue was also raised as to who was the aggressor in the assault in question. The fact that the defendant was intoxicated and in a belligerent frame of mind at the time he assaulted the defendant, and the fact that he had assaulted another person a short time prior to the assault on the respondent and had also assaulted another person a short time thereafter, were competent to show defendant's belligerent frame of mind, and the court did not err in admitting evidence of those acts and evidence that he was intoxicated at the time.

It was held, in *Elfers v. Woolley*, 116 N. Y. 294, 22 N. E. 548, that, in an action to recover damages for assault and battery, all the circumstances immediately connected with the transaction, tending to exhibit and explain the motive of the defendant, are competent for the purpose of showing whether he acted maliciously or in an honest belief that he was justified in what he did.

In *Lee v. Longwell*, 136 Mich. 458, 99 N. W. 379, which was an action for an assault, it was held as follows: It is clear that, if the testimony was competent as tending to show the disposition of the defendant, time was not important, and the ruling was not erroneous on that ground.

In the case at bar the cross-examination of the defendant upon the questions both of his intoxication and other altercations immediately preceding and following the assault in question were permitted without objection, and those two questions involve the principal issue raised in the case at bar upon the probability of the assault. There was no question about the assault, although the defendant denied it and claimed that he acted in self-defense; but the condition of the plaintiff's face after the assault clearly shows that he had been seriously assaulted. Other witnesses who were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

present and saw the acts of defendant testified that he was the aggressor. We think the court did not err in admitting such evidence.

Finding no error in the record, the judgment must be affirmed, and it is so ordered. Costs awarded to respondent.

STEWART, C. J., and AILSHIE, J., concur.

JOY v. GIFFORD, Secretary of State.
(Supreme Court of Idaho. July 11, 1912.)

(Syllabus by the Court.)

1. JUDGES (§ 7*)—TERM—STATUTORY PROVISION.

Under the provisions of section 3 of the act of the Legislature, approved January 19, 1911 (Sess. Laws 1911, p. 4), authorizing the appointment of an additional judge for the Third judicial district "to hold office until the next general election for district judges and until his successor is elected and qualified," *held* that, where the first appointee of the Governor resigned his office before the next general election, and the Governor made another and further appointment to fill the vacancy, such subsequent appointee takes the office subject to the same provisions as the original appointee, and will be entitled "to hold the office until the next general election for district judges and until his successor is elected and qualified."

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 24-28; Dec. Dig. § 7.*]

2. APPOINTMENT OF DISTRICT JUDGE—TERM OF OFFICE.

As to whether or not an appointee to fill a vacancy in the office of district judge, where the judge had been duly and regularly elected under the general statute, would hold the office until the next general election for district judges or only until the next general biennial election for the election of state and county officers generally, *quære*.

Original proceeding by Charles L. Joy against Wilfred L. Gifford for writ of mandamus. Alternative writ quashed and demurrer to the petition sustained, and proceeding dismissed.

Frank Martin and S. E. Blaine, of Boise, for plaintiff. D. C. McDougall, Atty. Gen., J. H. Peterson, Asst. Atty. Gen., and E. G. Davis, of Boise, for defendant.

AILSHIE, J. This is an application for a writ of mandate to the Secretary of State to command him to file the nomination of Charles P. McCarthy as a candidate for district judge of the Third district. The Secretary declined to file the nomination for the reason that he claims there is no election to be held this year for the election of district judges. The Eleventh session of the Legislature passed an act which was approved by the Governor on the 19th day of January, 1911, for an additional district judge for the Third judicial district, and section 3 of the act provides as follows: "That the Governor shall, upon the passage

and approval of this act, appoint such additional district judge for the Third judicial district, to hold office until the next general election for district judges, and until his successor is elected and qualified, and said judge shall receive the salary and perform the duties of a district judge for said district." In pursuance of the provisions of this act, the Governor immediately appointed John F. MacLane to the office of district judge for the Third district, and the appointee thereupon qualified and entered upon the duties of the office and continued to discharge the duties of district judge until the 27th day of January, 1912, and upon the latter date resigned the office. The Governor immediately appointed Charles P. McCarthy to the office of district judge to fill the vacancy caused by the resignation of Judge MacLane. On June 28, 1912, and during office hours, the petitioner herein, Charles L. Joy, presented to the defendant, the Secretary of State, at his office in the Capitol building, a nomination paper in due and regular form nominating Judge McCarthy as a candidate for the office of district judge for the Third district to be voted for at the primary election to be held July 30, 1912. The fees were duly tendered, and thereupon Judge McCarthy presented to the Secretary of State his written acceptance of such nomination in conformity with the primary election law. The Secretary declined to file the nomination on the ground that there is no authority for electing a district judge at the 1912 election, and contends that Judge McCarthy holds the office until the regular election for the election of district judges in 1914.

Section 11, art. 5, of the Constitution, provides that the term of office of district judges shall be four years. Section 6 of article 4 of the Constitution provides that: "If the office of a justice of the Supreme Court or district court, Secretary of State, State Auditor, State Treasurer, Attorney General, or superintendent of public instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be provided by law."

Section 320 of the Revised Codes provides for filling vacancies in certain offices as follows: "All vacancies in any state office, and in the Supreme and district courts, unless otherwise provided for by law, shall be filled by appointment by the Governor, until the next general election after such vacancy occurs, when such vacancy shall be filled by election."

Section 350 of the Revised Codes provides that: "At the general election, A. D. 1910, and every alternate year thereafter, there shall be elected one judge of the Supreme

Court, and at said general election, and every fourth year thereafter, there shall be elected in each judicial district of the state, one district judge."

Counsel for the Secretary of State argue that there is no general election in 1912 for district judges, and that the words "general election," as employed in section 320 of the Revised Codes, above set out, have reference to the general election at which candidates are elected for the particular office which becomes vacant, and that it does not refer to the general, biennial state election held for the election of state and county officers generally. In support of this contention, counsel cite *McGee v. Gardner*, 3 S. D. 553, 54 N. W. 606; *State ex rel. Fish v. Howell*, Sec'y of State, 59 Wash. 492, 110 Pac. 386; *People v. Budd*, 114 Cal. 168, 45 Pac. 1060, 34 L. R. A. 46; *Matthews v. Shawnee County*, 34 Kan. 606, 9 Pac. 765; *State v. Philips*, 30 Fla. 579, 11 South. 922.

[2] As we view the question presented to us in this case, it is unnecessary for the court to pass upon the broad general question as to whether or not an appointment to fill a vacancy in the office of district judge holds only until the following general biennial election in the state, or holds until the general election at which district judges are elected throughout the state for their full terms. In view of the provisions of our Constitution and various statutes bearing on the question, we doubt the soundness of defendant's position, and are not inclined at this time to commit the court on this question, and therefore reserve it for consideration at such time as it may squarely arise.

[1] The office herein sought to be filled by election was created by an independent act of the Legislature and, that act provided by section 3, *supra*, the method of filling the office "until the next general election for district judges, and until his successor is elected and qualified." To our minds this provision of the statute is conclusive of the question here raised. This act is subsequent to all the provisions of the statute with reference to the appointment of officers and filling vacancies, and it specially provides that the appointee of the Governor shall hold the office until the "next general election for district judges." That election will be the general biennial election in 1914. It was agreed on the oral argument that if Judge MacLane, the first appointee, had remained on the bench, there would be no question but that his term would not expire until the general biennial election in 1914, and until his successor might be elected at such election and subsequently qualify. It is urged, however, that Judge McCarthy, who was appointed to fill the vacancy caused by the resignation of Judge MacLane, is in some way and by some process limited by the general statutes with reference to appointments to

fill vacancies. That contention is not thought to be sound. The appointment is to fill the same office created by the Legislature, and is made by the same officer authorized by the Legislature to make the appointment, and the power of appointment conferred on the Governor is not exhausted by one appointment or two appointments or any number of appointments until the term specified by section 3 of the act expires, namely, "until the next general election for district judges and until his successor is elected and qualified." Although Judge McCarthy is appointed on account of the vacancy caused by the resignation of Judge MacLane, it is still true that he is appointed to satisfy the demands and requirements of the specific act creating this office. We conclude, therefore, that Judge McCarthy's appointment holds until the next general election for district judges, namely, the general biennial election to be held in 1914 and "until his successor is elected and qualified."

For the foregoing reasons, the writ must be quashed, and the proceeding is hereby dismissed.

SULLIVAN, J., concurs.

SEAWELL v. GIFFORD, Secretary of State.
(Supreme Court of Idaho, July 10, 1912.)

(Syllabus by the Court.)

1. STATES (§ 73*)—OFFICERS—OFFICE HOURS.

Under the provisions of section 339, Rev. Codes, the secretary is required to keep his office open for the transaction of business from 10 a. m. until 4 p. m., except upon holidays.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 74; Dec. Dig. § 73.*]

2. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—CERTIFICATE OF NOMINATION—TIME FOR FILING.

The provisions of the election laws, as amended by Direct Primary Law (Sess. Laws of 1909, p. 197) § 5, requires a certificate of nomination to be filed with the secretary of state at least 30 days, and not more than 60 days, prior to the primary to be held to nominate candidates for such office; and a certificate presented for filing 29 days before the election cannot be legally filed by the secretary of state.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 118; Dec. Dig. § 126.*]

3. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—CERTIFICATE OF NOMINATION—TIME FOR FILING.

The provisions of that statute are mandatory.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 118; Dec. Dig. § 126.*]

4. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—CERTIFICATE OF NOMINATION—TIME FOR FILING.

Under said statute, at least 30 days must intervene between the date of the filing and the date of the primary.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 118; Dec. Dig. § 126.*]

5. TIME (§ 9*)—EXCLUDING LAST DAY—PRIMARY ELECTIONS—CERTIFICATE OF NOMINATION—FILING.

Section 11 of the Rev. Codes provides that a holiday shall be excluded, when it is the last day in which any act provided by law is to be done, and section 12 refers to an act which is to be done upon a particular day; and said sections have no application to this case, as the election law requires nomination papers to be filed at least 30 days prior to the date of the primary, and such paper cannot be legally filed within such 30-day period.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

6. TIME (§ 9*)—EXCLUDING DAYS—PRIMARIES—ACCEPTANCE OF NOMINATION—FILING.

Under the provisions of section 10 of the direct primary law, the time for filing an acceptance of nomination by a candidate is computed by excluding the first day and including the last day, unless the last day is a holiday, in which case it is also excluded, and the candidate has until the following legal day to file his acceptance.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.*]

Original application by John L. Seawell for a writ of mandate, commanding Wilfred L. Gifford, Secretary of State, to receive and file a certificate of nomination. Application denied.

Frank Martin, J. R. Smead, and W. A. Ricks, all of Boise, for plaintiff. D. C. McDougall, Atty. Gen., and J. H. Peterson, Asst. Atty. Gen., for defendant.

SULLIVAN, J. This is an original application by the plaintiff, John L. Seawell, for a writ of mandate to compel the secretary of state to file his nomination paper, nominating said Seawell to the office of Representative in Congress, and to be voted on at the primary election on the 30th day of July, 1912. The facts are substantially as follows: On the 29th of June, 1912, at about the hour of 4 p. m., the petitioner called up the secretary of state's office by phone and requested that the office be kept open for from 15 to 20 minutes; that about half after 4 o'clock the petitioner and one Pike presented themselves at the office of the secretary of state prepared to file said nomination papers, but found the office closed. Later on the same day petitioner accosted the deputy of said defendant on the streets of Boise, and later saw the secretary in the capitol building, and requested the filing of his nomination paper. On the following day, to wit, June 30th, that being Sunday, between the hours of 10 a. m. and 4 p. m., the petitioner presented himself at the office of defendant with the intention of asking to have said paper filed; but the office was closed. On the 1st day of July, the petitioner again, in company with said Pike, presented said paper to the defendant and tendered the filing fee. The defendant declined to file the paper, on the ground that the time for filing same had expired.

[1] Under the provisions of section 330, Rev. Codes, the secretary of state is required to keep his office open for the transaction of business from 10 a. m. to 4 p. m., except upon holidays; and no question is raised in this case as to the defendant's refusal to receive said paper after 4 o'clock in the afternoon of the 29th of June, 1912, as his office was locked at that time, and no further business received.

[2-4] The primary election for the year 1912 will be held on the 30th day of July, and the statute relating to the filing of nominations to be voted upon at said primary is section 5 of the election laws, as amended by Sess. Laws of 1909, p. 197, and in part is as follows: "Each candidate for office, or some qualified voter in his behalf, shall file a nomination paper in the proper office, as herein provided, at least thirty days, and not more than sixty days, prior to the primary to be held to nominate candidates for such office, in substantially the following form."

The question is then directly presented as to what is the latest day, under the statute, upon which certificates of nomination can be filed. Counsel for petitioner contends that such papers may be filed on the first day of the 30-day period commencing prior to the 30th of July; and that, if said first day of the 30-day period comes on Sunday or a legal holiday, then said papers may be filed the day following such holiday. It is contended by counsel for the defendant that the words "at least thirty days . . . prior to the primary" mean that the time would expire on the 29th day of June, at the close of office hours on that day; and that the meaning of the statute is that full 30 days must elapse between the closing of the nominations and the morning of the primaries. Under the latter contention, it was claimed that there are 29 days in July preceding the 30th of that month, the date the primary is to be held, and it would require the last day, or 30th, of June to make the 30-day period; and that the 29th day of June was the last day upon which nomination papers could be received and filed by the defendant.

Said section of the statute provides that such papers must be filed at least 30 days prior to the primary election. Now, if such papers must be filed 30 days prior to the day of election, they cannot be legally filed within the 30 days next preceding the date of election. In other words, they must be filed "without" that period, and not "within" it. That is the reasonable construction of said statute; in fact, it is too plain to require construction. If an act must be done 30 days prior to a certain day, if it is done within that 30-day period, it certainly is not done 30 days prior to the commencement of such period. If the secretary of state had received and filed said nomination

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

paper on Sunday, the 30th day of June, or on Monday, the 1st day of July, Sunday being a legal holiday, it would not have been filed at least 30 days prior to the date of the primary election.

It is contended by counsel for the plaintiff that Sunday, the 30th of June, was the last day upon which nominations could be filed, and, inasmuch as that day fell upon Sunday, the time would then be extended until and including Monday, July 1st. If this view is taken, the positive provision of said statute would be ignored; for, if it were filed on Sunday, it would be only 29 days prior to the date of the election, and, if filed on Monday, only 28 days prior thereto.

[5] As to the method of computing time under the statute, section 11 of the Rev. Codes is as follows: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

Section 12, Rev. Codes, is as follows: "Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed."

Those sections refer to the time in which an act provided by law is to be done. Section 11 provides that a holiday shall be excluded when it is the last day of the time "in which any act provided by law is to be done," and section 12 refers to an act which is appointed to be done "upon" a particular day. In the case under consideration, however, the statute does not fix the day upon, or the time within, which the certificate is to be filed, but declares that it shall be filed "at least thirty days" prior to the day of the primary election; and to hold that it could be filed 29 or 28 days prior to such date would be a clear disregard of the plain provisions of said statute.

It was held, in *Griffin v. Dingley*, 114 Cal. 481, 46 Pac. 457, under an election statute which provides that "certificates of nomination required to be filed with the county clerks, or with the clerk or secretary of the legislative body of any city or town, shall be filed not more than fifty nor less than thirty days before the day of election, when the nomination is made by the convention," that, where the last day on which the certificate could be filed ordinarily falls on Sunday or a legal holiday, the certificate must be filed on the day prior, to be in time.

In *State ex rel. Anderson v. Falley*, 9 N. D. 464, 83 N. W. 913, it was held that, where a certificate of nomination was to be filed

by the secretary of state not less than 30 days before the election, if filed 29 days before the election, it was too late, and that the statute in that regard is mandatory, and the fact that the 30th day before the election fell on Sunday would not change this rule, and that that section of the North Dakota statute (corresponding to section 11 of our Rev. Codes, above quoted), relating to excluding holidays, has no application to an election case.

[6] It is suggested by counsel that section 10 of said direct primary law provides that within 5 days after said nominating papers shall have been filed, if for a county office, and within 10 days for any other office, there shall be filed an acceptance of said nomination; and that some question has been raised as to the time allowed to the candidate to accept the nomination, and whether, if the last day for filing acceptance falls upon a legal holiday, the candidate has until the following day to file his acceptance. That section of the statute provides that a certain act must be done *within* 5 days or *within* 10 days, and is different from the provisions of section 5 of said act, which provides that an act must be done *outside* of 30 days, or 30 days *prior* to the day of the primary election; that is, 30 days must intervene between the date of the election and the date of filing the nomination. The time in which said acceptance is to be filed comes within the provisions of said section 11, Rev. Codes, as the time fixed is *within* 5 days after said nominating paper shall have been filed that the county officer, or within 10 days that any other officer, shall file his acceptance; and, under the provisions of said section, an act to be done "within" a certain time, the time is computed by excluding the first day and including the last, unless the last day is a holiday, in which case it is also excluded. Therefore, in filing an acceptance, if the last day for filing the same falls on a legal holiday, that day is excluded, and the candidate has until the following legal day to file his acceptance.

We therefore conclude, under the provisions of said section 5 of the election laws, that a nomination paper must be filed with the secretary of state at least 30 days prior to the primary election, and that, as said nomination paper was not presented for filing at least 30 days prior to the 30th day of July, 1912, the day fixed for holding the primary election, the defendant, as secretary of state, was justified in refusing to file said nomination paper. The writ is therefore denied.

AILSHIE, J., concurs. STEWART, C. J., did not sit at the hearing, and took no part in the decision.

**COAST LUMBER CO. v. ÆTNA
LIFE INS. CO.**

(Supreme Court of Idaho. July 6, 1912.)

Syllabus by the Court.

1. INSURANCE (§ 513*)—LIABILITY OF INSURER—EMPLOYERS' LIABILITY INSURANCE.

Where a contract for insurance against bodily injury and death, accidentally suffered, provides a limitation of \$5,000 as the company's liability for loss on account of an accident resulting in bodily injury or death, for each person, and likewise provides that the company will pay the expense of litigation in addition to the sum limited, and also provides that, if the company shall elect to pay the assured the sum limited, it shall not be liable for further expense of litigation after payment shall have been made, and also further provides that, in case suit is brought against the assured to enforce a claim for damages on account of accident, the company will, at its own cost, defend such suit, and such company exercises its option and defends a suit, such company is liable for all costs and expenses in such action, both in the trial and appellate courts.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 513.*]

2. INSURANCE (§ 168*)—LIABILITY OF INSURER—EMPLOYERS' LIABILITY INSURANCE.

The covenant "to pay the expense of litigation," and, also, "the company will, at its own cost, defend such suit in the name and on behalf of the assured," are clear and express promises, and an agreement on the part of the insurance company that the company will pay the costs incurred in defending a suit for damages against the assured, where payment of the sum insured is refused by the insurance company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 325; Dec. Dig. § 168.*]

3. INSURANCE (§ 513*)—EXTENT OF LIABILITY—COSTS AND EXPENSES.

"Costs and expenses," as used in the contract of insurance involved in this case, is the amount paid counsel and witnesses, and court costs, and all costs, including the taxable costs recovered by the plaintiff in such suit.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 513.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1633-1640; vol. 8, p. 7620.]

4. INSURANCE (§ 513*)—EXTENT OF LIABILITY—EMPLOYERS' LIABILITY INSURANCE—INTEREST.

Where an action is brought to recover damages sustained under a life insurance policy insuring against injuries and death, and a defense is made by the insurance company on behalf of the assured, and such action is contested and tried in the district court, and thereafter appealed to the Supreme Court, where such judgment is affirmed, the assured cannot recover from the insurance company interest on the amount of insurance for the period during which said judgment is being contested through the appellate court, and until such judgment is paid by the insurance company upon affirmance, as part of the costs and expenses of such litigation.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 513.*]

Appeal from District Court, Ada County; John F. MacLane, Judge.

Action by the Coast Lumber Company against the Ætina Life Insurance Company. From a judgment for defendant, plaintiff ap-

peals. Reversed and remanded, with directions.

A. A. Fraser and R. R. Wedekind, both of Boise, for appellant. Richards & Haga, of Boise, for respondent.

STEWART, C. J. On the 14th day of April, 1909, Charles N. Maw recovered a judgment against the appellant for personal injuries for the sum of \$12,500, with interest thereon at the rate of 7 per cent. per annum until paid, together with costs and disbursements incurred in said action, amounting to the sum of \$96.40. An appeal was taken from said judgment to the Supreme Court of this state, and said judgment was affirmed on the 18th day of March, 1911, and the costs on the appeal were assessed at the sum of \$46.25. On the 18th day of May, 1911, plaintiff paid such judgment in full, amounting to the sum of \$14,489.95.

This action was thereafter commenced by the appellant against the respondent, for the purpose of recovering the sum of \$856, the interest accruing upon the sum of \$5,000 for two years, one month, and four days, the period expiring between the date the judgment was entered on the 14th of April, 1909, in the foregoing case, and the payment of said judgment on the 18th of May, 1911, and also for the sum of \$96.40, the costs upon said trial, and the further sum of \$46.25, the costs of appellant in said action.

The cause was tried to the court, findings of fact made, and judgment was rendered in favor of the defendant that the plaintiff take nothing by its complaint. This appeal is from the judgment.

This action is based upon an insurance policy issued by the respondent to the appellant, which, among other things, contains the following provision: "In consideration of the warranties of the assured hereinafter set forth and of fifty-six and no/100 dollars (\$56.00) estimated premium, the Ætina Life Insurance Company of Hartford, Connecticut [called the company], does hereby insure the Coast Lumber Co. of Boise, county of Ada, state of Idaho [called the assured], against loss or expense arising or resulting from claims upon the assured for damages on account of bodily injuries or death accidentally suffered, by reason of the operation of the trade or business described herein, by any employé or employés of the assured while within the factory, shop, or yards described herein," etc.

This insurance is subject to the following conditions:

"A. The company's liability for loss on account of an accident resulting in bodily injuries to or in the death of one person is limited to five thousand dollars (\$5,000.00); and, subject to the same limit for each person, the company's total liability for loss

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r. Indexes

on account of any one accident resulting in bodily injuries to or in the death of more than one person, is limited to ten thousand dollars (\$10,000.00). The company will, however, as provided in conditions D and E, hereof, pay the expense of litigation in addition to the sum herein limited, provided that if the company shall elect to pay the assured the sum as herein limited, it shall not be liable for further expenses of litigation after such payment shall have been made.

"B. This policy does not cover loss or expense arising on account of or resulting from injuries or death to, or if caused by [here follows an enumeration of the risks not assumed, or for which the insurer shall not be liable].

"C. Upon the occurrence of an accident the assured shall give immediate written notice thereof with the fullest information obtainable to the home office of the company at Hartford, Conn., or its duly authorized agent. If a claim is made on account of such accident the assured shall give like notice thereof with full particulars. The assured shall at all times render to the company all co-operation and assistance in his power.

"D. If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company's home office every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same or to pay the assured the indemnity as provided for in condition A hereof.

"E. The assured, whenever requested by the company, shall aid in effecting settlements, securing the information and evidence, the attendance of witnesses and in prosecuting appeals, but the assured shall not voluntarily assume any liability, or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the company previously given, except that the assured may provide at the company's expense such immediate surgical relief as is imperative at the time of the accident.

"F. No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within ninety days after payment of such loss or expense."

It is the contention of the appellant that the respondent is liable, under the provisions of the foregoing policy of insurance: First. For loss or expense arising or resulting from

claims upon the assured for damages on account of bodily injuries. Second. That, where suit is brought against the assured to recover damages on account of accidents covered by the policy, the company will defend such proceedings at its own cost, in the name and on behalf of the assured, or settle the same, unless it should elect to pay the assured the indemnity provided for. Third. That the insurance company must pay, not only the sum of \$5,000, the amount limited by the policy, but, in addition thereto, the expense of litigation, as provided in condition A, actually sustained and paid in money by him after actual trial of the issue, as provided in condition F.

[1] The right of the plaintiff to recover is to be determined by the language used in the contract of insurance, and the compensation depends entirely upon the covenants in the contract; and in construing such contract the general rules applicable to contracts generally should be applied. *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Me. 574, 43 Atl. 503.

Under the provisions of condition A, the respondent company agrees to pay for loss on account of accident resulting in bodily injuries to or in the death of one person to the extent of \$5,000, and to "pay the expense of litigation in addition to the sum herein limited, provided if the company shall elect to pay the assured the sum as herein limited, it shall not be liable for further expenses of litigation after such payment shall have been made." That is, where the employé brings an action against the assured, the company reserves the right to pay to the assured the sum named in the policy, and by so doing is relieved from any expense incurred in the litigation to recover a greater sum than the amount specified in the policy and paid. If such payment, however, is not made by the insurance company, then the company agrees to pay the expense of litigation in addition to the sum limited by the policy of insurance; and, under the provisions of condition C of the policy, when an accident occurs, the assured is required to give written notice to the insurance company or its agent, and, if claim is made on account of such accident, the assured is required to give notice of the particulars, and, under the provisions of condition D of the contract, if thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by the policy, the assured is required to notify the insurance company as soon as the summons or other process is served, and the insurance company agrees to defend such suit "in the name and on behalf of the assured at the cost of the insurance company, unless the company elects to settle the same." Under the provisions of condition E, the assured is prohibited from assuming any liability, or in any way interfering with negotiation for settlement, or any legal proceeding, or

incur any expense, or settle any claim, except at its own cost, without the written assent of the company. Under the provisions of condition F, no action shall lie against the company for loss or expense, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within 90 days after payment of such loss.

From these various provisions, it is apparent that, where an accident occurs, the assured shall give notice to the company; and, if a claim is made on account of such accident, notice shall also be given to the company by the assured; and thereafter, if a suit is brought against the assured to enforce a claim of damages on account of accident covered by the policy, the company reserves the right to pay the amount specified in the contract of insurance, or to defend the action brought against the assured for damages. And if the company defends such action, it promises and agrees to do so at its own costs and expense.

In this case an action was brought by Maw against the assured, the Coast Lumber Company, to recover the sum of \$15,000, and the respondent asserted its option under condition D of the policy of insurance, and took charge of the defense of the appellant, Coast Lumber Company, and conducted and prosecuted such defense during the trial and up to the entry of judgment for damages in said suit, and likewise prosecuted the appeal from that judgment to the Supreme Court, where such judgment was affirmed. This being true, the respondent obligated itself to pay the expense of such litigation in addition to the sum limited in the policy. Where the action for damages is for a sum in excess of the amount fixed and stipulated in the policy of insurance, and the company elects to defend, rather than to pay the amount specified in the policy of insurance, then the company assumes and agrees to pay, in addition to the amount specified in the policy, the expense of litigation. This is clearly contemplated by conditions A and D, and is a clear and specific agreement on the part of the insurance company as a part of the consideration for the policy.

[2,3] The covenant "pay the expense of litigation," as used in condition A, and the provision in condition D, "and the company will, at its own cost, defend such suit in the name and on behalf of the assured," are clear and express promises, and an agreement on the part of the insurance company that the company will pay the cost incurred in defending a suit for damages against the assured, where payment of the sum insured is refused by the insurance company; and such costs and expense is the amount paid counsel and to witnesses, and other court costs, and all costs and other expenses, including the taxable costs recovered by the

plaintiff in said suit, if the defense made is unsuccessful. This is clearly the contract which the parties have made, and which is enforceable in this action.

The plaintiff's right of recovery does not depend upon the amount of the judgment recovered by the person sustaining the injuries, and for which suit is brought against the assured, because of the limit of insurance fixed by the policy of insurance; for the company reserves the right to make the defense, without regard to the amount claimed by the party injured by the accident, or the amount that may be recovered in such action, inasmuch as the assured is excluded from the control of conduct of the defense made in such suit. If the defense made proves successful, the insurance company would have done no more than it claimed to do; and, if the defense was unsuccessful, then the company did no more than it promised to do under the provisions of the contract; and the expense and cost thus incurred were obligations which the insurance company assumed and agreed to pay, where the amount of insurance was not paid by the insurance company, and where the insurance company elected to make a defense on behalf of the assured. *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Me. 574, 43 Atl. 503; *New Amsterdam Casualty Co. v. Cumberland Telegraph Co.*, 152 Fed. 961, 82 C. C. 315, 12 L. R. A. (N. S.) 479; *Brewster v. Empire State Surety Co.*, 145 App. Div. 878, 130 N. Y. Supp. 439; *Puget Sound Imp. Co. v. Frankfort*, 52 Wash. 124, 100 Pac. 190.

The evidence in this case shows that the insurance company took charge of the defense, as provided in the contract of insurance, upon the trial of said action in the district court, and that the appeal was authorized by the insurance company, and that counsel was employed by the insured, as well as by the insurance company, in prosecuting the appeal; and the court so found, and the evidence is sufficient to support the findings. This being true, the respondent insurance company in no way released its claim under the terms of the contract, or released itself from the provisions of said contract with reference to paying the expense of such appeal; and the appellant is entitled to recover the costs alleged and proven.

[4] There is a claim made in this case that the appellant company should be allowed interest on the judgment for two years, one month, and four days, the period between the time the judgment was entered in the district court and the payment of the insurance on the 18th day of May, 1911. There is no provision in the policy by which the insurance company obligates itself to pay interest during that period of time. The accruing of interest is not costs or expenses of litigation, as covered by the provisions in the

insurance contract. And in this case the appellant is responsible, as well as the respondent, for the delay of payment of the insurance by reason of such appeal, because the appellant joined with the respondent in such appeal and employed counsel to prosecute the same.

The judgment in this case is reversed, and the cause is remanded, with directions to enter judgment in favor of the appellant covering the costs and expenses paid by the appellant, both upon the trial and upon the appeal.

The judgment is reversed; costs awarded to appellant.

AILSHIE and SULLIVAN, JJ., concur.

(22 Idaho, 190)

ANDERSON et al. v. BOARD OF COM'RS
OF LEMHI COUNTY.

(Supreme Court of Idaho. June 21, 1912.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 69*)—LICENSES—DISCRETION OF COUNTY COMMISSIONERS.

Sections 1507, 1508, 1512, and 1513 of the Rev. Codes, when read and construed together, recognize the power of the board of county commissioners to grant or refuse an application for a license to sell intoxicating liquors at any place within the boundaries of the county, and authorize the board of commissioners to act upon all applications where they have been made at least twenty days before the meeting of the board at which action is to be taken; and in taking such action and granting or rejecting an application the board is vested with a discretionary power, and that discretion extends as well to applications made for license to sell within the boundaries of an incorporated city as to applications for license to sell in an unincorporated town or village or in a rural community.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 70, 73; Dec. Dig. § 69.*]

2. INTOXICATING LIQUORS (§ 69*)—LICENSES—DISCRETION OF COUNTY COMMISSIONERS.

The proviso contained in section 1508 of the Rev. Codes, "that when application is made for the sale of intoxicating liquors, for a place outside of any incorporated city, either upon their own motion or upon objections duly filed upon the part of any citizen and resident of the precinct within which it is intended to carry on such sale, the county commissioners shall determine whether or not the granting of such license will be conducive to the best interests of the community," etc., should be construed as imposing a positive duty upon the board to make the investigations therein required in cases of applications to sell intoxicating liquors for any place outside of an incorporated city, and should not be construed as a limitation of the discretionary power of such board; the purpose of the proviso being to impose a special duty upon the board in exercising its discretion in certain cases rather than to limit its power and discretion in other cases.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 70, 73; Dec. Dig. § 69.*]

3. INTOXICATING LIQUORS (§ 45*)—LICENSES—RIGHT TO LICENSE.

Statutes authorizing the licensing of the liquor traffic, and conferring upon the licensee

the authority to retail intoxicating liquors, must be read and construed in the light of a grant rather than that of a limitation of a right, no one having an inherent, natural, or inalienable right to carry on the business of retailing intoxicating liquors. And one who claims the right or seeks to establish such right must point out in clear and unmistakable terms a legal grant of such right covering his specific case, and that he has complied with the terms of the statute granting such right.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 47; Dec. Dig. § 45.*]

4. INTOXICATING LIQUORS (§ 69*)—LICENSES—STATUTORY PROVISIONS.

Section 1512 of the Rev. Codes authorizes and empowers the board of county commissioners to revoke a license issued by them to sell intoxicating liquors, and this statute would be rendered nugatory, useless, and ineffective for any purpose if it should be held that the proviso to section 1508, Rev. Codes, renders it mandatory upon the board to issue a license to sell intoxicating liquors within any incorporated city, and that no discretionary power rests in the board in such cases.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 70, 73; Dec. Dig. § 69.*]

5. INTOXICATING LIQUORS (§ 61*)—LICENSES—AUTHORITY TO ISSUE.

The board of county commissioners exercise the higher and superior power in the matter of granting licenses to sell intoxicating liquors within an incorporated city, and, unless an applicant can procure a license from the board of county commissioners, he has no authority to sell within the boundaries of an incorporated city, and the municipal authorities have no power or right to grant a license to one who has not been able to procure a county license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 60-62; Dec. Dig. § 61.*]

Appeal from District Court, Lemhi County; James M. Stevens, Judge.

Action by William Anderson and another for writ of mandate to the Board of Commissioners of Lemhi County. From a judgment granting the writ, defendant appeals. Reversed and remanded, with directions to dismiss the proceeding.

J. K. Rankin, Pros. Atty., and E. W. Whitcomb, both of Salmon, for appellant. F. J. Cowen, and Geo. W. Padgham, both of Salmon, for respondents.

AILSHIE, J. This is an appeal from an order of the district court issuing a writ of mandate against the board of commissioners of Lemhi county, directing them to issue a liquor license to the plaintiff William Anderson, authorizing him to sell intoxicating liquors within the corporate limits of Salmon City.

[1] This appeal involves the question as to whether or not a board of county commissioners have the power or discretion under section 1508 of the Rev. Codes to reject an application for a liquor license where the application is made for a license to sell intoxicating liquors within the boundaries of an incorporated city. The board of commissioners took the position that they had a right under the statute to exercise their

judgment and discretion in the matter of issuing a liquor license, whether for the sale of intoxicating liquors within or without an incorporated city. The district judge, on the other hand, held that they have no such right or discretion where the application is made for the sale of liquors within the boundaries of an incorporated city. Section 1507 of the Rev. Codes provides that all applications for license to sell intoxicating liquors "must be made to the board of county commissioners of the county wherein it is proposed to sell such liquor, at least twenty days before the meeting at which said application shall be acted upon, and said application shall specify the precinct within which such place of sale is to be located, and said application may be granted or rejected by said board as hereinafter provided." Section 1508 of the Rev. Codes provides that, before any license shall issue, "the applicant shall produce before such board the receipt of the sheriff, showing that he has paid into his hands the amount due for such license, and shall execute and deliver to said board his bond to the state of Idaho, which bond shall be in the penal sum of three thousand dollars," etc. Section 1508 closes with the following proviso: "That when application is made for the sale of intoxicating liquors, as in this section provided, for a place outside of any incorporated city, either upon their own motion or upon objections duly filed upon the part of any citizen and resident of the precinct within which it is intended to carry on such sale, the county commissioners shall determine whether or not the granting of such license will be conducive to the best interests of the community in which such saloon or business is proposed to be established, and whether or not such applicant is a fit person to have such license and carry on said business, and whether or not such place of sale and business will likely be conducted in a quiet, orderly and peaceable manner, and should said board of county commissioners determine adversely to the applicant upon any grounds above specified, the license must be refused and the sheriff shall return the amount deposited to said applicant; otherwise the said license may be granted; and such order of the board of county commissioners shall be subject to appeal to the district court as in the case of other orders of said board."

It is upon the construction of the foregoing proviso to section 1508 that the respondent herein seeks to sustain and uphold the action of the district court in ruling that the board has no discretion in the matter of issuing a license for the sale of intoxicating liquors within the boundaries of an incorporated city. It is argued that since this proviso authorizes and directs the board of commissioners, either upon their own motion or upon the objection of any citizen, to

investigate and determine whether or not the granting of a license outside of any incorporated city "will be conducive to the best interests of the community in which such saloon or business is proposed to be established, and whether or not such applicant is a fit person to have such license and carry on said business, and whether or not such place of sale and business will likely be conducted in a quiet, orderly and peaceable manner," it was thereby intended that the board should have no such authority or discretion where the sale is intended to be made within an incorporated city.

[3] In construing this provision of the statute, it is necessary to bear in mind the status of the liquor business. It is not the exercise of any natural or inherent right or recognized lawful business. No one has an inherent or natural right to engage in the liquor traffic (*State v. Calloway*, 11 Idaho, 719, 84 Pac. 27, 4 L. R. A. [N. S.] 109, 114 Am. St. Rep. 285; *Gillesby v. Board of Com'rs*, 17 Idaho, 586, 107 Pac. 71; *Darby v. Pence*, 17 Idaho, 697, 107 Pac. 484, 27 L. R. A. [N. S.] 1194; *Black on Intoxicating Liquors*, § 48), and statutes authorizing the licensing of the liquor business and conferring the right on the licensee to sell and traffic in intoxicating liquors must be read and construed in the light of a grant of authority, rather than a limitation of natural right. In this respect it differs from the licensing of ordinary mercantile and manufacturing industries and enterprises or any ordinary commercial business. In this latter class of cases the right existed independent of and before any license or regulation was imposed upon it. In the liquor business the right did not exist here until it was conferred by statute. It follows, therefore, that one who seeks to establish the right to carry on the business of selling and disposing of intoxicating liquors must point out a clear and unmistakable grant by law to so engage in such business; otherwise, no such right exists. Here the lawmaking power has authorized the licensing of applicants to sell intoxicating liquors under certain regulations and restrictions and has said that such applications "may be granted or rejected by said board as hereinafter provided." Section 1507. Nowhere else is there any provision restricting that power and discretion, but section 1508 provides the method of its exercise in cases where the sale is to be made outside of incorporated cities. The law requires all applicants to file their applications at least 20 days before the meeting of the board at which they desire to have such applications acted upon. The question at once arises, Why should an application "be acted upon" if the board have no alternative but to grant the application? The further inquiry arises, Why should the application be made to the board at all, and why should it be made twenty days before

the meeting of the board, if the board has no discretion in the matter? This is followed by the provision that the application "may be granted or rejected by said board as hereinafter provided." The only provisions following section 1507 with reference to the power and duty of the board in such matters are contained in section 1508 heretofore quoted, and the provisions of sections 1512, 1513, and 1514.

[4] Section 1512 provides that when any person who has received a license to sell intoxicating liquors shall be convicted of a violation of any of the provisions of the liquor laws or any of the penal statutes of this state, relating to the sale of intoxicating liquors or shall fail to conduct his business in a quiet, orderly, and peaceable manner, or shall violate any of the conditions of his bond, "the board of county commissioners may, and it is hereby made their duty to, revoke said licenses." Now the question arises, What is the use of revoking a license because the licensee has been convicted of a crime, or has violated the statute, or has maintained a disorderly and disreputable place if he can apply to the board at their next session and compel the board to issue him a license? Is it possible that the board of commissioners must issue a license to one convicted of crime or who is known to maintain a disorderly and disreputable place?

[5] Section 1513 authorizes cities and towns to prohibit the sale of intoxicating liquors within their limits, although a person may have a license from the board of county commissioners, unless such person also procures a license from the city authorities, and the city authorities may refuse to grant a license, and thereby prevent the holder of a county license from ever selling liquor within the municipality. *Gale v. City of Moscow*, 15 Idaho, 332, 97 Pac. 828. This section further specifically provides that "no license granted by such city or town shall run for any longer period than the license granted by such board of county commissioners; and the revocation of the county license granted by the board of county commissioners shall work a revocation of any license granted by such city or town." Taking these provisions all together, it is clear that no one has a right to sell intoxicating liquors within the boundaries of the county, whether it be within or without a municipality, until he first procures a license from the board of county commissioners; and no one has a right to sell intoxicating liquors within a municipality, although he has a county license, unless he is able to procure a license from the municipal authorities. A double check or restriction is laid about the sale of intoxicating liquors within municipalities.

[2] Reverting now to the proviso above quoted from section 1508, we are clearly convinced that it was not the intention of the

Legislature by this proviso to limit the discretion of a board of commissioners, but rather to place an additional duty upon the board of commissioners. It was the intention by this proviso to require the board of commissioners in all cases where the application is made for a license to sell liquors at a place outside of any incorporated city to inquire into and ascertain the fitness of the applicant to have such a license, and to also ascertain whether, in their opinion, the granting of such license would be "conductive to the best interests of the community in which such saloon or business is proposed to be established." They may make the same inquiry on any application, though it is not mandatory except when the application is for a license to sell outside an incorporated city. It is clear that some men acting as commissioners would never be convinced that it was conducive to the best interests of a community to have a saloon established therein, while other men, acting in the same capacity, would perhaps conclude that it is to the best interests of the community to have such a business conducted therein. This statute also imposes upon them the further duty of ascertaining whether or not the place would likely be conducted in a quiet, orderly, and peaceable manner should the license be granted. This duty is not mandatory on the board where the application is made to sell liquor within an incorporated city. The reason for this is apparent. The city authorities are in a better position to know the location of the saloon and the character and reputation and habits of the saloon keeper than are the members of the board of commissioners; and they can refuse the applicant a license if they do not think he is a fit person or are not willing to have a saloon located at a place where the applicant desires to carry on the business. While this duty is not made mandatory on the board, the right to make the inquiry and investigation is not denied by the statute. When the application is made to sell intoxicating liquors in an unincorporated town or rural district where there are no local police or other peace officers, it is made a positive duty of the board to investigate both the fitness of the applicant and the best interests of the community and the probability of the applicant conducting the business in a peaceable, quiet, and orderly manner, and thereby saving the county from costs and expenses in maintaining the police authority of the state in that locality. The Legislature evidently considered that the board of commissioners had been granted ample discretion to be exercised by them in all instances, whether the application be to sell within or without the limits of a municipality, and the specific thing they had in mind by the enactment of this proviso was to impose the additional duty and obligation on the board of investi-

gating in all cases where the application should be made to sell liquors in a rural community or unincorporated town or village.

It follows from what has been said that the board of commissioners had a legal discretion vested in them which they might exercise in acting upon an application for a license to sell intoxicating liquors, whether such application be made for license to sell within or without the boundaries of an incorporated city. This discretion cannot be controlled by writ of mandate. The judgment of the lower court is therefore reversed, and the cause is remanded, with direction to dismiss the proceeding. Costs awarded in favor of appellant.

STEWART, C. J., and SULLIVAN, J., concur.

SULLIVAN v. BOARD OF COM'RS OF LEMHI COUNTY.

(Supreme Court of Idaho. June 24, 1912.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 69*)—LICENSEES—DUTIES OF COUNTY COMMISSIONERS.

Under the provisions of section 1508, Rev. Codes, where an application is made for a license to sell intoxicating liquors at a place outside of an incorporated city, it is made the duty of the board of county commissioners to make the following investigations: First, "to determine whether or not the granting of such license would be conducive to the best interests of the community in which such saloon or business is proposed to be established"; second, to determine whether or not such applicant is a fit person to have such license and to carry on such business; and, third, to determine whether or not such place of sale and business would likely be conducted in a quiet, orderly, and peaceable manner, and, if the board finds in the negative on any one of these questions, it is made the positive duty of such board to deny the application.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 70, 73; Dec. Dig. § 69.*]

2. INTOXICATING LIQUORS (§ 75*)—LICENSEES—PROCEEDINGS TO PROCURE—REVIEW.

Upon an appeal from an order of the board of county commissioners, granting or refusing to grant a liquor license under the provisions of section 1508, Rev. Codes, the district court has jurisdiction to review any question involving the legality of the action of the board in passing on the application, and any question of law which may have been involved in the application and action taken thereon by such board; but the court has no jurisdiction or authority to examine or review the facts upon which the board exercised its discretion in determining any one of the three questions which section 1508 requires the board to investigate and determine before granting or refusing such application. These questions involve the discretionary power of the board, and that discretion is not conferred upon the courts.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 74, 76-79; Dec. Dig. § 75.*]

Appeal from District Court, Lemhi County; James M. Stevens, Judge.

Appeal by John Sullivan from an order of the Board of County Commissioners of Lemhi County refusing to grant a liquor license. From a judgment of the district court reversing the action of the commissioners, they appeal. Reversed and remanded, with directions.

D. C. McDougall, Atty. Gen., J. H. Peterson and O. M. Van Duyn, Asst. Attys. Gen., for appellant. F. J. Cowen, of Salmon, for respondent.

AILSHIE, J. This appeal involves the action of the board of county commissioners of Lemhi county in rejecting the application of John Sullivan for a license to sell intoxicating liquors at retail in Leadore in Junction precinct, Lemhi county. The respondent, Sullivan, made application in due and regular form, and paid his license fee, and executed the proper undertaking. The board of commissioners acted on the application and denied the same "for the reason that the granting of such license would not be conducive to the best interests of the community." The applicant thereupon appealed from the action of the board to the district court. The matter came on regularly for hearing in the district court, and no appearance was made on behalf of the board of commissioners. There seems to have been no evidence taken in the matter whatever. The court, however, in his findings recites that "the court proceeded to hear the evidence submitted in the said matter from which it appears," etc. The court reporter, however, who was directed by an order of the district court to make a transcript of the evidence, certifies under oath "that she was present at Salmon, Idaho, at the regular April, 1912, term of the district court in and for the county of Lemhi, state of Idaho, and at such term of court acted as such reporter; that no evidence was adduced and no notes taken in the above entitled cause, and for this reason can make no transcript." No evidence whatever is reported in the record. This, however, is of no consequence as we view the matter.

[1] This case differs from the case of Anderson v. Board of Commissioners, 125 Pac. 188 in that the Anderson Case was an application for a license to sell intoxicating liquors within the boundaries of an incorporated city. In this case the place at which the sale is to be made is an unincorporated town or village. This case therefore falls within the terms of the proviso to section 1508, considered and discussed by this court in the Anderson Case. It was therefore the duty of the board of commissioners, under the terms of the proviso to section 1508, to make the following investigations: First, to "determine whether or not the granting of such license would be conducive to the best interests of the community in which such saloon

or business was proposed to be established"; second, to determine "whether or not such applicant was a fit person to have such license and to carry on such business"; and, third, to determine "whether or not such place of sale and business would likely be conducted in a quiet, orderly and peaceable manner." It is made the positive duty of the board of county commissioners to refuse to grant the license "should said board of county commissioners determine adversely to the applicant upon any grounds above specified." It does not appear from the record that the board of commissioners investigated and determined any of the above specified grounds, except the first, but they evidently made an examination on that because they reached the determination and conclusion "that the granting of such license would not be conducive to the best interests of the community." Upon the appeal the district court makes a finding as follows: "That the said board of commissioners have granted the applications of two other persons for the sale of intoxicating liquors in the said precinct and that it would be conducive to the best interests of said community that the said John Sullivan be granted such license."

[2] Section 1508, Rev. Codes, closes with the following clause: "And such order of the board of county commissioners shall be subject to appeal to the district court as in the case of other orders of said board." It is contended that this provision of the statute authorizes an appeal from an order refusing to grant a liquor license, and that upon appeal the matter is heard anew, the same as if it had never been heard before the board of commissioners, and that the district judge hears the matter and determines all the questions that the statute (section 1508) requires the board of commissioners to determine, and that his determination is conclusive on the board. This contention is made on the theory that section 1953 applies to appeals of this kind. That section provides that: "Upon the appeal, the matter must be heard anew and the act, order or finding so appealed from may be affirmed, reversed or modified." We do not believe that section 1953 was intended to apply to an appeal of this kind. That section was enacted many years before this provision was added to section 1508, authorizing an appeal from the action of the board of commissioners in allowing or rejecting an application for a liquor license. Section 1953 is contained in article 5, title 2, of the Political Code, and that article is dealing with "county finances and claims against the county." While the right of appeal applies to all orders made by the board of commissioners as such, it clearly had no reference at the time enacted to orders of the board of commissioners in granting or refusing applications for liquor licenses. At the time of the enactment of this statute (section 1953) no ap-

peal would lie from the allowance or rejection of an application for a liquor license. The terms on which licenses then issued were set out in detail by the statute, and a compliance with those terms entitled the applicant to his license. The very fact that this statute (section 1508, Rev. Codes) imposes a duty upon the board to investigate and determine certain facts, and that the doing so necessarily involves the exercise of discretionary power, and that this power and authority is not conferred upon the court, renders it improbable that the Legislature ever intended that upon an appeal from an order either granting or refusing such a license the court should assume original jurisdiction to examine into and determine the matters and facts enumerated in the statute and act as a license board, and adjudicate who should and who should not receive licenses to sell intoxicating liquors. If this discretion may be exercised in the first place by the board of commissioners, and then the same discretionary power can upon appeal be exercised by the district judge, irrespective and independent of the original exercise thereof by the board of commissioners, then there could have been no object in vesting the jurisdiction originally in the board of commissioners. Their action and discretion would amount to nothing if, upon appeal from such order, the district court is to hear the matter "anew" and in the same manner as the board of commissioners would hear such an application and can consider it independent of and free from any action and consideration given the matter by the board of commissioners. We are rather inclined to construe this statute as conferring the power on the district court to review any question as to the legality of the action of the board and to determine any question of law which may have been involved in the application and action taken by the board thereon. For example, there would doubtless be as many, if not more, occasions for the citizen to appeal from the action of the board in granting a petition where the board acted either without a proper application, a proper hearing, or granted the license to an unfit person, than there would be for the applicant to appeal on account of any wrongful or illegal action by the board. If the board should grant a license to an applicant to sell liquor in a rural community without investigating the matter and determining the facts required to be determined by the board or without the application having been filed twenty days before the meeting, their order would undoubtedly be subject to reversal on appeal by an interested citizen. So also, if the board of commissioners should reject an application on the ground that the undertaking and bond were not in due form or had not been properly executed and filed or that the application for the license had not been filed in

time, this would involve a question of law which might properly be reviewed and corrected on appeal. On the other hand, it is difficult to see and understand how a district court on appeal can review and pass upon the facts that were before the board of commissioners, and upon which they exercised their discretion, and determine either that the "granting of such license would not be conducive to the best interests of the community in which such saloon or business was proposed to be established, or that the applicant was or was not a fit person to have such license and carry on such business, or that such proposed place of sale and business would or would not likely be conducted in a quiet, orderly and peaceable manner." Doubtless facts could be presented by the citizens of any community sufficient to justify a board of commissioners reasonably exercising their legal discretion in determining either that the granting of a license to sell liquors in a certain community would not be "conducive to the best interests of the community in which such saloon or business was proposed to be established," or that "such place of sale and business would not likely be conducted in a quiet, orderly and peaceable manner." On the other hand, proof might be submitted in any given case which would satisfy another and different board or official that the application should not be denied on any one of the foregoing grounds.

These are questions that common, everyday experience teaches us are viewed in a different light by different citizens and likewise by different officials. The Legislature deemed it necessary to submit this question to the judgment and discretion of some official, board, or body, and so it concluded that the board of commissioners was the proper body. If that judgment and discretion is to be supplanted and displaced on appeal by the judgment and discretion of another officer in the person of the district judge, then there can be no uniform standard in the county; nor can there be any uniform judgment and discretion thereon. The board may see the matter from one viewpoint and the district judge from another viewpoint. In *Darby v. Pence*, 17 Idaho, 697, 107 Pac. 484, 27 L. R. A. (N. S.) 1194, this court, in considering the discretionary power conferred upon the city council of Boise City in the matter of granting liquor licenses, said: "If the fact that the applicant was a man of good moral character and fit to carry on the business and such question was one which might be reviewed in the courts, then, instead of the common council of Boise City being the judge of the fitness of an applicant, as provided in the ordinance, the court would become the judge and the provisions of the ordinance would be of no force or effect whatever. Had the com-

mon council intended to leave the question of the applicant's fitness to receive a license open to investigation in the courts, then the ordinance would have so provided." In the *Darby Case* the court was dealing with a city ordinance instead of an act of the Legislature, but the question of discretion was there being considered. It is not shown that the board of commissioners in any way violated the provisions of the statute in considering and passing upon the application of the respondent, nor does it appear that they have in any way acted arbitrarily. The fact that they had previously granted licenses to two other applicants to sell liquors at the same place or in the same precinct is no evidence that they have acted arbitrarily or unfairly on this application. The fact that one or two licenses have been granted for the sale of intoxicating liquors at a particular place does not entitle every other person who applies to have a license to sell at that place. This fact would rather furnish an argument against the granting of further licenses for such locality. An increase in the number of saloons in a rural community necessarily increases the expense of properly exercising the police authority in that community and increases the hazards and dangers to life and property and the peace and order of the community.

The judgment of the district court should be reversed, and it is so ordered, and the cause is remanded, with direction to affirm the action of the board of commissioners. Costs awarded in favor of appellant.

STEWART, C. J., and SULLIVAN, J., concur.

ANDERSON v. BOARD OF COM'RS OF LEMHI COUNTY.

(Supreme Court of Idaho. June 24, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 75*)—LICENSES—PROCEEDINGS TO PROCURE—REVIEW.

Where a board of county commissioners grant or refuse to grant a license to sell intoxicating liquors within the county, the proper remedy for an aggrieved party under section 1508, Rev. Codes, is by appeal to the district court.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 74, 76-79; Dec. Dig. § 75.*]

Appeal from District Court, Lemhi County; James M. Stevens, Judge.

Appeal by William Anderson from an order of the Board of County Commissioners of Lemhi County denying an application for a liquor license. From a judgment of the district court reversing the order of the commissioners, they appeal. Reversed and remanded, with directions.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indices 125 P.—13

J. K. Rapkin, Pros. Atty., and E. W. Whitcomb, both of Salmon, for appellant. F. J. Cowen, of Salmon, for respondent.

AILSHIE, J. This case involves the same state of facts involved in the case of *Anderson v. Board*, 125 Pac. 188, just decided. In that case the applicant for a liquor license sought by writ of mandate to compel the board to issue the license. Feeling, doubtless, that there might be a question as to the remedy, he also appealed from the action of the board of commissioners to the district court. In the district court a stipulation was entered into between counsel for the appellant and the board, showing that the appellant had made due and regular application, paid the license fee and given the required bond, and that thereafter the board considered and acted upon the same and refused to grant the license asked upon the grounds "that the granting of such license would not be conducive to the best interests of the community in which the said license was sought." It was further stipulated and agreed that the board had granted the application of three other persons to sell intoxicating liquors within the municipal corporation of Salmon City. The cause came on for trial in the district court, and the court adopted the stipulation as findings of fact, and as a conclusion of law found that the appellant had complied with all the requirements of the statute, and that the appellant was a fit person to receive a license, and that he would be likely to conduct an orderly place, and that the board of commissioners had no discretion in the matter of granting or refusing an application in due and regular form for a license to sell liquors within the boundaries of an incorporated city. The court thereupon reversed the action of the board of county commissioners, and directed them to issue a license to the appellant to sell intoxicating liquors within the limits of Salmon City. The board has appealed from the order and judgment.

From what has already been said in *Anderson v. Board of Commissioners of Lemhi County*, 125 Pac. 188, recently decided by this court, it follows that appeal was the appropriate remedy for the appellant to pursue. No question arises in this case, however, about there being any abuse of discretion or arbitrary action in the matter, and the case has been rested solely upon a question of law, namely, that the board is not vested with any discretion in such matters. We have held adversely to that contention in the *Anderson Case*, and will not further discuss the question here. The board had a discretion which it has regularly and legally exercised.

The judgment of the district court should be reversed, and it is so ordered, and the cause is hereby remanded with direction to

the trial court to affirm the action of the board of county commissioners. Costs awarded in favor of appellant.

STEWART, C. J., and SULLIVAN, J., concur.

POWERS v. BOISE CITY.

(Supreme Court of Idaho. July 9, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 133*)—CONDUCT OF COUNSEL—ACTION OF COURT.

Held, that the city was not prejudiced by the remarks made by counsel for respondent in his argument to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

2. TRIAL (§ 133*)—CONDUCT OF COUNSEL—ACTION OF COURT.

The doctrine or rule laid down by this court in *Goldstone v. Rustemeyer*, 123 Pac. 635, in regard to improper remarks made by counsel during argument to the jury, approved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

3. MUNICIPAL CORPORATIONS (§§ 763, 791*)—STREETS—OBSTRUCTIONS—NOTICE TO CITY.

Boise City must exercise reasonable care to discover obstructions or defects in its streets and sidewalks, and, if such obstructions or defects remain for any considerable length of time, it is at least constructive notice to the city of such obstructions or defects.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615, 1647-1651; Dec. Dig. §§ 763, 791.*]

4. MUNICIPAL CORPORATIONS (§ 821*)—STREETS—OBSTRUCTIONS—ACTION FOR INJURIES—QUESTION FOR JURY.

As to whether the city has constructive knowledge of obstructions or defects in streets and sidewalks is a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.*]

5. MUNICIPAL CORPORATIONS (§ 763*)—STREETS—OBSTRUCTIONS—LIABILITY OF CITY.

Under the charter of Boise City, the city had power to manage and regulate its streets and sidewalks, and the privilege or power so granted imposes a corresponding obligation on the part of the city, and such power is coupled with the implied obligation that ordinary care at least will be exercised in keeping the streets and sidewalks clear of obstructions and defects, and, if it fails to do so, it is liable for personal injuries occasioned thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.*]

6. MUNICIPAL CORPORATIONS (§ 764*)—STREETS—OBSTRUCTIONS—CARE REQUIRED.

The city, being liable for such injuries, should prove a spur to the officials to keep the streets and sidewalks in a safe condition.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1616-1620; Dec. Dig. § 764.*]

7. MUNICIPAL CORPORATIONS (§ 788*)—STREETS—OBSTRUCTIONS—ACTS OF THIRD PERSON.

Where a street or sidewalk is obstructed by other persons, and the city has either actual or constructive notice thereof, it is pri-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

marily liable for injuries resulting therefrom, regardless of whether the abutting owner or a police officer or the person who placed the same there is liable to the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. § 788.*]

8. REFUSAL TO DIRECT VERDICT—No Error.

Held, that the court did not err in refusing to instruct the jury to return a verdict for the defendant.

Appeal from District Court, Ada County; John F. MacLane, Judge.

Action by Mary A. Powers against Boise City. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. F. Reddoch and P. E. Cavaney, both of Boise City, for appellant. Hawley, Puckett & Hawley, of Boise City, for respondent.

SULLIVAN, J. This action was commenced to recover from Boise City certain damages for personal injuries sustained by the plaintiff on June 29, 1907. The cause of the injuries was the tripping and falling by the respondent over a telephone wire attached to a pole which lay close to the sidewalk. The pole was about 20 feet long and 6 to 10 inches in diameter. The wire, which was several feet in length, was securely fastened to the small end of the pole and extended onto the sidewalk, forming a loop, in which the plaintiff caught her foot as she was walking along the sidewalk. The plaintiff was injured about 9 o'clock in the evening. She was walking in the ordinary manner along the sidewalk when the accident occurred, and did not see the wire until after she was thrown to the sidewalk. The sidewalk in question had for a long time been the main traveled thoroughfare for pedestrians living south of the Oregon Short Line Railway track. Other streets in that vicinity had no crossing over the railroad track, and, as this street had a crossing, it was generally used by people in that vicinity. The evidence shows that the pole and wire had been in the same position for several months before the accident occurred. As a result of the accident, plaintiff suffered intensely for a number of months. She was seven weeks in bed, and it was nearly two years before she could walk without crutches. The evidence shows she suffered a great deal of pain and at the time of the trial was unable to take a step with her left foot. Prior to the injury she was a healthy woman. At the time of the accident she was about 56 years of age, with an expectancy of life of 16 years. As a result of the injury her left leg is three-quarters of an inch shorter than the right. The cause was tried to the court with a jury, and the jury rendered a verdict in favor of the plaintiff for \$3,000, and judgment was entered for that amount on said verdict. The appeal is from the judgment.

1. Several errors are assigned as to the rejection and admission of evidence. We have examined those assigned errors and are fully satisfied that the court did not err in the admission or rejection of such evidence.

2. The denial of the appellant's motion for a nonsuit is assigned as error. A motion for a nonsuit was interposed at the close of plaintiff's testimony and denied. Thereafter at the close of all the testimony in the case the motion was renewed and denied. Upon a careful examination of the matter, we find that the court did not err in denying said motions.

[1] 3. It appears that counsel for plaintiff stated during his argument that Boise City would have a remedy against the Rocky Mountain Bell Telephone Company to recover any judgment that might be rendered against it in this case, and was thereupon interrupted by counsel for defendant, who requested the court to instruct the jury that such remarks should not be considered by them in the case, and the court thereupon said: "The jury is instructed, in response to counsel's request, that the only question for them to consider in this case is the liability of the defendant, Boise City, to the plaintiff, and not the liability as between Boise City and the Bell Telephone Company or any other parties not mentioned in this record." So far as the record is concerned, that closed the incident. It appears from the record that the question was mooted, at least, as to whether the Bell Telephone Company was the responsible party. Instruction No. 7 given by the court is as follows: "The jury is instructed that the fact, as admitted in the answer of the defendant, that the pole and wire causing the injury in this case belonging to the Rocky Mountain Bell Company, did not in any way relieve the defendant from its duty to keep the said pole and wire from causing an unreasonable obstruction to the pedestrians using ordinary care in walking on the board walk in question in this case. If the city was negligent, as set forth in these instructions, then it is no defense for it to say that the Rocky Mountain Bell Telephone Company was also negligent." This instruction indicates that said matter had been considered by the court, and we are fully satisfied from the whole record that the appellant was not prejudiced by said statement made by counsel.

[2] It was contended by counsel for respondent that the rule laid down by this court in *Goldstone v. Rustemeyer*, 21 Idaho, 703, 123 Pac. 635, is not supported by the weight of authority. However, this court has approved the rule there laid down in *Petajanleml v. Washington Water Power Co.*, 124 Pac. 783, and in referring to the argument of counsel made to a jury, this court there said: "We have examined it (argu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

ment of counsel) with care and must say that it was of such a nature as could not well be approved by any court and was calculated to prejudice the jury rather than to furnish them any aid in the way of fact or argument upon which to base a verdict. If there was any doubt as to the justice of the verdict in this case, the court would be justified in reversing the judgment on account of the prejudicial statements and arguments made by counsel for respondent"—and cited with approval *Goldstone v. Rustemeyer*, supra. This court has no inclination to depart from the rule laid down in the *Rustemeyer Case*. Counsel must keep themselves within reasonable bounds in making their arguments to the jury, and not make statements outside of the record with the clear purpose of prejudicing the jury.

[3] 4. It is also contended that there is no evidence showing, or tending to show, that Boise City had no notice, actual or constructive, of the condition of said pole and wire lying along the sidewalk. There is nothing in this contention, as it appears from the evidence that said pole with the wire attached had been lying by the sidewalk for two or three months at least. It is the duty of the city officers to be vigilant in keeping its streets and sidewalks in repair so that the traveling public will not be injured by defects therein. In note to the case of *Elam v. Mt. Sterling*, 20 L. R. A. (N. S.) on page 725, it is stated: "The city should exercise reasonable care to discover defects and obstructions in its streets and sidewalks, and the performance of this duty requires their inspection, and the existence of such a defect or obstruction for a long time warrants the conclusion of actual knowledge thereof."

[4] And whether the city had constructive knowledge is a question for the jury.

[5] Boise City was given power over its streets and sidewalks and highways by its charter. It appears that the Legislature had been very liberal in granting powers to Boise City under its special charter, which was in force at the time this accident occurred. And whenever a state gives a power to a municipality to manage and regulate its streets and sidewalks, then the city must assume the responsibility for the careful management thereof. The privilege so granted calls for a corresponding obligation on the part of the city, and the power so granted is not free from any conditions, for it is coupled with the implied obligation that ordinary care will be exercised in its use. The Supreme Court of this state has held that cities under the general law and incorporated under the general laws of Idaho (which general laws give far less privileges to those cities than are given to Boise City under its special charter) are responsible for negligence in caring for their sidewalks. In the case of *Carson v. City of Genesee*, 9 Idaho, 244, 74 Pac. 862, 108 Am. St. Rep. 127, this

court held that cities and villages incorporated under general laws of the state are liable in damages for negligent discharge of the duty of keeping such streets and alleys in a reasonably safe condition for use by travelers in the usual modes, and that such liability exists in the absence of a specific statute imposing it; that such liability results from the exclusive control granted over the streets and the duty imposed to keep them in repair and the power granted to raise adequate revenue therefor. That case seems to be a leading case, and the note thereto in 108 Am. St. Rep. 127, covers 38 pages and is very exhaustive. This court said in the *Carson Case* that: "In such communities the travel both by day and night is so much greater in comparison with the travel over the country at large that the maintenance of good and safe thoroughfares for the protection of life and property becomes an urgent necessity, and such corporations should be held liable for a negligent discharge of that duty. The application of this principle should prove a spur to the officials of such corporations to keep the streets and sidewalks in a safe condition for the uses to which they are dedicated. Its denial would be to defeat the plainest justice in many instances."

[6] City officials must understand that if they neglect to keep the streets and alleys in proper repair, and injury results from such negligence, the city is liable for the damages, and the officer who neglects his duty in making proper inspection of the streets and sidewalks, by reason whereof personal injury results, is liable to the city. As bearing upon this question, see the following Idaho cases: *Moreton v. Village of St. Anthony*, 9 Idaho, 532, 75 Pac. 262; *Village of Sand Point v. Doyle*, 11 Idaho, 642, 83 Pac. 598, 4 L. R. A. (N. S.) 810; *Eaton v. City of Weiser*, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225; *Miller v. Village of Mullan*, 17 Idaho, 28, 104 Pac. 660, 19 Ann. Cas. 1107.

[7] Although the city did not place said telephone pole and wire by said sidewalk, the city nevertheless is primarily liable, notwithstanding the negligence of a third party in placing said pole by the sidewalk. It is the primary and absolute duty of the city to keep its streets and alleys reasonably safe, and that duty extends to all obstructions placed therein, no matter by whom. The primary fault and liability may be that of an abutting owner or a police officer or of a stranger, yet the city will be liable. 5 *Thompson on Negligence*, § 6170.

[8] 5. The refusal of the court to instruct the jury to return a verdict for the defendant is assigned as error. That contention is without merit. The court did not err in refusing to give such instruction.

We have considered the other errors assigned, but shall not refer to them in detail

here. It is sufficient to say that we find no reversible error in the record, and the judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

STEWART, C. J., and AILSHIE, J., concur.

McCORNICK v. BROWN et al.

(Supreme Court of Idaho. May 31, 1912.)

(Syllabus by the Court.)

1. MORTGAGES (§ 445*)—ACTIONS TO FORECLOSE—PLEADING.

A complaint, which alleges that M. S. executed and delivered to W. S. McC. four promissory notes personally, and thereafter that a mortgage upon certain mining claims was executed and delivered by M. S. personally, and by W. D. S. and P. S. S. and E. B. S. Van H., for the purpose of securing such several notes executed and delivered by M. S., and that such notes have not been paid and the amount is due, states a cause of action against M. S. personally and W. D. S., P. S. S., and E. B. S. Van H. for the foreclosure of such mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1308, 1309, 1318; Dec. Dig. § 445.*]

2. MORTGAGES (§ 486*)—ACTIONS TO FORECLOSE—DECREE.

In an action to foreclose a mortgage given to secure notes executed by M. S., where such mortgage is executed by M. S., W. D. S., P. S. S., and E. B. S. Van H., and describes certain mining claims, and a decree of foreclosure is made by the trial court, the decree should be personally against M. S. and for a foreclosure of all right, title, and personal interest of M. S., W. D. S., P. S. S., and E. B. S. Van H., in and to the property described in the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1404-1411, 1470; Dec. Dig. § 486.*]

3. MORTGAGES (§ 481*)—ACTIONS TO FORECLOSE—FINDINGS—SUFFICIENCY.

Where an action is brought to foreclose a mortgage against several parties, and the complaint alleges that the mortgage was executed by such persons, and the answer denies such execution, and it appears from the proof that such execution was by power of attorney, and the court makes a finding that the defendants did execute such mortgage, such finding is sufficient upon the issues made by the pleadings, and it was not reversible error on the part of the court in failing to find whether the attorney in fact was duly authorized to sign the mortgage as such attorney in fact. The finding of the ultimate fact in issue in the case, to wit, that the defendants executed the mortgage, was sufficient under the issues made by the pleadings.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1400; Dec. Dig. § 481.*]

Appeal from District Court, Blaine County; E. A. Walters, Judge.

Action by W. S. McCornick against M. Shaughnessy, personally and as trustee under the will of Eudora Shaughnessy, deceased, and others. On the death of defendant M. Shaughnessy, his administrator, Fred Brown, was substituted as a party to the action and decree. From a judgment for

plaintiff, defendants appeal. Modified and affirmed.

Lynne F. Clinton, of Boise, for appellants. Henderson, Pierce, Critchlow & Barrette, of Salt Lake, and Sullivan & Sullivan, of Boise, for respondent.

STEWART, C. J. This action was commenced in the district court of the Fourth judicial district in and for Blaine county by W. S. McCornick, doing business as W. S. McCornick & Co., against M. Shaughnessy personally, and as executor and trustee under the will of Eudora Shaughnessy, deceased, Philip S. Shaughnessy, Walter D. Shaughnessy, and Eudora B. Shaughnessy Van Horn, for the foreclosure of a mortgage upon a group of mining claims consisting of the Monarch Lode, Lot No. 37, Bay State Lode, Lot No. 38, Bon Ton Lode, Lot No. 39, and Mountain Boy Lode, Lot No. 40, in the county of Blaine.

The complaint alleges that the defendant M. Shaughnessy, is indebted to the plaintiff upon four certain promissory notes executed by M. Shaughnessy to plaintiff as follows: One promissory note dated January 2, 1906, for the sum of \$2,623; one promissory note dated April 2, 1906, for the sum of \$250; one promissory note dated February 8, 1907, for the sum of \$250; and one promissory note dated April 12, 1907, for the sum of \$250. It is also alleged that on the 8th day of February, 1907, the defendant M. Shaughnessy personally and as executor and trustee under the will of Eudora Shaughnessy, deceased, Walter D. Shaughnessy, Philip S. Shaughnessy, and Eudora B. Shaughnessy Van Horn, for the purpose of securing the payment of the several notes so given, made, executed, and delivered to the plaintiff a certain deed of conveyance in the nature of a mortgage upon the property described in the complaint. This mortgage is attached to the complaint, and it appears that the same is signed as follows: "M. Shaughnessy, personally and as executor and trustee under the last will of Eudora Shaughnessy, deceased; Walter D. Shaughnessy, by M. Shaughnessy, his attorney in fact; Philip S. Shaughnessy, by M. Shaughnessy, his attorney in fact; Eudora B. Shaughnessy Van Horn, by M. Shaughnessy, her attorney in fact." The recording of the mortgage is alleged, and also that the plaintiff was the holder of the notes, and that the same had not been paid, and that there is due thereon the principal and interest and attorney's fees, and a decree of foreclosure is demanded.

The record in this case contains a copy of a demurrer filed by M. Shaughnessy as executor and trustee under the will of Eudora Shaughnessy, deceased, while the order of the trial court recites the action of the court upon the demurrer as follows: "The defendants herein, M. Shaughnessy, personally, and as executor and trustee under the will of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Eudora Shaughnessy, deceased, Philip S. Shaughnessy, Walter D. Shaughnessy, and Eudora B. Shaughnessy Van Horn, having heretofore, by their attorneys, interposed demurrers to the complaint of plaintiff herein, and the same having heretofore been argued and submitted to the court, and the court being now fully advised in the premises, it is ordered that the said demurrers and each of them be and the same are hereby overruled. * * * There is some controversy between counsel as to whether demurrers were filed by Philip S. Shaughnessy, Walter D. Shaughnessy, and Eudora B. Shaughnessy Van Horn; but from this record we are inclined to think from the order of the trial court that demurrers were filed by all of the defendants, and this court will consider the complaint as though demurrers had been filed by all of the defendants.

The demurrer is upon the grounds: First, that the complaint does not state facts sufficient to constitute a cause of action against the defendant, as executor or trustee under the will of Eudora Shaughnessy, deceased. Second, that the complaint is insufficient in that: (a) It does not sufficiently appear that the defendant was ever appointed, or now is, the executor or trustee under the will of Eudora Shaughnessy, deceased; (b) it does not appear that any demand was ever made upon the defendant M. Shaughnessy for the payment of the note referred to in the complaint for the sum of \$250, dated February 8, 1907; (c) it does not appear that any demand was ever made upon the defendant M. Shaughnessy for the payment of the note referred to in said complaint, dated April 2, 1907; (d) it does not appear that the note dated April 12, 1907, was secured by the alleged assignment referred to in the complaint. Third, that the complaint does not sufficiently set forth or show that the defendant M. Shaughnessy had the authority to execute or deliver the mortgage described in the complaint. Fourth, that the complaint is insufficient because it does not appear that M. Shaughnessy had the authority to execute or deliver the assignments on property held by him as executor and trustee under the will of Eudora Shaughnessy, deceased, to secure his own private and individual indebtedness. This demurrer was overruled, and an answer was filed.

The answer admits the execution of the mortgage, sought to be foreclosed, by M. Shaughnessy, in person and as executor and trustee, but denies the authority of Shaughnessy to execute the same as executor or trustee, and denies that Walter D. Shaughnessy, Philip S. Shaughnessy, and Eudora B. Shaughnessy Van Horn executed or delivered said mortgage. The answer also admits that M. Shaughnessy, acting as attorney in fact, executed the mortgage, but denies that Shaughnessy had any right or authority to execute or deliver the same, and

admits that the defendant M. Shaughnessy, personally, and assuming to act as executor and trustee under the will of Eudora Shaughnessy, and as attorney in fact for Philip S. Shaughnessy, Walter D. Shaughnessy, and Eudora B. Shaughnessy Van Horn, executed and delivered the mortgage. The answer also alleges that the property described in the mortgage belonged to the estate of Eudora Shaughnessy, deceased, and that such estate was under probate in the district court of Blaine county; that Philip S. Shaughnessy, Walter D. Shaughnessy, and Eudora B. Shaughnessy Van Horn are the children of Eudora Shaughnessy, deceased, and as such are heirs under the will of Eudora Shaughnessy, deceased; that M. Shaughnessy in executing the mortgage assumed to act as executor and trustee of the will of Eudora Shaughnessy, deceased, and also attorney in fact for Philip Shaughnessy, Walter D. Shaughnessy, and Eudora B. Shaughnessy Van Horn in the execution and delivery of the mortgage; and that the indebtedness and the whole thereof was a personal indebtedness of M. Shaughnessy.

The cause was tried to the court, and findings of fact, conclusions of law, and judgment entered. In the findings of fact the trial court found that the defendant M. Shaughnessy was indebted upon the notes set out in the complaint; that on the 9th day of February, 1907, M. Shaughnessy personally and as executor and trustee under the last will of Eudora Shaughnessy, deceased, Walter D. Shaughnessy, Philip S. Shaughnessy, and Eudora B. Shaughnessy Van Horn, for the purpose of securing the payment of said notes, executed and delivered the conveyance as a mortgage described in the complaint; that the plaintiff is owner of the notes. As conclusions of law the court found: First, that the plaintiff was entitled to judgment against M. Shaughnessy for the principal and interest due upon the notes and attorney's fees; second, that the plaintiff was entitled to a decree declaring the mortgage described in the complaint to be a lien upon the property described, and foreclosing the same, and for the sale of said property, with the privilege of redemption within six months from the date of said sale; and thereon entered a decree declaring that plaintiff recover from the defendant M. Shaughnessy the amount due on said notes and interest and attorney's fees, and that the mortgage be declared a lien upon the property described, and that the same be foreclosed and the property sold. This appeal is from the judgment and decree.

[1] It is contended on behalf of appellant that the complaint is defective because, the action being a proceeding to foreclose a mortgage against an estate, the complaint should allege: First, the presentation of the claim to the executor or trustee; second,

that there was an executor and trustee of the estate of Eudora Shaughnessy, deceased; third, that the complaint does not allege an express waiver of recourse against any other property of the estate; fourth, that the complaint does not allege that Shaughnessy was an attorney in fact for the other defendants alleged to have signed the mortgage by power of attorney, or that M. Shaughnessy had authority to execute the mortgage.

As to this being an action to foreclose a mortgage, there can be no question. From the allegations of the complaint it clearly appears that the action is against M. Shaughnessy, personally, for the debt represented by the notes and described in the complaint, and for a foreclosure of the mortgage as against M. Shaughnessy and Philip S. Shaughnessy, Walter D. Shaughnessy, and Mary D. Shaughnessy, upon the property described in the complaint, and that the action is not against M. Shaughnessy as executor or trustee of the estate of Eudora Shaughnessy, deceased. This being true, it was not necessary to allege in the complaint that the claim was presented to M. Shaughnessy as executor or trustee of the estate of Eudora Shaughnessy, deceased, or that there was an executor or trustee of the estate of Eudora Shaughnessy, deceased.

There are no allegations in the complaint or any claim made in this action that M. Shaughnessy was in possession of any property as executor or trustee of the last will of Eudora Shaughnessy, deceased, or that this was a proceeding against such estate. From the complaint it is apparent that the action is against certain persons, naming them, who are alleged to have executed a mortgage, and in the complaint they were described by the same names as their signatures appeared to the mortgage, and the use of the words "executor and trustee" is merely a description of the person and is so treated in this action.

Whether the complaint was insufficient because it is not alleged that Shaughnessy was attorney in fact for the other defendants and had power and authority to execute the mortgage is immaterial, because it is specifically alleged in the complaint that the persons whose names appear as signers of the mortgage executed the mortgage. The manner of execution was a matter of defense, and the complaint was sufficient, as it alleged that the mortgage was executed by the parties named. 31 Cyc. 1625. We think, therefore, that the complaint was sufficient and states a cause of action for the foreclosure of the mortgage against the defendant M. Shaughnessy personally, and the other defendants named in the complaint who are alleged to have executed and delivered the mortgage.

[3] The next question presented upon appeal is that the court failed to find that M.

Shaughnessy had authority to execute the mortgage on behalf of the other defendants as their attorney in fact. The court did find that "the mortgage was executed by the defendants, M. Shaughnessy personally, and as executor and trustee under the last will of Eudora Shaughnessy, deceased, Walter D. Shaughnessy, Philip S. Shaughnessy, and Eudora B. Shaughnessy Van Horn, for the purpose of securing the payment of several promissory notes so given as aforesaid." This is a finding of the ultimate fact in issue in the case, to wit, that said defendants executed the mortgage. The answer denied that these defendants executed said mortgage. This was a direct issue of fact, and, when the court found that the defendants had executed the mortgage, it was a finding on the ultimate, material fact, put in issue by the pleadings. The defendants in the case offered no evidence on behalf of defendants sustaining the allegations of the answer, or which in any way controverted the allegations of the complaint. The court having made this finding, such finding gave the plaintiff the right to recover upon the issue made. There were no independent acts upon which the court was required to make a finding.

In the case of *Later v. Haywood*, 14 Idaho, 45, 93 Pac. 374, this court said: "These principal probative facts may have all been true, when separately stated, yet, if taken as a whole, and each modified, limited, and explained by the other, as one transaction, it still might have been true that all these matters constituted one and the same transaction, and that the deed from Hill to the defendant was in fact and in truth a mortgage. The plaintiffs were entitled to a finding upon this issue. It is the 'bone of contention' under the pleadings, and it is the center about which, and to support which, all the evidence would certainly have to be directed under the pleadings. A finding upon this question would certainly affect and control the judgment to be entered. If the finding upon this material issue was in favor of the plaintiff, it is apparent that the judgment must follow the finding and also be in favor of the plaintiff." In support of this rule we also cite *Adams v. Crawford*, 116 Cal. 495, 48 Pac. 488; 38 Cyc. 1966.

The evidence introduced in the trial of the case is not before this court, and it will be presumed, in the absence of such evidence, that the evidence was sufficient to justify the trial court in finding that the mortgage was executed by the defendants.

The judgment is clearly in accordance with the findings of fact and conclusions of law, and clearly shows upon its face that the court did not decree a lien on property of the estate of Eudora Shaughnessy, deceased. The judgment declares a lien on the property described in the mortgage, and includes any interest therein which may belong to

the defendants. Counsel for defendants Walter D. Shaughnessy, Philip S. Shaughnessy, and Eudora B. Shaughnessy Van Horn, upon the appeal, argue that the findings do not show that the mortgage was executed by them personally and not by their attorney in fact, and that the evidence does not show that it was for their own benefit exclusively. The evidence is not here, and we are unable to say what it proves. It may be that they expressly requested the plaintiff to loan the money to M. Shaughnessy on the giving of the mortgage, and, in the absence of anything to the contrary, this court will presume that the evidence so showed. And if the money was loaned by the plaintiff to Shaughnessy, and Shaughnessy was to pay the same over to the defendants and failed to do so, it was a matter of defense, and should have been pleaded and some evidence presented to this court upon which such question could have been determined.

[2] Objection is also urged against the form of the decree. It is claimed that the same is against an estate in the property described in the mortgage, and that the decree limits the period of redemption to six months. We have carefully examined the decree in this case and find nothing in the decree which justifies such a contention. The first part of the decree is to the effect "that the plaintiff do have and recover from the defendant M. Shaughnessy the sum of \$3,373," with certain interest and attorney's fees. This part of the decree is against M. Shaughnessy, personally. It then further provides: "That the mortgage set forth in the complaint in this action and described and referred to in the findings of fact herein be and the same is declared to be a lien upon the property therein described."

The decree, in so far as the foreclosure of the mortgage and the interest in the property included in said mortgage, is somewhat indefinite and uncertain, and should be modified, and the decree declare "that the mortgage set forth in the complaint and referred to in the findings of fact is a lien upon whatever interests the defendants personally had in the property described in the mortgage and complaint, to wit, the Monarch Lode No. 73, Survey No. 37, Bay State Lode No. 74, Survey No. 38, Bon Ton Lode No. 75, Survey No. 39, and Mountain Boy Lode No. 76, Survey No. 40; and that the interests of said defendants personally in said property be sold under said decree to pay the amount of said judgment."

It is stipulated that since the commencement of this case M. Shaughnessy died, and that Fred Brown has been appointed and qualified and is acting as administrator of the estate of M. Shaughnessy. It is therefore ordered that said Fred Brown, administrator of the estate of M. Shaughnessy, shall be substituted as a party to the action and as

a party to the decree in place of M. Shaughnessy.

It is also stipulated and agreed between the parties that T. H. Monohan has been appointed administrator with the will annexed of the estate of Eudora Shaughnessy. It is therefore ordered and directed that T. H. Monohan, administrator under the will of the estate of Eudora Shaughnessy, be substituted instead of M. Shaughnessy as executor and trustee under the will of Eudora Shaughnessy, deceased.

It is also stipulated that Walter D. Shaughnessy has died since this action was commenced, and that Philip S. Shaughnessy and Mary D. Shaughnessy have been appointed administrators of the estate of Walter D. Shaughnessy. It is therefore ordered and directed that Philip S. Shaughnessy and Mary D. Shaughnessy, administrators of the estate of Walter D. Shaughnessy, be substituted as defendants and as parties to said decree in place of Walter D. Shaughnessy.

It is therefore ordered that the judgment be modified as indicated in this opinion. The trial judge is directed to enter a modified decree in accordance with this opinion, and the parties shall be stated as above indicated in this opinion. Costs awarded to appellants.

AILSHIE and SULLIVAN, JJ., concur.

(23 Idaho, 63)

DEMENT v. CITY OF CALDWELL.

(Supreme Court of Idaho. May 31, 1912.
Rehearing Denied June 28, 1912.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 293*)—SEWER ORDINANCE—SUFFICIENCY.

Where a city ordinance that declares the intention of the city council to organize a sewer district and to construct a sewer system provides as follows: "The character of the proposed lateral sewer system shall be that of gravity according to the plans and specifications now in the office of the city engineer of the city of Caldwell, Idaho"—held a sufficient compliance with the provisions of subdivision 3 of section 2353, Rev. Codes, which require that the ordinance of intention shall state "the general character of the proposed sewerage system and sewerage disposal works," and that the reference in the ordinance to the plans and specifications is sufficient to give notice to all parties interested of the character of the proposed system.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 773-775; Dec. Dig. § 293.*]

2. MUNICIPAL CORPORATIONS (§ 502*)—SEWER SYSTEM—PLANS—EVIDENCE.

Under the evidence in this case, held that the plans and specifications of said sewer system had been properly prepared and were on file in the office of the city engineer at the time fixed for the hearing of protests against the organization of such district, and that the engineer who prepared said plans and specifications and superintended the construction of said system was at least a de facto city en-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

gineer and performed the duties of city engineer.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1174; Dec. Dig. § 502.*]

3. MUNICIPAL CORPORATIONS (§ 502*)—SEWER ASSESSMENTS—PLANS AND SPECIFICATIONS—EVIDENCE.

The evidence held sufficient to sustain the findings of the court that proper estimates, plans, and specifications were made.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1174; Dec. Dig. § 502.*]

4. EVIDENCE (§ 83*)—OFFICIAL ACTS—PRESUMPTIONS.

The presumption is that the officers of a city act according to law in matters pertaining to their office, until the contrary is shown.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. § 83.*]

5. MUNICIPAL CORPORATIONS (§ 293*)—CONSTRUCTION OF SEWER—GROSS ESTIMATE.

A gross estimate of the cost of the construction of a sewer system inserted in the ordinance of intention is sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 773-775; Dec. Dig. § 293.*]

6. MUNICIPAL CORPORATIONS (§ 502*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—BURDEN OF PROOF.

The burden of proof is on the party who attacks an assessment, and it will be presumed, in the absence of evidence to the contrary, that the official acts connected therewith were performed regularly and in substantial compliance with the provisions of the statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1174; Dec. Dig. § 502.*]

7. MUNICIPAL CORPORATIONS (§ 311*)—PUBLIC IMPROVEMENTS—SEWER ORDINANCE—AMENDMENT.

Where it is ascertained that under the provisions of an ordinance proper connection cannot be made by lot owners with the sewer system, such ordinance may be amended or changed so as to provide a reasonable method for such connection.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 823, 825; Dec. Dig. § 311.*]

8. MUNICIPAL CORPORATIONS (§ 289*)—SINGLE ORDINANCE—SEPARATE IMPROVEMENTS.

A single ordinance may provide for more than one improvement, and a single sewer district may consist of two noncontiguous tracts of land, and, as it does not appear from the record that appellant was injured by having these tracts included in one sewer district, he has no cause of complaint.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 762, 765; Dec. Dig. § 289.*]

9. MUNICIPAL CORPORATIONS (§ 510*)—PUBLIC IMPROVEMENTS—CONTRACTS—APPROVAL.

Section 2354, Rev. Codes, provides, among other things, that, in event that the assessment or assessment rolls therein provided for shall not be confirmed, then the contract for the construction of sewers shall be of no force or effect. Under that provision the contractor took his chances on proceeding to construct sewers prior to the confirmation of such assessment; but, when the council did

confirm the assessment, such contract was in full force and effect.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1180; Dec. Dig. § 510.*]

Appeal from District Court, Canyon County; Ed L. Bryan, Judge.

Proceedings by J. A. Dement against the City of Caldwell to prevent confirmation of an assessment. Judgment for the City, and plaintiff appeals. Affirmed.

Smith & Scatterday and Rice, Thompson & Buckner, for appellant. H. E. Wallace and J. J. Plowhead, for respondent.

SULLIVAN, J. This is an appeal from a judgment of the district court confirming the action of the city council of the city of Caldwell in confirming the assessment of local lateral sewerage improvement district No. 4 of said city. It involves the legal organization of said district, the construction of a sewer system in said district, the assessment of benefits in said district, and the confirmation of such assessments by the city council. Said city undertook the construction of said sewer system under the provisions of chapter 14, tit. 13, of the Political Code, and particularly under the provisions of section 2353, Rev. Codes. The work was carried on to completion and the system turned over to the city as provided by law. An assessment roll was prepared and submitted to the council and approved by it on the 31st of October, 1910. The action of the council in that regard was appealed from to the district court in and for Canyon county, and the district court confirmed the action of the council in that regard, with the exception of a few minor matters, and this appeal is from the judgment of the district court.

[1] (1) It is first contended that the ordinance of intention passed by said city council on June 13, 1910, does not sufficiently describe the general character of the proposed improvement as required by paragraph 3 of section 2353, Rev. Codes. Section 3 of said ordinance is as follows: "The character of the proposed lateral sewer system shall be that of gravity according to the plans and specifications now in the office of the city engineer of the city of Caldwell, Idaho." This court held, in *Williams v. City of Caldwell*, 19 Idaho, 514, 114 Pac. 519, that, where a city ordinance declaring the intention of the council to organize a sewer district and construct a sewer system states that "the character of the proposed lateral system shall be that of gravity and according to the plans and specifications now on file in the office of the city engineer," it is a sufficient compliance with the terms of subdivision 3 of said section 2353, Rev. Codes, which requires that the ordinance of intention shall state the "general character of the proposed sewerage system and sewerage disposal

works"; that the reference to the plans and specifications is sufficient to give notice to all parties interested in the general character of the proposed works. The decision in that case virtually disposes of the question here under consideration. Under the provisions of subdivision 3 of section 2353, a detailed statement of the plans and specifications and the material out of which the system is to be constructed need not be inserted in the ordinance, as any one desiring information in regard thereto may ascertain it from the plans and specifications, if they have notice where those are kept on file.

[2] (2) It is contended that the city engineer did not draw any plans or specifications of said sewer system; that he never resigned as city engineer, and most of the duties of that office were performed by one Richardson, who was not officially appointed, who took no oath of office, and who gave no bond.

It appears from the record that the city engineer, Williams, appointed one Richardson deputy city engineer. It also appears that said Williams himself made the preliminary estimate for the bids for the construction of said sewer; that said Richardson performed the duties of city engineer during the construction of the sewer, at the request of the mayor; that he acted as city engineer during that period of time and drew the salary of the engineer for said services, the city engineer being away from the city and engaged in other work. Under the facts of this case, it makes no difference whether the minutes of the city council show that Richardson was duly appointed as deputy city engineer or not. The record shows that Richardson acted as and was considered city engineer by the city council and mayor. In any event, he was a de facto engineer and performed the duties of the city engineer. There is no charge of any fraud or anything of that kind in connection with this matter. 28 Cyc. 420; 35 Cyc. 1522; Abbott's Municipal Corp. §§ 656, 659. Under the provisions of section 2354 the sewer committee has authority to appoint an engineer.

[3] (3) It is also contended by counsel for appellant that, because the city engineer did not deliver any plans and specifications to his successor, it must necessarily follow that no plans or specifications were ever in existence. We cannot agree with that contention, as the records show that such plans and specifications were made and on file in the city engineer's office, at least as early as June 27, 1910, at the time fixed for hearing protests against the organization of such district and the proposed improvements and works to be constructed. At that hearing no protests whatever were filed, and the protestants herein do not claim that they have been misled or damaged in any way by reason of no plans or specifications being on file in the city engineer's office, nor do they

produce any proof whatever showing that such plans and specifications were not on file in said office at said date. The appellant introduced evidence to show that City Engineer Williams did not turn over to his successor the plans and specifications used in the construction of said sewerage system, but that is not proof that no such plans and specifications were not on file in his office at the date noticed for the hearing of protests against the organization of such district.

[4] (4) It is next contended that no estimate of the cost of said system was made by the city engineer as was required by section 2201, Rev. Codes. There is no evidence in the record to show that the city engineer did not make the detailed estimate required by the provisions of that section. Williams, the city engineer, testified that he believed that he made the preliminary estimates for the bids before he turned the matter over to Richardson, and it appears from the record that Richardson filled the blank in the ordinance, when requested to do so, and placed the amount at \$10,000. We think the evidence is sufficient to sustain the finding of the court that such estimates, plans, and specifications were made. It is presumed that the officers of the city acted according to law in all matters until the contrary is shown, and it is incumbent upon the appellant to show that no estimate was made, and that the city council acted in the matter without the necessary details, which he failed to do.

[5] The fourth section of ordinance No. 173, approved by the mayor on June 14, 1910, is as follows: "The estimated cost of said improvement district is the sum of \$10,000." That ordinance was published in the official paper, and the property owners were thus given notice of the estimated cost of the sewer system. It was not necessary to place an estimate in detail in said ordinance. A gross estimate of the cost was sufficient. *Platt v. City of Payette*, 19 Idaho, 470, 114 Pac. 25. However, as before stated, no protest whatever was filed against the organization of said district, and we think the evidence sufficiently shows the plans and specifications for said improvements were on file in the engineer's office on the date noticed for the hearing of said protest, to wit, June 27, 1910.

[6] The burden of proof is on the party who attacks an assessment. It will be presumed, in the absence of evidence to the contrary, that official acts were performed regularly and in substantial compliance with the statute. *Taxation by Assessment*, by Page & Jones, § 1466; 28 Cyc. 1167, 1168.

[7] (5) It is next contended that connections with said system cannot be made in compliance with section 14 of ordinance No. 180. Said section requires sewer pipes in the yards to be of the best quality of vitrified pipes with cement joints, and "they

shall not be laid nearer than two feet on the exterior of the wall nor less than two feet below the surface of the ground, nor will they be allowed in bad or made ground. In all such cases sewers beneath the ground shall be of cast iron pipes." That provision is construed by counsel for the city to mean that, if it is impossible to secure drainage by placing the pipe two feet under the ground, then cast-iron pipe must be used, and not vitrified pipe. That construction may be correct, but it seems to us a little strained. But it appears that, as some controversy had arisen over the proper construction of that ordinance, the council amended said section of said ordinance by enacting ordinance No. 192. That ordinance provides, among other things, that where a sewer is less than two feet below the surface of the ground, cast-iron pipe placed to as great a depth as possible in the ground to insure sufficient drainage shall be used in the yards. Under the provisions of that ordinance, connection can be made by the lot owner with the sewer in said district. The police power authorizing the city to enact ordinances requiring a lot owner to connect with the sewer must provide a reasonable method for such connection, and it could not force a person to connect with a sewer in a way that would not drain the sewage from the lot or in a way that would not accomplish the purpose for which the sewer was constructed. If a lot owner receives no benefit, he certainly cannot be assessed for a benefit.

It is suggested by counsel that section 119 of ordinance No. 180 does not admit of all persons making connection with the sewer, for the reason that one-fourth of an inch grade per foot is too great. It appears from the evidence that that refers to pipes in buildings, and not to pipes laid from the building to the sewer, and that the latter pipes may have a grade of one-fourth inch to ten feet.

[8] (6) It is next contended that the land embraced in said sewer district is composed of two areas which are not contiguous, and that the sewerage system of each of said areas has a separate and distinct outlet. The record shows that said tracts have one and the same outlet, and, in order to give any force and effect to this objection, it would be necessary for the appellant to show that he was in some manner injured by the creation of such district in the manner in which it was created. Counsel seem to assume that the mere formation of this district in the way it was formed precludes the sewer committee from apportioning the assessments equitably; but there is nothing in the record to show that the assessments were inequitably made, or not in accordance with the benefits received. The sewer committee evidently concluded that the benefits were about equal and that each property owner should be assessed accordingly. There

is nothing in the record to show that appellant was prejudiced by forming the district in the way it was organized. There is no doubt but that a single ordinance may provide for more than one improvement. See Abbott's Munic. Corp. 1, page 868, note, and page 1107, note. It is stated in Taxation by Assessment, by Page & Jones, § 572, that if to add together the cost of different sewers laid on different streets and to apportion the aggregate cost upon the property fronting on any of such sewers results in assessment which is not materially in excess of the benefits conferred upon any tract of land, such assessment is not invalid. The similarity of the improvement proposed to be made and the situation of the property to be assessed with respect to it affords a more satisfactory test as to whether the two tracts might be embraced in a common scheme as one improvement than their actual and physical contact with each other. Village of Hinsdale v. Shannon, 182 Ill. 312, 55 N. E. 327. In the case at bar the improvements to be made in each tract were of the same kind and character, and there is nothing to show that there was any difference in the physical features of the country or in the soil to be excavated for the laying of the pipes. It does not appear from the record that the appellant was injured by having these tracts included in one ordinance, and for that reason he cannot recover on that ground.

(7) As to the condition of the sewer: It is contended that the sewer pipes were not properly laid and are not of sufficient depth in the ground, and that they leak, and offensive odors arise from such leakage. There is a substantial conflict in the evidence upon these questions. Several experts in laying sewers testified as to the sufficiency of said sewers for the purposes intended. It appears that there has been considerable feeling over this matter, and that at two different times at a certain point the sewer had been stopped up. At one time a gunny sack filled with straw or hay was thrust into the eight-inch sewer pipe, and at another, a piece of oilcloth, large enough to choke the sewer, had been thrust into it, and that at those times the cement in some of the joints of the sewer pipe had been broken and certain ground flooded. This was not caused by the defective construction of the sewer system. The evidence shows that the sewer pipes came to the surface of the ground in places. But there is evidence in the record to show that in such places the ground was low and on a proper grade would have to be filled, and that the pipes in such places had been covered with loose dirt, as required by the contract. We think it sufficiently appears from the evidence that, when the lots along such pipe are graded to the height contemplated, there will be no difficulty along that line.

The great weight of the testimony shows that the contract price for the construction

of the sewer was reasonable in amount. No fraud is alleged and no fraud is shown, and it is not for this court to say that the contract price was too high. See *Bellevue Water Co. v. City of Bellevue*, 3 Idaho (Hasb.) 739, 35 Pac. 693.

It appears from the testimony that two members of the board of county commissioners of Canyon county and also members of the board of health in that county made an examination of said sewer, and they testified that they found it in good shape so far as its construction was concerned, and in their opinion it was a benefit to all of the property in said sewer district.

[9] Appellant filed his protest against the confirmation of the assessment on October 22, 1910. The sewer system at that time was nearly completed, and it appears that the first intimation said council had that any person was dissatisfied was when said protest was filed. Appellant knew what the estimated cost of construction of said sewer system was, and he certainly knew that he would have to pay his proportionate part of it if he had lots in that district. If the contract price was within the estimated cost, appellant cannot now be heard to complain that the total cost of the sewer is too high. He ought to have appeared on June 27, 1910, and entered his protest at that time against the estimated cost, if he thought it excessive. On October 22, 1910, he filed his protest, as above stated, against the confirmation of the assessment, and it is contended by counsel for appellant that the provisions of section 2354, Rev. Codes, clearly point out to the contractor how and when he may safely proceed with his work. The provisions referred to are as follows: "No contract herein provided for shall go into effect, in so far as the committee or city, town or village are concerned, to be binding upon it or them, until the assessment herein provided for shall be confirmed; and in the event the assessment or the assessment rolls herein provided for shall not be confirmed, then such contracts shall be of no further force or effect." Under those provisions the contractor takes his chance if he proceeds with his contract before the assessment is confirmed, and, if it is not confirmed, then the contract is of no further force or effect. But in the case at bar, the assessment was confirmed, and therefore said contract has force and effect. If the contractor wanted to take his chances and not await such confirmation, he, of course, could proceed. It was not absolutely necessary for him to await the action of the council in that regard. The fact that he did proceed would not of itself render the contract of no force or effect, and, when the council confirmed the assessment, the contract was in full force and effect.

Upon the material questions raised on this appeal there is a substantial conflict in the

evidence, and there is substantial evidence to support the findings of fact and judgment entered by the trial court.

The judgment must therefore be affirmed, and it is so ordered, with costs of this appeal in favor of the respondent city.

STEWART, C. J., and AILSHIE, J., concur.

HILL et al. v. TWIN FALLS SALMON RIVER LAND & WATER CO.

(Supreme Court of Idaho. July 6, 1912.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 35*)—NATURE OF RIGHT—STATUTORY PROVISIONS.

Under the provisions of section 5110, Rev. Codes, every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair, of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct, to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 40; Dec. Dig. § 35.*]

2. MECHANICS' LIENS (§ 96*)—RIGHT TO LIEN — CONSENT OF OWNER — AUTHORITY OF AGENT.

Under the provisions of section 5110, every contractor, subcontractor, architect, builder, or any person having charge of any mining claim, or of the construction, alteration, or repair, either in whole or in part, of any other building or other improvement shall be held to be the agent of the owner for the purpose of the mechanic's lien law.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 128; Dec. Dig. § 96.*]

3. MECHANICS' LIENS (§ 95*)—PERSONS ENTITLED—SUBCONTRACTOR.

Under the mechanic's lien law of the state it was the intent of the Legislature to grant an absolute lien direct upon the property to the person who performs labor upon or furnishes materials to be used in the building, structure, or other improvement, without reference to whether such person performing such labor or furnishing such material is an original contractor or a subcontractor or a laborer or a materialman.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 127; Dec. Dig. § 95.*]

4. MECHANICS' LIENS (§ 96*)—RIGHT TO LIEN — CONSENT OF OWNER — AUTHORITY OF AGENT.

Where T. F. S. R. L. & W. Co. is engaged in the constructing of a dam for the purpose of creating a reservoir for irrigation purposes, and such company employs H. to haul and transport cement from a railroad station to the place of use to be used in the construction of said dam by the company, and H. sublets a contract to H. & S. to do such hauling, H. is the agent of the land and water company, the owner and builder of the dam, under the provisions of section 5110, Rev. Codes, in relation to mechanics' liens.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 128; Dec. Dig. § 96.*]

5. MECHANICS' LIENS (§ 50*)—RIGHT TO LIEN — CONSENT OF OWNER — AUTHORITY OF AGENT.

Where H. & S. haul and transport cement from a railroad station to the place where T. F. S. R. L. & W. Co. are constructing a dam, and such cement is accepted and used by the company in the construction of said dam, and H. & S. are employed to haul and transport said cement by H., a contractor employed by the company, and upon the delivery of said cement the same is used in the construction of said dam and becomes a part of the improvement and enhances the value of the company's property, H. & S. are entitled, upon complying with the statute, to a lien upon said dam for labor and services rendered by them in hauling and transporting said cement.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 47; Dec. Dig. § 50.*]

Appeal from District Court, Twin Falls County; C. O. Stockslager, Judge.

Action by D. L. Hill and another against the Twin Falls Salmon River Land & Water Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. H. Hays and P. B. Carter, both of Boise City, for appellant. Longley & Hazel, of Twin Falls, for respondents.

STEWART, C. J. This is an action brought for the purpose of foreclosing a mechanic's lien upon the dam, works of irrigation, and lands necessarily used in connection therewith, and known as the Salmon River Dam, situated in Twin Falls county, Idaho. While the respondents are joined as plaintiffs in said action, the action is individual, and the parties are joined under the provision of section 5121, Rev. Codes, which provides: "Any number of persons claiming liens against the same property may join in the same action. * * *" In considering the case the plaintiffs will be recognized as separate in their respective rights. The material facts in the case are stipulated, although there is some oral evidence; but there is no substantial conflict upon any fact which is controlling in determining the rights of the respective parties to the action. The only question to be determined upon this appeal is whether, under the facts of the case as shown by the record, the respondents are entitled to a lien upon the property against which the lien is sought to be foreclosed. The cause was tried to the court, and findings of fact made and judgment rendered sustaining respondents' claims of lien and ordering foreclosure thereof. A motion for a new trial was made and overruled, and this appeal is from the judgment and from the order overruling the motion for a new trial.

The facts as shown by the evidence and found by the trial court are as follows: The defendant, the Twin Falls Salmon River Land & Water Company, is the owner of the Salmon River Dam and the land upon which the same is situated, together with certain abutting land necessary for its use. A con-

tract was made between the Twin Falls Salmon River Land & Water Company and one J. T. Hughes by which the company employed said Hughes to haul cement for use in said dam from the railroad station at Rogerson to a point close to the dam, a distance of about seven miles, with the intention of using said cement in the construction of a dam, and such cement was thereafter so used in the construction of said dam and on the property of the defendant company. Hughes employed the plaintiffs to haul a portion of said cement, agreeing to pay therefor the price of \$2.25 per ton, which has not been paid by either the defendant or Hughes. The cement hauled and delivered by the plaintiffs was delivered at a place for storage designated by the defendant, and a large part at the mixer of the defendant and afterwards put to use in the dam. In hauling the cement the plaintiffs used their own teams and loaded and unloaded the same and performed all the work and labor incident to the transportation of said cement from the town of Rogerson to the works of the defendant, and the defendant knew that the plaintiffs were engaged in hauling the cement and used the same and have received the benefit of the work and labor performed by the plaintiffs.

Upon these facts the court concluded as a matter of law that J. T. Hughes, in employing the plaintiffs, was acting as the agent of the defendant company under the mechanic's lien laws of the state, and that the respondents were entitled to a lien upon the dam and adjacent property, particularly describing the same, where the improvements were made.

It is the contention of the appellant on this appeal that, under the facts as found by the trial court, the respondents are not entitled to a lien upon the dam and property of the defendant; that Hughes, the employer of the respondents, was engaged as a carrier to haul freight from Rogerson to the dam, a distance of seven miles, and in doing so did nothing with the building of the dam and was in no way performing labor upon it; that he did not furnish any material for its construction; and that the employment of the respondents had no relation whatever except that of carrier. The appellant also contends that whatever right the respondents had in the way of a lien was that conferred by the provisions of section 3446 of the Rev. Codes, as follows: "Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof, by labor, or skill, employed for the protection, improvement, safe-keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due him from the owner, for such service. * * *" And that the right and privilege to a lien for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

labor performed by the respondents depend entirely upon the provisions of this section of the Revised Codes, and that the respondents show no rights accruing to them under the provisions of section 5110 of the Rev. Codes.

It is apparent, however, that the respondents entirely surrendered and waived their rights to a lien, if such rights existed, under the provisions of section 3446 of the Rev. Codes, by reason of the fact that when the cement was delivered to the appellant, and the possession was surrendered to the appellant, the right to a lien ceased, as the right of lien conferred by this section depends wholly upon the possession of the property. The rights, therefore, of the respondents under the facts in this case depend wholly upon section 5110.

[1, 2] Section 5110 of the Rev. Codes reads in part as follows: "Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of, any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter."

Under this statute the Legislature evidently intended to grant the right to claim a lien, to any person who contributes labor or material for the construction, alteration, or repair of a building or structure upon real property.

[3] It will also be observed from the language of this statute that it was clearly the intent of the Legislature to grant an absolute lien direct upon the property, to the person who performs labor upon, or furnishes material to be used in a building, structure, or other improvement without reference to whether such person performing such labor, or furnishing material, is an original contractor or a subcontractor, or a laborer or a materialman, without reference to whether there is anything due the original contractor from the person or corporation constructing such building or other improvement. Of course, this right is limited by requiring the person claiming the lien to file the claim within the time fixed by the statute, and otherwise complying with the law; and in construing section 5110 the distinction above referred to should not be overlooked, when such statute is compared with the statutes of other states and the construc-

tion put upon the statutes of other states by the courts of the respective states.

In construing this statute we should also have in mind section 5150, Rev. Codes, which provides: "This title establishes the law of this state, respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect their object."

Guided by this rule of construction, and the express language of section 5110, we think the only reasonable and rational conclusion that can be drawn from this statute is that it was the intent of the Legislature to provide a lien for every person who performs labor upon any building or other structure for the work or labor done or furnished at the instance of the owner of the building or his agent.

[4] We think it is also provided by this statute that a contractor, such as Hughes is shown to be by the evidence in this case, and as found by the trial court, was the agent of the appellant, the owner and builder of the dam, in employing the respondents in the labor they performed in hauling the cement from the railroad station to the place of use. *Valley Lumber Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24; *Shaw v. Johnston*, 17 Idaho, 676, 107 Pac. 399.

[5] This leaves, as the only question for solution, whether the labor and service of the respondents was intended to be used, and was actually so used, in the construction of the dam, and was effectual in the construction thereof, and became a part of the structure, to the extent of changing the shape and character of the structure in order to make it a complete dam. If such service was of such a character, then there can be no question but that the respondents performed labor upon the structure to be completed as a dam. We think there can be no question but that the performance of labor upon irrigation works such as a dam constructed for the purpose of creating a reservoir is subject to a lien. *Creer v. Cache Valley Canal Co.*, 4 Idaho, 280, 38 Pac. 653, 95 Am. St. Rep. 63; *Bennett v. Twin Falls Land & Water Co.*, 14 Idaho, 5, 93 Pac. 789.

In the case of *McClain v. Hutton*, 181 Cal. 132, 61 Pac. 273, 68 Pac. 182, 622, the Supreme Court of California, in discussing a statute of that state which is practically the same as the statute of this state, says: "The claim of Trower was for the hauling of materials used in the construction of the building; and it is objected, on the supposed authority of *Adams v. Burbank*, 103 Cal. 646 [37 Pac. 640], that he was not entitled to a lien for labor of this kind. The case cited, however, has no application. There the claimant was employed by the brick men to haul bricks for them, and he had no connection with the contractor, who owed him no liability. His position was not different from that of the laborers who made the

trick.' But the claimant here was directly employed by Waggoner, as the agent of Mrs. Hutton; and his labor was performed on the building in the same sense as that of the men who lifted the brick from the ground to the upper parts of the building. *Malone v. Big Flat Gravel Min. Co.*, 78 Cal. 578 [18 Pac. 772]."

In the case of *Wilson v. Nugent*, 125 Cal. 280, 57 Pac. 1008, the Supreme Court of California also considered this question and held: "The proof did not show that Farnsworth & Ruggles had any lien. They did not perform labor upon or furnish material to be used on the building. Their services consisted of hauling slate to the building and delivering it to the character. This did not bring them within the terms of the statute. *Adams v. Burbank*, 103 Cal. 651 [37 Pac. 640]."

It will be seen by this opinion that the court seems to base its opinion upon the same principle recognized in *Adams v. Burbank*, 103 Cal. 651, 37 Pac. 640, that a lien did not lie for hauling material to a building to be used in such building, where the services were performed upon contract with or under the direction of a contractor. The reasoning, however, of the court in those two cases, has no application under the statute of this state, for the reason that the statute of this state in express terms provides: "And every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter." Under the facts of this case, Hughes being the contractor, and Hughes having employed the respondents to perform the work, if such work falls within the provision of the statute granting a lien, then Hughes was the agent of the company under the statute; and this is clearly held by the Supreme Court of California in the case of *McCain v. Hutton*, supra.

In the case of *Kehoe v. Hansen*, 8 S. D. 198, 65 N. W. 1075, 59 Am. St. Rep. 759, the Supreme Court of South Dakota, in discussing this question, says: "Ordinarily, the contractor for the material delivers the same, and includes the expense of hauling in the price of the material. No objection, so far as we are aware, has ever been made to thus including the expense of hauling in the price of the material. If it may be so included, and the lien made to cover the same, why may not the cartman make a separate contract for hauling, and acquire a valid lien therefor? We can discover no valid reason why, if the contract to haul the lumber is made directly by the owner with the cartman, he may not enforce a lien therefor. The hauling of the material, in many instances, constitutes a large item in the ex-

pense of the building, especially where the same is built of stone or brick. Labor, therefore, in getting the material together upon the ground, ready for the structure, is fairly within the meaning of our mechanic's lien law of work upon the building—work that enters into, and constitutes labor upon, the building."

In the latter case the court cites with approval a very interesting discussion of this question from the Supreme Court of Pennsylvania, in *Hill v. Newman*, 38 Pac. 152, 80 Am. Dec. 473, as follows: "The law is that every building may be subjected to a lien for the payment of all debts contracted for work done and material furnished for or about its erection, and this may very fairly be taken to include the work of hauling the materials to the place of building. We think we should have to unduly strain the language in order to exclude it. It is work about the erection of the house, and is, of course, charged for by the materialman when he has the lumber, stone, brick, sand, or lime delivered by his own carters. The hauling away of the clay dug out of the cellar and foundation is always considered proper work for him; and we know not why the carter may not be a proper man to claim it, if he did the work at the request of the owner or the contractor, and not as a mere hireling under the contractor, or under a subcontractor."

We think there can be no question but that the rule stated by the Supreme Courts of South Dakota and Pennsylvania is a correct and just application of the correct rule to apply and a fair construction of the statute of this state, and that the facts shown in this case clearly bring the rights of the respondents within the provisions of this statute. The facts show clearly that Hughes was the agent of the appellant company; that he employed the respondents, as such agent and contractor, to carry and deliver cement to the place of use, and for the purpose of being used in the construction of the dam and improvements constructed by the appellant; that the appellant company knew that the respondents were so employed; that the respondents were carrying and delivering such cement for the purpose of being used in such constructive work; and that the labor and expense of the services thus rendered by the respondents entered into and became a part of the structure, and enhanced the value of appellant's property, in the same way as the labor of any other person performed directly upon said structure. *Naylor & Norlin v. Lewiston, etc., Ry. Co.*, 14 Idaho, 722, 95 Pac. 827.

In the latter case, in discussing the right to a lien for labor upon tools used in the construction of an improvement, this court said: "It is argued, however, upon the part of the appellants, that the plaintiffs were not entitled to a lien for \$150, the amount

claimed for the use of tools and appliances. It would seem that, if a person furnishes tools which are used and consumed in the construction of work, such person would be entitled to a lien for the same reason that gives a lien for the use and consumption of material. The use and consumption of tools ought to give the same right as the use and consumption of material. Under the contract, the plaintiffs were to have a reasonable compensation for the use of tools, and the plaintiffs admitted and agreed that the value of the use was \$150. The item of \$150 was a proper lienable right. Included in the claim of lien, also, was compensation for superintending the work. Counsel argue that no lien should be allowed for this labor. The statute, however, clearly contemplates a lien for labor performed in or upon improvements. The labor of a superintendent in the construction of works becomes a part of the improvement to the same extent as the labor of any other individual, and establishes his right to a lien the same as that of any other person who performs labor upon or in said work. *Thompson v. Wise Boy Min., etc., Co.*, 9 Idaho, 363, 74 Pac. 958."

So, in the present case the labor and services of the respondents became a part of the construction of the dam to the same extent as the labor of any other individuals and gave the respondents the same right to a lien. The respondents hauled the cement to the place of use for the purpose of use, and it was accepted by the appellant and so used in the construction and as a part of the construction the same as any other material or any other labor contributing to the erection and improvement of said property. It is a well-recognized principle that a materialman who makes a contract for the delivery of material to be used, and which is actually used, in the construction of an improvement, may include in a claim of lien not only the value of the material, but the cost of delivery to the place of use, and, this being the general rule, there can be no reason why, when the labor is done and the material furnished by different persons, each person should not be entitled to a lien.

The facts of this case are clearly distinguishable from that class of cases where the hauling or the labor was performed without reference to the place of use of the material hauled or transferred. As an illustration, the railroad company which hauled the cement from Salt Lake to Rogerson had no knowledge where the cement was to be used or that it was to be used at a particular place or for a specific purpose. The cement was delivered by the railroad company at its own station or storage room upon its own property and not to the users of the material. It follows that it would not be entitled to a lien. But the respondents

knew where the cement was to be used, and their labors were in delivering it for that specific use and at the place and for the purpose for which the services were rendered. There certainly can be no reason why any class or kind of labor, and it matters not what it is, which is intended to aid and enhance the construction of any particular improvement, and is received and used in such improvement, should not be and is not entitled to a lien upon such improved property under the statute of this state. The Legislature clearly intended as the essential element and purpose of the statute to give to the person who performs labor, or the person who furnishes material which is intended to, and does in fact, enter into the construction and development of a building or other improvement, as described in the statute, a lien upon the improvement, and convenient ground, for the purpose of securing payment for such labor or material.

The judgment in this case is affirmed. Costs awarded to respondents.

AILSHIE and SULLIVAN, JJ., concur

MARSHALL v. NIAGARA SPRINGS ORCHARD CO., Limited.

(Supreme Court of Idaho. June 8, 1912.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 12*)—APPROPRIATION OF WATER RIGHTS—APPLICATION TO STATE ENGINEER—REQUISITES.

Under the provisions of section 3253, Rev. Codes, an application to the state engineer for permit to appropriate water is required to state facts which can only be secured by entrance to the place where the appropriation is made, and a survey of the premises and surroundings at the point of diversion and place of improvement, and also a survey of the realty to be taken for dams and ditches to be used in appropriating the water to a beneficial use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 5; Dec. Dig. § 12.*]

2. WATERS AND WATER COURSES (§ 12*)—APPROPRIATION OF WATER RIGHTS—APPLICATION TO STATE ENGINEER—REQUISITES.

An application for a permit to appropriate water under the provisions of section 3253 makes it necessary for a person intending to make an appropriation in accordance with the statute to go upon the ground immediately surrounding the point at which the diversion from the natural channel is to be made, for the purpose of securing and preparing data and plans and maps required by such application.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 5; Dec. Dig. § 12.*]

3. WATERS AND WATER COURSES (§ 12*)—APPROPRIATION OF WATER RIGHTS—PERMIT—EFFECT.

A permit issued by the state engineer to appropriate water from the public waters of the state is the consent given by the state that the applicant may proceed under the law and make an appropriation of the public

waters. It is the initiation of the appropriation, but of itself is not an appropriation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 5; Dec. Dig. § 12.*]

4. EMINENT DOMAIN (§ 69*)—APPROPRIATION OF WATER RIGHTS—RIGHT TO ENTER LAND.

The entry upon private property for the purpose of investigation, inspection, and the making of surveys, plans, and specifications for the purpose of making application for a permit does not necessarily result in the permanent taking of the real property of the owner, but it necessitates the entry upon such land, and the right to enter upon such land must be secured either by agreement of the parties or by condemnation proceedings, and, without such remedy being pursued, the entry, if made, is a trespass.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 171-179; Dec. Dig. § 69.*]

5. EMINENT DOMAIN (§ 69*)—RIGHT TO ENTER PROPERTY—APPROPRIATION OF WATER RIGHTS.

The Constitution and laws of this state specifically recognize the right to divert and appropriate the unappropriated waters of any natural stream to a beneficial use, and that such right shall never be denied; but this does not mean that a person is given the right to go upon private property of another for the purpose of making an appropriation, without the license or consent of the owner, or before such right is acquired by proceedings for condemnation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 171-179; Dec. Dig. § 69.*]

6. WATERS AND WATER COURSES (§ 133*)—APPROPRIATION OF WATER RIGHTS—RIGHTS OF OWNER OF LAND.

Where N. S. O. Co. owns all the lands on both sides of the channel of water from the place the water comes from the rimrock until the channel ends and the water empties into another stream, it is the right of N. S. O. Co., by reason of its ownership of the land, to have exclusive possession of said land, and such owner is protected against any right that is attempted to be acquired by trespass on such land in the way of an attempt to appropriate the waters running across said land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 146; Dec. Dig. § 133.*]

Appeal from District Court, Lincoln County; Edward A. Walters, Judge.

Action by Frank Marshall against the Niagara Springs Orchard Company, Limited. From a judgment for plaintiff, defendant appeals. Reversed.

Richards & Haga, of Boise, for appellant. Bowen, Porter & Stockslager, of Twin Falls, for respondent.

STEWART, C. J. Frank Marshall, the respondent, brought this action in the district court against Winia Smalley, Henry Smalley, John R. Newton, and Samuel T. Hamilton for the purpose of condemning a right of way for a ditch and power house and other buildings required in connection therewith across the land asked therewith. The land across which such right of way is asked is described as follows: Lot 8 of section 11 and lot

1 of section 10, township 9 S., range 15 E. The defendants named in the complaint did not appear in said action, but the appellant herein, the Niagara Springs Orchard Company, Limited, applied to be made a party defendant and was permitted to do so, and filed an answer setting forth that said defendant was the owner of the property described in the complaint; the same having been transferred, to wit, by the defendants named in the complaint. The cause was tried to the court, and findings of fact, conclusions of law, and a decree were entered in favor of the plaintiff, and the trial court adjudged the condemnation of a strip of land described by metes and bounds, and a part of the property described in the complaint, and assessed the damages for the same. From such judgment this appeal was taken.

It appears from the record in this case that the title to the property described in the complaint, part of which is involved in this action, was granted by the United States, by patent, to the predecessors in interest of the appellant, January 17, 1895, and December 1, 1897, and that the title thus acquired, by proper conveyance passed to the appellant on January 9, 1911. It also appears that lot 1 of said section 10 and lot 3 of section 11 extend from the north shore or water line of Snake river to the line lying upon the lands which extend from the top of the rimrock of Snake river, and said lands include a part of highlands at the top of the rimrock and all lands lying between the rimrock and the north shore of Snake river; that the waters of Smalley Springs rise and emerge from the earth at the foot of the rimrock, and wholly and entirely are within lots 1 and 3, and no part or portion of the springs or waters or streams is outside of lots 1 and 3. It also appears that respondent made application to the state engineer for a permit to appropriate the waters flowing from Smalley Springs and the natural stream of water leading therefrom, all situated and being upon the lands described in the complaint, and that the state engineer granted such permit in accordance with the application of plaintiff and the laws of the state of Idaho relating thereto, and it was issued to him for power purposes for the purpose of creating power for lighting, heating, manufacturing, and motive power. This permit of the state engineer was dated August 30, 1909, and was granted upon a condition inserted in such permit as follows: "This is to certify that I have examined the within application for a permit to appropriate the public waters of the state of Idaho and hereby grant the same, subject to the following limitations and conditions: * * * Good and sufficient bond to be filed in the sum of one thousand dollars (\$1,000) on or before October 29, 1909." The bond thus provided for in the permit was not filed with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes, 125 P.—14

the state engineer until December 17, 1909, 49 days after the expiration of the time allowed by the permit and also by section 3254 of the Rev. Codes.

The question presented on this appeal, and upon which a reversal is asked, is: Can an appropriation of water upon private land be initiated by trespass upon private property, and is the attempted appropriation void as against the landowner whose land has been trespassed upon?

It is the contention of the appellant that the action to condemn land for a power site, as alleged in the complaint, cannot be maintained for the reason that the plaintiff has not acquired any water right upon which to base such action, for the reason that he acquired no appropriation nor initiated any legal right to appropriate, by virtue of the permit, based upon a trespass upon private land.

It is the contention of the respondent, however, that the permit issued to the respondent gave to him an inchoate right to the waters of the stream at the point described in the application and the permit, and in making such application for the permit the respondent was not a trespasser upon the land of the appellant and made no entry upon said land, but, on the contrary, the respondent was pursuing the statutory remedy prescribed, whereby he might perfect his inchoate right to the water, by condemnation proceedings.

Section 3, art. 15, of the Constitution of the state declares: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. * * *" And section 1, art. 15, provides: "The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law." From these two provisions of the Constitution of the state it would seem that the right to divert and appropriate the unappropriated waters of any natural stream to a beneficial use is granted to all persons who intend to make a beneficial use of the same, and is subject to the regulation and control of the state in the manner prescribed by law. The Legislature of this state, to carry out the power granted to the Legislature under the foregoing provisions of the Constitution, has provided (section 3240, Rev. Codes): "Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control

shall be in the state, which, in providing for its use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed. * * *"

Section 3242 provides: "The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation."

Section 3243 provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases."

[1] Section 3253, Rev. Codes, provides the procedure by a person who intends to make an appropriation under the statute for a permit to appropriate the waters of the state when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state. This section, among other things, requires that "any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, or lakes or other public waters in the state of Idaho, shall, before commencing the construction, enlargement or extension or change in the point of diversion of the ditch, canal, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the state engineer for a permit to make such appropriation." This application referred to requires the application to state, among other things: (2) The source of the water supply; (3) the nature of the proposed use; (4) the location and description of the proposed ditch, channel, or other work and the amount of water to be diverted and used; (5) the time required for the completion of construction of such works, which in no case shall exceed five years from the date of approval of the application; (6) the time required for the complete application of the water to the proposed use; that the application shall be accompanied by a plan and map in duplicate of the proposed works for the diversion and application of the water to a beneficial use, showing the character, location, and dimensions of the proposed reservoir, dams, canal, ditches, pipe lines, and all other works proposed to be used by them in the diversion of the waters and the area and location of the lands proposed to be irrigated.

It clearly appears, from the application required by this statute, that such application must state facts which can only be secured by an entrance to the place where the appropriation is made and a survey of the premises and surroundings at the point of diversion and plan of improvement, and also a survey of the realty to be taken for dams and ditches to be used in appropriating the water to a beneficial use, and especially in a case where it is necessary to construct buildings and other works necessary for the utilization of the water for power purposes. Plans and maps are required to be prepared showing the character and location and dimensions of the works and the area and location of the lands proposed to be irrigated or otherwise used.

[2] It would be impossible to comply with this provision of the statute unless the person intending to make the appropriation went upon the ground immediately surrounding the point at which the diversion from the natural channel is to be made for the purpose of securing and preparing the data and plans and maps required by this section.

[3] Under the provisions of section 3254, Rev. Codes, "the application so indorsed shall constitute a permit, and shall be returned to the applicant, and he shall be authorized, on receipt thereof, to proceed with the construction of the necessary works for the diversion of such water * * * to a beneficial use, and to perfect the proposed appropriation."

In the case of *Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 385, this court had under consideration the right acquired by a permit granted by the state engineer, under the provisions of the original act passed by the Legislature in 1903 (Sess. Laws 1903, p. 223), and in the opinion in that case says: "The permit thus provided for took the place of the posting of notice as required under the act prior to 1903, and merely gave the applicant an inchoate right which could ripen into a legal and complete appropriation only upon the completion of the works and the application of the water to a beneficial use. The right given by the permit is merely a contingent right, which may ripen into a complete appropriation or may be defeated by the failure of the holder to comply with the requirements of the statute. The permit, therefore, is not an appropriation of the public waters of the state. It is not real property under the statute. Rev. Codes, § 3056; *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 793, 51 Pac. 990, 40 L. R. A. 485. A permit, however, is the consent given by the state to construct and acquire real property. In order to acquire a permit, the statute provides that the person, association, or corporation, intending to acquire the right to the beneficial use of the waters of any natural stream, etc., before commencing the construction of such works,

shall make application to the state engineer for such permit. Certain facts are required to be stated in the application."

It is apparent from the provisions of the statute that a permit issued by the state engineer to appropriate the public water of the state is not an appropriation of the water, but that such permit is the consent only of the state that the applicant may proceed under the law and make an appropriation of public water. In the case now under consideration, in order for the respondent to make an appropriation of the water at a point upon the land owned by the appellant, it was necessary for the respondent to enter upon the lands of the appellant in the first instance for the purpose of making the necessary examination and making the surveys and maps and plans required in order to make a proper application to the state engineer for a permit which permitted the respondent to proceed in the manner prescribed by law in perfecting his appropriation. After this permit was obtained, it was necessary under the law for the respondent to do the constructive work required to perfect the appropriation, and this necessarily required the taking of the real property of the appellant for this use, and this could be acquired by agreement of the parties or by condemnation proceedings under the statute.

[4] The entry, however, for the purpose of investigation, inspection, and the making of surveys, plans, and specifications for the purpose of making application for a permit, would not necessarily result in the permanent taking of the real property of the appellant; but it would result in the necessary entry upon the land of the appellant. The right to enter the land of the appellant, therefore, should have been secured from the appellant, either by an agreement of the parties, or by condemnation proceedings, and, without such remedy being pursued, the respondent in making such entry would be a trespasser. In this instance, therefore, it appears clearly from the record that, in making the entry upon the lands of the appellant for the purpose of making the surveys and plans and maps upon which his application to appropriate the water was based, the respondent was a trespasser upon the lands of the appellant.

[5] While the Constitution and laws of this state specifically recognize the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, and that such right shall never be denied, still such provisions of the Constitution and statute do not authorize a person to go upon private property of another for the purpose of making an appropriation. The Constitution and laws of this state specifically recognize the right to divert and appropriate the unappropriated waters of any natural stream to a beneficial use, and that such right shall never be denied; but

this does not mean that a person is given a right to go upon private property of another for the purpose of making an appropriation, without the license or consent of the owner, or before such right is given by proceedings for condemnation.

[6] As shown by the facts in this case, the appellant owns all the land on both sides of the channel of water from the place the water comes from the rimrock, until the channel ends and the water empties into another stream. It is true that the appellant has made no effort whatever to appropriate the water of said stream or to apply such water to any beneficial use, and in this action the appellant is making no claim whatever to said water by reason of any appropriation or any supposed riparian ownership of the same. But, notwithstanding such facts, it is the appellant's right by reason of his ownership of the land to have exclusive possession of said land, and said owner is protected against any right that is attempted to be acquired by trespass thereon in the way of an attempt to appropriate the water running across said land, and neither the respondent, nor any other person, can divert such water without entering upon and leading it across the lands of the appellant, or using the lands of the appellant in distributing the power created by the use of such water, and committing a continuing trespass upon the premises of the appellant.

Mr. Well, in his third edition of *Water Rights in Western States* (volume 1, c. 10), discusses this question generally, and the decisions of the courts of several states and the federal courts passing upon this question have been collected. In the text the author recites the different rules that have been announced by the various decisions, and from such discussion it clearly appears that the weight of authority and better reasoning is with the proposition that an appropriation of water at a point upon private land cannot be made by trespass, and that, where an attempt is made to initiate the right to appropriate the public water of the state by trespass upon private property, such initiation of such right is void as against the owner of the land. Applying this rule to the facts of this case, an action to condemn a portion of the land of appellant for the purpose of using the same as a power site cannot be maintained, because no water right has been legally acquired which would make necessary the use of said land. This necessarily results from the fact that the water right was initiated by trespass. *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081; *Smith v. Denniff*, 24 Mont. 20, 60 Pac. 399, 81 Am. St. Rep. 408; *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484; *Mud Creek Irr. A. & M. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078.

In the case of *Prentice v. McKay*, supra, the Supreme Court of Montana reviews a

number of cases bearing upon this subject, and says: "If Mrs. Prentice made a valid appropriation of water upon the private lands of S. C. Prentice, she must have acquired an easement in his lands, and, if she did acquire such easement, she must have done so by grant from S. C. Prentice by condemnation proceedings or by prescription. But the record here fails absolutely to disclose that Mrs. Prentice ever resorted to condemnation proceedings, or ever received a grant of the easement or acquired it by adverse user." In this case the court held that the transaction between Mrs. Prentice and S. C. Prentice amounted only to a license which gave the right to take the water from the springs and streams to her land, and that such license was not coupled with any interest or for valuable consideration paid, and was therefore revocable at the pleasure of the licensor or his successors, and that the action in this case in obstructing the use amounted to a revocation. In that case the court cites the case of *Alta Land Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217, and also quotes with approval from *Smith v. Denniff*, 24 Mont. 22, 60 Pac. 399, 81 Am. St. Rep. 408: "One may not acquire a water right on the land of another without acquiring an easement in such land. * * * And an easement is an interest in land that cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription." And the court comments as follows: "Since the use of water is declared by the Constitution of this state (article 3, § 15) to be a public use, the right to appropriate water on the land of another may be acquired by condemnation proceedings."

In the case of *United States, etc., Co. v. Gallegos*, 89 Fed. 770, 32 C. C. A. 474, the United States Court of Appeals in discussing this question says: "The appellant owns all the land on both banks of this river. Regardless of its right to the water, it has the undoubted right to the undisturbed and exclusive possession of its land; and the appellee can divert no water without entering upon and leading it across this land, and committing a continuous trespass upon it." The court, in further discussing the Constitution of the state of Colorado, announces that the Constitution and statutes of that state do not give one the right to make an appropriation against a landowner by trespass on his land.

In the case of *Le Quilme v. Chambers*, 15 Idaho, 405, 98 Pac. 415, 21 L. R. A. (N. S.) 76, this court in discussing the right to appropriate water from a spring says: "If the land on which this spring was located had already been patented before the location by appellants, then a different question would arise, because appellants would have been trespassers in entering upon the land for the purpose of locating, appropriating, and

diverting the water, unless they first had acquired a license or easement so to do."

In *Swank v. Sweetwater Irr. Co.*, 15 Idaho, 353, 98 Pac. 297, in discussing the right of the owner of a water right to enter lands owned by another party, and to construct ditches and channels across such lands, the court says: "The fact that a party has a water right gives him no right to enter the lands of others for the purpose of constructing ditches and canals across them, except over public lands of the United States. He must obtain that easement and right of way either by purchase or condemnation." *Batterton v. Douglass Min. Co.*, 20 Idaho, 760, 120 Pac. 827.

If, then, under the provisions of section 3253 of the Rev. Codes, a person intending to make an appropriation is required to make surveys and prepare maps and plans in order to make a proper application, and in order to comply with such provisions of the statute it is necessary for such applicant to enter upon the lands surrounding the place where the appropriation or water is to be made, and such lands are owned by private persons, and such permit cannot be obtained by agreement between the applicant and the owner or owners of such adjoining and surrounding land, then it is incumbent upon the applicant, in order to justify an entry upon such lands, to proceed under the statute and condemn such right or easement. That was not done in this instance, and the respondent herein was a trespasser in initiating his proposed appropriation, and the mere fact that the state engineer granted the permit in no way conferred any right upon the respondent to enter upon private land for the purpose of making an appropriation.

Under this rule it is clear that the trial court erred in its finding of fact that the respondent is the owner and in possession of a water right for power purposes, granted to him under the permit of the state engineer of the state of Idaho from Smalley Springs. This must follow by reason of the fact that the permit issued by the state engineer confers no right to enter upon private land for the purpose of initiating an appropriation of water. As to the second finding of the trial court, we are inclined to think that the trial court was correct in finding that Smalley Springs, or the waters thereof, or the stream flowing therefrom, was not owned by the appellant, and that the waters of said springs at all times have been owned by the state of Idaho, subject to appropriation; but that such finding is incorrect in the conclusion that such water was subject to the right and use of the plaintiff under the permit issued by the state engineer. The court, under the view that we have expressed, was in error in finding 3, that the respondent did not attempt to make his appropriation by trespass. As to finding

6, we think the permit offered in evidence as "Exhibit A" was properly admissible in the case, but that the consideration and weight of such permit as evidence might be contradicted, and the permit shown to be of no effect under the facts of the case. The court also erred in finding 7, wherein it is held that an appropriation of water could be made on private premises through a trespass on such premises, and without the knowledge and consent of the owner of such premises.

It is also urged by counsel for appellant that the permit issued by the state engineer was of no effect after the expiration of 60 days from the date of issue, because the respondent, to whom such permit was issued, failed to file a bond within 60 days from the date of the permit. In view of the opinion of this court that the permit was of no force or effect by reason of the fact that it was based upon a trespass, it is immaterial whether the bond was filed or not, and it is unnecessary to pass upon the objection made in disposing of this case.

The judgment in this case is reversed, and the costs are awarded to the appellant.

ALLSHIE and SULLIVAN, JJ., concur.

CONNOLLY et al. v. REED, Probate Judge.
(Supreme Court of Idaho. May 23, 1912.)

(Syllabus by the Court.)

1. ALIENS (§ 12*)—INHERITANCE—STATUTORY PROVISION.

Under the provisions of section 5715 of the Revised Codes of this state, "Aliens may take in all cases by succession as citizens," provided, however, that "no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 12, 33-46; Dec. Dig. § 12.*]

2. COMMON LAW (§ 12*)—ADOPTION.

Under the statute of this state (section 18, Rev. Codes), the common law of England, so far as it is not repugnant to or inconsistent with the Constitution or laws of the United States, is the law of this state in all cases not provided by statute.

[Ed. Note.—For other cases, see *Common Law*, Cent. Dig. § 10; Dec. Dig. § 12.*]

3. ALIENS (§ 9*)—INHERITANCE—COMMON LAW.

At common law an alien had no inheritable blood and could not succeed to real property by descent or inheritance and could not therefore claim through an intestate.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 21-29; Dec. Dig. § 9.*]

4. ALIENS (§ 12*)—INHERITANCE—STATUTORY PROVISION.

The statute of this state (section 5715) is not a recognition or an extension of any previously existing right which a nonresident alien had of succeeding by inheritance to the estate of a deceased person, but is rather the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

grant of a right which did not previously exist.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 12, 33-46; Dec. Dig. § 12.*]

5. ALIENS (§ 12*)—INHERITANCE—TIME FOR ASSERTION OF CLAIM.

In order for a nonresident alien to succeed to the estate of an intestate decedent in this state, he must appear and claim such succession within five years after the date of the death of the decedent.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 12, 33-46; Dec. Dig. § 12.*]

6. ALIENS (§ 12*)—INHERITANCE—TIME FOR ASSERTION OF CLAIM.

Where C. died intestate leaving an estate within the state of Idaho, and a cousin of the decedent made application for letters of administration and represented that he and three other cousins were the next of kin and entitled to succeed to the estate, and letters of administration were granted, and the estate was administered upon and final account was rendered and approved and distribution ordered and made to the four cousins who claimed to be the next of kin and the right to succession, and thereafter and more than five years subsequent to the death of the decedent M., a citizen and resident of Galway, Ireland, of the kingdom of Great Britain, filed a petition in the probate court alleging that she was the half-sister of the decedent and entitled to the estate. *Held*, that her failure to appear and claim her right to succession within the five-year period granted by statute bars her right and claim, and the court had no jurisdiction to grant her any relief.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 12, 33-46; Dec. Dig. § 12.*]

7. ALIENS (§ 12*)—INHERITANCE—TIME FOR ASSERTION OF CLAIM—"APPEARANCE"—"CLAIM."

A demand made through an attorney or agent upon an administrator for possession of the property of the estate which he represents, or a request made by an attorney of the judge of the probate court that he be notified if any further proceedings are to be taken in the estate, is not an appearance or claim within the purview and meaning of section 5715 of the Revised Codes sufficient to stop the running of the statute limiting the time within which such claim of the right of succession shall be made by a nonresident alien.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 12, 33-46; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 1, pp. 449-451; vol. 2, pp. 1202-1211; vol. 8, p. 7604.]

8. ALIENS (§ 12*)—INHERITANCE—TIME FOR ASSERTION OF CLAIM.

The commencement of an action by a nonresident alien in the federal court in and for the district of Idaho, which action is subsequently dismissed by the court, does not stop the running of the statute in the state courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 12, 33-46; Dec. Dig. § 12.*]

9. ALIENS (§ 12*)—INHERITANCE—TIME FOR ASSERTION OF CLAIM—FRAUD.

An allegation by a nonresident alien who seeks to establish her right of succession to the estate of a decedent within this state, alleging that C. by fraudulent misrepresentation procured the distribution of the estate to himself and others, is not a sufficient allegation to show any wrong or injury to the alien claimant who failed and neglected to appear and claim the right of succession within the five-year period granted to such claimants, where

it is not alleged and does not appear that the fraud had anything to do with or resulted in preventing or depriving the nonresident alien claimant from setting up or asserting her claim to the property within the statutory time.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 12, 33-46; Dec. Dig. § 12.*]

Original action by Lawrence F. Connolly and another for a writ of prohibition to Bert A. Reed, as probate judge of Kootenai county. Writ granted.

C. W. Beale, of Wallace, Chas. L. Heitman, of Spirit Lake, and R. T. Morgan, of Cœur d'Alene, for plaintiffs. Elder & Elder, of Cœur d'Alene, for defendant.

AILSHIE, J. This is an application for a writ of prohibition against the judge of the probate court of Kootenai county. Plaintiffs pray that a writ issue prohibiting any further action or proceedings by the probate court on the petition of Bridget Madden heretofore filed in that court. It was agreed on the hearing that the names of Wm. C. Connolly and Ellen Udell should be added as parties to the action and be bound by the decision herein.

The facts necessary to an understanding of this case and on which the decision must turn are as follows: John Corbett, a resident of Kootenai county, died intestate on the 30th day of January, 1907, leaving an estate variously estimated at from \$20,000 to \$75,000. Thereafter and on February 20, 1907, Lawrence F. Connolly procured letters of administration of the Corbett estate. Upon securing his appointment as administrator, Connolly represented to the court that he and one John J. Connolly, residing at Harrison, Idaho, and William C. Connolly and Ellen Udell, residing at Greeley, Neb., were the surviving heirs of John Corbett, deceased. The estate was thereafter appraised, and on March 7, 1907, an inventory and appraisal was filed with the probate court. Such proceedings were had in conformity with the statute; that thereafter and on August 23, 1909, a decree of settlement of final account and distribution was made and entered. The estate was accordingly distributed to the Connollys and their sister, Ellen Udell. On February 23, 1912, Bridget Madden, a nonresident alien and a resident of Galway, Ireland, filed her petition in the probate court of Kootenai county, alleging her residence and citizenship in the county of Galway, Ireland, kingdom of Great Britain, and alleging that she was a half-sister of John Corbett, deceased, and as such was entitled to succeed to his estate under the laws of the state of Idaho. After due and regular notice was given, a hearing was had on the petition of Bridget Madden, and the court sustained a demurrer thereto on the ground that under the provisions of section 5715, Rev. Codes, "no nonresident foreigner can take by suc-

cession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession," and that accordingly the petitioner had failed to appear and claim succession within five years of the death of the intestate, and was therefore barred by the statute. The latter order and decree was entered on the 23d day of March, 1912. The matter remained in that condition without further proceeding being taken until April 6, 1912, when Bridget Madden filed a motion in the probate court to set aside and vacate the judgment and decree of March 23d, dismissing her petition upon the ground that the order of March 23d did not allow her the right to file an amended petition, and she prayed that the order and decree might be vacated and that she be permitted to file an amended petition. The motion was subsequently heard, and on April 18, 1912, the court made an order permitting her to file an amended petition, which petition was submitted at the same time and in connection with the motion. By the amended complaint the petitioner sought to bring herself within the provisions of section 5715 of the Revised Codes requiring a nonresident alien to appear and claim the right to succession within five years of the death of the decedent. She alleged that Lawrence F. Connolly, John J. Connolly, William C. Connolly, and Ellen Udell each well knew at the time the estate of John Corbett was distributed to them that Bridget Madden was the only and sole surviving heir of John Corbett, deceased, and was rightfully entitled to the estate, and that they concealed such fact and failed to disclose the same to the probate court of Kootenai county. She further alleged that the first knowledge or notice that she had of the death of her brother, John Corbett, was on or about the 9th day of April, 1911, when she was advised of his death and that he had left an estate in Kootenai county, Idaho, of the value of about \$75,000, and that she thereupon demanded of Lawrence F. Connolly, the administrator of said estate, all of the property belonging to said estate:

"That upon receiving this information of the death of John Corbett, and of the value of the estate left by him, your petitioner made a demand upon said Lawrence F. Connolly on and prior to the 9th day of April, 1911, for the return and delivery of the property of the estate of John Corbett to your petitioner. That said Lawrence F. Connolly refused to deliver said property to your petitioner, and informed your petitioner that she had no right in or to said property, and that said Lawrence F. Connolly had at all times refused to deliver said property over to your petitioner, or to her attorneys duly authorized.

"That on or about the _____ day of December, A. D. 1911, your petitioner Bridget

Madden appeared in the probate court in and for Kootenai county, state of Idaho, by her attorney Robert H. Elder, and then and there gave notice to the Honorable Bert Reed, probate judge of Kootenai county, state of Idaho, that your petitioner Bridget Madden claimed an interest in the property of the estate of John Corbett, deceased, and requested and directed the Honorable Bert Reed, probate judge, of Kootenai county, state of Idaho, to notify Robert H. Elder, your petitioner's attorney, if the said Lawrence F. Connolly should apply to said court for a discharge.

"That Bridget Madden, the above-named petitioner, on or about the 14th day of March, A. D. 1912, filed her bill of complaint in the Circuit Court of the United States in and for the district of Idaho against Lawrence F. Connolly, individually, and as administrator of the estate of John Corbett, deceased, John J. Connolly, William Connolly, Ellen Udell, and the Empire Mill Company, a corporation, defendants, in said action, and in said bill of complaint Bridget Madden, as plaintiff, claimed to be the heir of John Corbett, deceased, and claimed to be the owner of all the property belonging to the estate of John Corbett, deceased. That in said action your petitioner prays for a decree of said court decreeing your petitioner to be the owner and entitled to the possession of all the property of the estate of John Corbett, deceased. That it is alleged in said bill of complaint that your petitioner is the sole and surviving heir of John Corbett, deceased, and that by said action your petitioner on or about the 14th day of March, A. D. 1912, appeared in said court and claimed the property of the estate of John Corbett, deceased.

"That thereafter a writ of subpoena was duly issued to said defendants, Lawrence F. Connolly, William Connolly, John J. Connolly, Ellen Udell, and the Empire Mill Company, commanding them to appear in said action and to make answer to allegations in said bill.

"That thereafter Lawrence F. Connolly, individually, and as administrator of the estate of John Corbett, deceased, John J. Connolly, and the Empire Mill Company appeared in said action.

"That thereafter said action was dismissed without prejudice to another action."

The foregoing allegations are followed by the further allegation that the petitioner has at all times since she learned of the death of her brother claimed all the property belonging to his estate, and that she had at various times demanded possession of said property from Lawrence F. Connolly, the administrator of the estate, and that she thereafter and on the 13th of November, 1911, executed and delivered to William C. Carlyle, E. H. Belden, and W. C. Losey a power of attorney wherein and whereby she authorized her attorneys to collect, sue for, recov-

er, and claim all the property of John Corbett, deceased. The foregoing are the allegations by which the petitioner, Bridget Madden, sought to avoid the provisions and operation of section 5715 of the Revised Codes.

[1] As we view this case, a construction of the provisions of the statute (section 5715) will be decisive of the right of Bridget Madden, on the one hand, to a hearing on her amended petition in the probate court and of the petitioners herein, on the other hand, to have a writ of prohibition issue to the probate court. If the petition shows on its face that no claim to the right of succession has been made within the five-year period, then the writ prayed for should issue. The statute (section 5715, R. C.) provides as follows: "Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

The foregoing provision of the statute is a part of the law governing probate proceedings and is found in chapter 14, title 10, part 3, of the Code of Civil Procedure. This chapter is devoted to the specific subject of "Succession," and commencing with section 5700, which defines succession, the chapter proceeds step by step to define the interest which passes to heirs and to enumerate the heirs in the order in which they shall be entitled to succeed to the estates of deceased persons and such other matters as naturally pertain to the devolution of estates.

[2] Now, under the statute of this state (section 18, R. C.), the common law of England, so far as it is not repugnant to or inconsistent with the Constitution or laws of the United States in all cases not provided by statute, is the law of this state.

[3] At common law aliens could not acquire property by descent. An alien at common law had no inheritable blood and could not therefore claim through an intestate. *Norris v. Hoyt*, 18 Cal. 217; 2 Cyc. 90 to 95, and notes. It became necessary, if aliens were to be allowed to take property in this state by succession, that the lawmaking power of the state should alter the common-law rule and declare the policy of the state in relation thereto. The Legislature in the exercise of this power enacted section 5715, supra, and provided that aliens may take in all cases by succession as citizens, but qualified this provision with reference to nonresident aliens.

[5] In case a nonresident foreigner should claim by succession, he must "appear and claim succession within five years after the death of the decedent to whom he claims

succession." The statute is definite and certain as to the date from which the five years begin to run. That date is the date of the death of the decedent. The only room for uncertainty about the statute is what constitutes an appearance and claiming "such succession." It would seem that where the alien is a nonresident and the property is in the possession and custody either of the state or of a third party who asserts title to the property, as was true in this case, and the alien has never reduced the property to his personal possession, it would be necessary for him to assert some legal claim to the property in an appropriate proceeding in a court of competent jurisdiction to determine and adjudicate his right of succession as prescribed by the probate laws of this state.

[6] Counsel for Bridget Madden, the alien claimant, cite and rely on *State v. Smith*, 70 Cal. 153, 12 Pac. 121, in support of their contention that the words "appear and claim such succession" are satisfied by any appearance in person or by attorney within the state and asserting a right to the property or asserting a right of succession or contracting with reference to the property. A careful study of the case cited convinces us that it does not go to the extent claimed for it by counsel, and that it does not support the contention here urged. In that case the decedent was a naturalized citizen of the United States and died intestate in the state of California leaving an estate of real and personal property. He left no heirs resident in the United States, but did leave one nephew and three nieces in England, his only next of kin. The nephew, John Smith, Jr., came to California and obtained letters of administration after having declared his intention to become a citizen of the United States. He administered upon the estate, reduced it to possession, and caused it to be finally distributed to the next of kin as above indicated. Thereafter the state, through the Attorney General, brought an action to declare the estate escheated to the state of California. The Supreme Court held against the contention made by the state on two grounds: First, that an action by the state, having been commenced within the five-year period after the death of the decedent, was premature and could not be maintained until after the lapse of the full five-year period; and, second, that the nephew of the decedent and one of the next of kin, having come personally to California and asserted his right and at the same time the right and claim of the three nieces to the property and having taken actual possession of the property, had brought himself and the other claimants within the meaning and purview of the statute (section 672, Civil Code of Cal.), which required the alien claimant to "appear and claim" the property within five years after the death of the decedent. It will therefore be seen from a comparison of the facts pre-

sented in the California case with the facts of the case at bar that there is a wide difference between them, and that the California case does not furnish authority for the position taken by the alien claimant in this case.

While not controlling our decision in this case, still it is worth while to note the difference between our statute and the California statute on this subject. Section 672 of the Civil Code of California (volume 2, Deering's Annotated Codes) is a part of title 2, part 1, division 2, of the Civil Code, and title 2 is devoted to the subject of "Ownership," and sections 669 to 672 are devoted to the subject of "Owners." Section 672 has specific relation therefore to the ownership of property. It prescribes the five-year limitation for the appearance of nonresident aliens, and differs from our statute in that it provides that he "must appear and claim the property within five years from the time of succession," while our statute (section 5715) found in the Code of Civil Procedure and in the probate procedure thereof, says: "No nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent." This change of wording is significant, and, when taken in connection with the fact that our statute is found in the probate practice act, while the California statute is found in the Civil Code dealing with owners and ownership of property generally, it appears to us that the difference is significant and worthy of consideration. Under our statute it would seem that it was intended that the claim and appearance should be made in the course of the administration or through the probate court in some manner.

[4] Our statute is not a recognition or extension of any previously existing right a nonresident alien had, but it is rather the fresh grant of a right or a statute of grace which the state confers on aliens. The state might as well declare all such estates escheated rather than allow them to go to a nonresident alien who is otherwise within the recognized line of succession. In this condition of the law, the question of time becomes an essential prerequisite to the right of a nonresident alien to succeed to an estate left by a decedent within this state.

[8] The only question, therefore, remaining to be determined in the case at bar is whether the facts pleaded in the amended petition tendered in the probate court were sufficient to show an appearance and claim to the right of succession on the part of Bridget Madden within the five-year limitation. It is admitted that no appearance of any kind was ever made in the probate court of Kootenai county within the statutory time, and that no appearance was made in any court of competent jurisdiction. It is alleged that an appearance was made in the federal court within the five-year period,

and that the action which Bridget Madden sought to prosecute in that court was subsequently dismissed for want of jurisdiction of that court over the subject-matter. It has been held, however, by this court, and we think correctly so, that a party who mistakes his remedy and seeks relief in a federal court does not thereby stop the running of the statute of limitations in the state court (*Finney v. American Bonding Co.*, 13 Idaho, 534, 90 Pac. 859, 91 Pac. 318; *Mills v. American Bonding Co.*, 13 Idaho, 556, 91 Pac. 381; *Morbeck v. Bradford-Kennedy Co.*, 19 Idaho, 83, 113 Pac. 89), and the principle involved in this holding is well applicable to the case at bar. The filing of the suit in the federal court was clearly not an appearance and claim of the right of succession to this estate as contemplated by the provisions of section 5715.

[7] On the other hand, the fact that an attorney went to the office of the probate judge and asked to be notified if any further step should be taken in the course of the administration or settlement of the Corbett estate, without in fact making any appearance in the case or appearing in court upon any hearing had in the matter of the estate, was clearly not an appearance and claim of the right of succession such as is contemplated by the statute. The same may be said with still greater force and reason in reference to the allegations as to the claims and assertions of right made by her attorneys and agents to the administrator.

[9] It is argued, however, that Bridget Madden alleged fraud on the part of the Connollys in not reporting to the probate court that she was the only surviving heir to the estate and in not advising her of the fact that her brother, John Corbett, was dead and that he had left an estate which she was entitled to inherit. It may be conceded that the allegations of the petition are true in this respect, and still that admission would not help the case of Bridget Madden. It is not charged that the Connollys through any fraud or otherwise kept her from appearing and asserting her right, or that they made any misrepresentations, or that they deceived her or misrepresented facts to her. Whatever fraud may have been practiced by them in procuring the estate to be distributed to them could in no way prejudice Bridget Madden if she failed and neglected to appear and assert her right within the five-year period prescribed by the statute. Any fraud practiced by the Connollys in this respect would be a fraud on the state of Idaho to which the property would have escheated, rather than a fraud on Bridget Madden. Had they not been guilty of any fraudulent misrepresentations to the probate court, and had they not claimed the property at all, and Bridget Madden had still failed to appear, the property would have escheated to the state under the provisions of sections 5716 and 5717 of the Revised Codes.

They represented, however, that they were the sole surviving heirs, and the property was distributed to them. Bridget Madden failed to appear within the statutory time granted her and consequently lost the right conferred by the state on a nonresident alien to appear and assert any right of succession to the estate. It follows, therefore, that any fraud which may have been practiced could not and did not work any injury upon Bridget Madden. If it was a fraud upon the state of Idaho, that is met in this case by the fact that the state is not a party to this proceeding, and has at no time been a party to the proceedings in the settlement and distribution of this estate, and has asserted no claim to the property of the estate.

It follows from what has been said that, upon the face of the petition as presented by Bridget Madden, the time granted her by statute had expired, and that the court was without jurisdiction to grant her any relief whatever. Having reached the foregoing conclusion, it becomes unnecessary for us to consider any other question raised in this case.

The writ should issue, and it is so ordered.

STEWART, C. J., and SULLIVAN, J., concur.

(22 Idaho, 323)

GRIFFITH v. ANDERSON.

(Supreme Court of Idaho. July 15, 1912.)

(Syllabus by the Court.)

1. TAXATION (§ 524*)—PAYMENT OF TAXES—EMBEZZLEMENT BY ASSESSOR.

Where a property owner pays the taxes on a tract or parcel of land to the county assessor, and the assessor thereupon gives an informal and unofficial receipt for such taxes, and fails to turn the money in to the county or to credit the landowner on the books of his office, and the county thereafter advertises the property for delinquent sale and sells the same and it is struck off to the county, and the county thereafter takes a tax deed to the property, *held*, that the county had no right to sell the property, and acquired no valid title thereto.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 968; Dec. Dig. § 524.*]

2. TAXATION (§ 734*)—TAX SALES—PURCHASE BY COUNTY.

Where a tract of land is sold at delinquent tax sale, and is struck off to the county, and the property is thereafter assessed from year to year to the landowner and the taxes so assessed are paid from time to time, and the assessor has failed and neglected to carry the property on the assessment roll in red ink entry, as provided by section 1755, Rev. Codes, *held*, that the county acquires no valid title to the property and cannot give a good title to a purchaser. *Parsons v. Wrble*, 21 Idaho, 695, 123 Pac. 638, approved and followed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 784.*]

(Additional Syllabus by Editorial Staff.)

3. ATTORNEY AND CLIENT (§ 18*)—ACTS OF ATTORNEY—PURCHASE OF TAX TITLE.

That plaintiff was an attorney at law did not prevent him from purchasing an alleged tax title from the county, and prosecuting an action to establish title based thereon.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 26; Dec. Dig. § 18.*]

Appeal from District Court, Elmore County; C. O. Stockslager, Judge.

Action by B. F. Griffith against Andrew Anderson to quiet title. Judgment for defendant, and plaintiff appeals. Affirmed.

B. F. Griffith and E. M. Wolfe, both of Mountainhome, for appellant. Daniel McLaughlin, of Mountainhome, for respondent.

AILSHIE, J. This action was instituted by the appellant in the district court in and for Elmore county to quiet title to lots 1, 2, and 3, in block 5, town of Mountainhome. Judgment was entered for the defendant, and the plaintiff appealed. The plaintiff's right and title grows out of a tax sale for delinquent taxes on the property for 1902. It is alleged that the taxes went delinquent for that year, and the property was subsequently sold and struck off to the county. The county received a deed to the property later and thereafter sold it to the appellant. As we view the case, it is unnecessary for us to review or discuss the evidence at any length. There is considerable conflict in the evidence, but, where there is a conflict, there is sufficient evidence to support the findings of the trial court, and we shall, therefore, state briefly the salient and decisive facts found by the trial court with such incidental comment as we deem necessary in connection therewith. The court finds in substance the following facts:

[1] That the property was assessed for the year 1902, and that during the time provided by law for the payment of taxes the owner of the property, Anna Ellison, paid the taxes to the assessor of Elmore county. In reference to this finding, it is well enough to observe that the evidence discloses that the payment was made by the owner of the premises to the assessor when he was at her home, and that he did not have his official receipt book with him, and that he gave her a written, informal receipt for the money, and that he never entered this on his books or made any record in his office of the payment of this money. About this time he became a defaulter in a large sum, and was subsequently prosecuted and convicted and sentenced to a term in the penitentiary.

The court finds that this property was placed on the delinquent list for the 1902 taxes, and in July, 1903, was sold at delinquent tax sale, and was duly and regularly sold and struck off to the county. Of this proceeding the owner of the property, Mrs. Ellison, apparently had no actual notice, and

only such constructive notice as the advertisement would give. Thereafter, and in the year 1905, when she discovered that she had not been given credit for the 1902 taxes paid by her to the assessor, she transmitted her receipt evidencing the payment of her taxes for 1902 to the board of county commissioners, and demanded that she be given credit on the proper assessment roll for the amount evidenced thereby. The board thereafter considered the matter, and during the same year and subsequent to the meeting of the board the deputy clerk of the board notified Mrs. Ellison that the amount evidenced by such tax receipt would be duly credited to her on the proper tax records of Elmore county, and the evidence discloses that the acting assessor some time after, the meeting of the board wrote the word "redeemed" on the record of tax sale certificates in his office under the heading "Name of Redemptioner" and opposite certificate No. 56, which was the certificate issued to the county for this land. During the same year, 1905, Mrs. Ellison and her husband sold and conveyed the property to James R. Clark. Thereupon Clark called on the assessor for a statement of all taxes due, unpaid, or delinquent against the property, and in reply thereto was furnished with a statement, and he thereupon paid all the taxes called for or demanded by such statement, but this statement did not include or make any mention of any delinquent taxes for 1902 or any tax sale having been made. The property was assessed from year to year after 1902 against Mrs. Ellison and her successors in interest and title, and the taxes were duly and regularly paid each succeeding year. Subsequently and prior to the issuance of the deed to the county and from the county to appellant, Clark sold and conveyed the property to the respondent Anderson, and Anderson continued to pay the taxes from year to year. The sale for delinquent taxes was made by the county, and the property was struck off to the county in July, 1903, but no deed was issued to the county until 1910, and the property was never carried on the assessment roll, as required by section 1755, Rev. Codes, and noted in red ink as therein provided to be done in all cases where property has been sold to the county for delinquent taxes and a certificate therefor has been issued to the county.

[2] The provisions and application of section 1755, Rev. Codes, were considered by this court in *Parsons v. Wrble*, 21 Idaho, 605, 123 Pac. 638, and it was there held in a somewhat similar case that a failure to make the red ink entry and carry the assessment on the roll, as provided by section 1755, was prejudicial to the substantial right of the property owner and avoided a tax sale. The trial court concluded as a

matter of law that the county, having received, through its duly elected and qualified assessor, the tax money covering the assessment for 1902, was responsible for the action of its officer in this matter, and that it had no power or authority to thereafter legally sell the property for delinquent taxes for the year 1902, and that the sale was therefore void, and that the county received no title to the property.

The legal conclusions reached by the court were unavoidable and inevitable. It is clear to us that the county acquired no valid title to this property. In the first place, the taxes were in fact paid, and the county never had any jurisdiction to sell the property for delinquent taxes. In the second place, there was a total failure to comply with the requirements of section 1755, and under the plain provisions of that section and the construction placed upon it by this court in *Parsons v. Wrble*, supra, the county was precluded from asserting any title to the property by reason of such tax sale.

[3] Some contention has been made in this case by respondent against the right of appellant to maintain his action, on the ground of his being an attorney at law, and that he had purchased this property from the county for the purpose of prosecuting an action thereon. This contention is absolutely without merit. There is nothing whatever shown in this case as having been done by appellant inconsistent with his duties and obligations as an attorney at law, and no reason is shown why he did not have the same right as any other person to purchase such title from the county as the county had in the premises.

Judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

STEWART, C. J., and SULLIVAN, J., concur.

SHOSHONE HIGHWAY DIST. OF LINCOLN COUNTY v. ANDERSON.

(Supreme Court of Idaho. June 5, 1912.)

(Syllabus by the Court.)

1. STATUTES (§ 123*)—SUBJECTS AND TITLES—ONE OR MORE SUBJECTS.

The title of the act of March 8, 1911 (Sess. Laws 1911, p. 121, c. 55), embraces but one subject, to wit, organization and government of highway districts, and matters germane, connected with, and relating to, the general subject of organization and government of highway districts, and in no way contravenes the provisions of section 16, art. 3, of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.*]

2. STATUTES (§ 123*)—SUBJECTS AND TITLES—ONE OR MORE SUBJECTS.

The title of the act of March 8, 1911 (Sess. Laws 1911, p. 121, c. 55), wherein it is provided for the organization and government

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of highway districts and for the apportionment among municipalities, does not designate two different subjects, as the apportionment among municipalities of the fund collected from taxation made by the organized highway district is directly germane and connected with the subject of government of highway districts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.*]

3. HIGHWAYS (§ 90*)—HIGHWAY DISTRICTS—NATURE AND PURPOSE.

A highway district, as intended by the act of March 8, 1911 (Laws 1911, p. 121, c. 55), is not a political municipality, such as a city, town, or village, but is a municipality created for a special purpose, and is made a taxing district, of territory to be organized under the provisions of said act, and is created for the purpose of assessing the property within a district for the sole purpose of improving the highways within the district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. § 90.*]

4. HIGHWAYS (§ 122*)—TAXES—LEGISLATIVE POWER—DELEGATION.

The subject of taxation is a matter within the province of the Legislature of the state, unless there is some specific limitation found in the Constitution, and the delegation of power to a highway district created under the provisions of the act, to assess taxes within the district, is not prohibited by the Constitution, even though a city, town, or village is included within such territory.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.*]

5. MUNICIPAL CORPORATIONS (§ 51*)—CREATION AND EXISTENCE—DISSOLUTION.

A municipal corporation organized under authority of the Legislature can be dissolved as directed by the Legislature, and this may be effected by the provisions of the law creating the corporation, or by the general laws of the state, or by a subsequent legislative act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 138-140; Dec. Dig. § 51.*]

6. ELECTIONS (§ 96*)—REGISTRATION—NECESSITY.

There is no constitutional requirement that registration must be had for elections in special municipal corporations created by the Legislature, such as irrigation districts, drainage districts, and good road districts, and no provision being made for registration in the act providing for the organization and government of such special municipal corporation, or by general law, none is required.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 97; Dec. Dig. § 96.*]

7. HIGHWAYS (§ 93*)—HIGHWAY COMMISSION—AUTHORITY—DE FACTO OFFICERS.

Where a person is appointed as a member of the board of highway commissioners under the provisions of the act of March 8, 1911 (Laws 1911, p. 121, c. 55), and such person is ineligible to hold such office, and such person accepts such office and acts in that capacity, until such eligibility of such officer is called in question, he acts as a de facto officer, and the action of the board is not illegal or void by reason of the fact that such de facto officer acts as a member of such board.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 304-307; Dec. Dig. § 93.*]

8. HIGHWAYS (§ 95*)—OFFICERS—HIGHWAY COMMISSION.

Where, under the provisions of the act of March 8, 1911 (Laws 1911, p. 121, c. 55), a highway district is created, and the Governor of the state appoints such commissioners as

provided in said act, and three members unani-
mously act upon the calling of an election and the issuing of bonds of said district, the fact that a majority of the board, constituted of members who are qualified as such, and controlling the power of the board, approves and indorses the entire proceedings, makes such action of the board legal as the action of the board.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.*]

(Additional Syllabus by Editorial Staff.)

9. STATUTES (§ 123*)—SUBJECTS AND TITLES—EXPRESSION OF SUBJECT IN TITLE.

Act March 8, 1911 (Laws 1911, p. 121, c. 55), relating to highway districts, is not invalid as containing subjects not expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. § 123.*]

Appeal from District Court, Lincoln County; E. A. Walters, Judge.

Action by the Shoshone Highway District of Lincoln County against Harry W. Anderson. From a judgment for plaintiff, defendant appeals. Affirmed.

Helst & Aubolee, of Shoshone, for appellant. Johnson & Haddock, of Shoshone, for respondent.

STEWART, C. J. The respondent brought this action in the district court for the purpose of securing a writ of mandate commanding the appellant, as secretary of the Shoshone Highway District, to deliver bonds in the sum of \$80,000 to the treasurer of said district and to take and file the treasurer's receipt therefor and to charge him therewith. The Shoshone Highway District was created and organized under the provisions of an act approved March 8, 1911 (Sess. Laws 1911, p. 121). Such district authorized the issuing of bonds of said district to the amount of \$80,000 under a resolution passed by the highway board of said district. A demurrer and answer were filed, and the cause was tried to the court and finding and judgment were entered in favor of the respondent. Counsel for appellant upon this appeal contend: First, that the highway district law approved March 8, 1911, is unconstitutional; second, that the provisions of the highway district law were not complied with, in that no registration was had prior to the bond election; third, that the proposed issue of bonds is void for the reason that one of the highway commissioners was disqualified for appointment as such commissioner.

[1] It is argued by counsel for appellant that the act of March 8, 1911, is unconstitutional because the title contains more than one subject, in that it provides: First, for the organization and government of highway districts, the construction, improvement, and maintenance of highways therein and a revenue therefor, for the appointment and election of highway boards and other district officers, and defining their duties; second, for the apportionment among municipalities,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and for the distribution of proceeds of road and bridge county taxes. This objection is made upon the provisions of section 16, art. 3, of the Constitution, which provides: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."

Under this provision of the Constitution it is contended by counsel for appellant that the title to the act approved March 8, 1911 (Sess. Laws 1911, p. 121), embraces more than one subject, in that it provides for the organization and government of highway districts; the construction, improvement, and maintenance of highways therein and a revenue therefor; for the appointment and election of highway boards and other district officers and defining their duties. The title reads as follows: "To provide for the organization and government of highway districts, the construction, improvement and maintenance of highways therein and a revenue system therefor; for the appointment and election of highway boards and for other district officers, and defining their duties; for the apportionment among municipalities, the highway district and the county, of the proceeds of road and bridge county taxes; and defining the relations of highway districts to the county and to municipalities included within such districts; repealing acts inconsistent herewith and declaring an emergency."

The language used in the portion of the title involved in the objection clearly indicates that the matters therein referred to all relate directly to the same subject. The organization and government of highway districts and the construction, improvement, and maintenance of highways therein and a revenue system therefor and the appointment and election of boards and other officers, and defining their duties, are properly connected with the general subject of organization and government of highway districts, and all relate to the same subject-matter. *Pioneer Irrigation District v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; *State v. Doherty*, 3 Idaho (Hasb.) 384, 29 Pac. 855; *Kessler v. Fritchman*, 119 Pac. 692; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259.

[2] The second objection to the title is that it embraces two different subjects: First, the organization and government of highway districts; and, second, for the apportionment among municipalities. It is argued that the subject of apportionment among municipalities is a separate subject to that of organization of highways. The apportionment, among municipalities, of revenue collected from taxation made by a highway district under authority granted to said district by legislative

enactment, is directly connected with the subject of government of highway districts and relates directly to the same subject of organization and government of highways, and is not a separate subject to that of organization. *Hettinger v. Good Road District No. 1*, 19 Idaho, 313, 113 Pac. 721.

In the case of *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259, this court quotes with approval the language of Judge Cooley, as follows: "If all parts of the act have a natural connection and reasonably relate, directly or indirectly, to one general, legitimate subject of legislation, the act is not open to the objection of plurality of subjects." This is clearly true as to the unity of the subjects stated in the title, and the language clearly shows that the "apportionment among municipalities," such as the districts, and the counties, of the proceeds of road and bridge county taxes and the defining of the relations of highway districts to the county and to municipalities included within the district, relate and are connected with the common subject of organization and government of highway districts.

In the case of *Pioneer Irrigation District v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201, this court had under consideration the title of an act providing for the organization and government of irrigation districts, and in that case many of the objections urged against the title to the present act were presented and fully considered, and after reviewing many authorities upon the subject this court said: "It will be observed from the foregoing that all of the provisions of said act have but one general object, subject, or purpose, and that is the reclamation and irrigation of the desert or arid lands in the state." So it may be said of the title to the act now in question, all the subjects mentioned in the title relate to one general object, subject, or purpose, and that is the organization and government of highway districts. It is apparent, therefore, that the title in this case meets every requirement and is within the provisions of section 16, art. 3, of the Constitution.

It is next argued by counsel for appellant that the act under consideration is unconstitutional and violates the provisions of section 6, art. 7, of the Constitution, in that said act provides for double taxation of property in municipal corporations situated within highway districts. This section reads as follows: "The Legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation." It is argued that inasmuch as cities, towns, and villages of the state are authorized to levy taxes for highway and street purposes, the Legislature has no power to authorize other municipal-

ities, such as highway districts, which include cities, towns, and villages, to levy a tax upon the property within cities and towns and villages for use upon highways and roads outside of the limits of such cities, towns, and villages.

It is clearly provided by the statutes of this state that cities and villages are authorized to levy taxes for the purpose of raising revenue for the construction and maintenance of highways, streets, and alleys in cities and villages. Rev. Codes, § 2238. Authority is also conferred upon the board of county commissioners to levy a tax for road purposes. Section 1917, Rev. Codes.

The act now under consideration also authorizes a highway district to levy a tax for road and bridge purposes upon all the property within the district. This includes the property within the towns and villages within the boundaries of the district. Section 64. This act also provides that such highway commissioners in such highway district shall constitute a highway board and shall have, except as provided in section 64, exclusive general supervision and jurisdiction over all highways within the district. The exception referred to in section 64 is: "Nothing in this act shall be construed as affecting or impairing any power of taxation or assessment for local municipal highway purposes on the part of the authorities of the municipality of any such included territory. Each incorporated city, town or village, or portion thereof, within a highway district, shall constitute a separate division of the district under this act, and the city council of each such city, and the board of trustees of each such town or village, so far as relates to their city, town or village, shall have the powers conferred, and must perform the duties imposed, upon the highway board of such highway district, by this act. Each such city council and board of trustees must appoint a road overseer, who must, within such city, town or village, have the powers conferred, and perform the duties, imposed by this act, on deputy directors of highways; in respect to such city councils, board of trustees and road overseers of any city, town or village, lying within a highway district, the powers and duties of such council, board or road overseer shall be as declared in this section. * * *

In section 37 of the act in controversy provision is made for the distribution of funds raised by taxation for road and bridge purposes by the board of county commissioners under the laws of the state as follows: "(1) In respect to that portion of such taxes which shall have been assessed and collected within the limits of any included municipality, as defined in section sixty-four hereof, such portion shall be paid and applied as follows: (a) To such municipality, twenty-five per cent. of so much of such portion as shall consist of the road tax au-

thorized by section 900 of the Political Code; unless by the charter of such municipality or other special law, such municipality may be entitled to a different percentage of such road taxes, and in that case such different percentage so provided by such charter or special law shall be paid to such municipality. * * * (b) To the highway district, seventy per cent. of so much of such portion as shall have been realized from the road tax authorized by section 900 of the Political Code; and ninety-five per cent. of all of such portion realized from other sources. (c) To the county, five per cent. of such portion, to be paid to the county treasurer and to be thereafter apportioned by the proper officers between the road and bridge funds of the county. (2) In respect to that portion of such taxes which shall have been assessed and collected within the highway district and outside of the limits of any included municipality, such portion shall be paid and applied as follows: (a) To the highway districts, ninety-five per cent. of such portion. (b) To the county, five per cent. of such portion to be paid to the county treasurer, and to be thereafter apportioned by the proper officers between the road and bridge funds of the county."

Section 41 of the act provides for the apportionment of the taxes levied by the highway board under section 40 of the act as follows: "The entire proceeds of taxes levied for bridge purposes and the proceeds of all taxes assessed and collected outside of the limits of included municipalities, as defined in section sixty-four hereof, shall be paid to the highway district. In respect to all taxes levied by the highway board for road purposes under section forty hereof, that portion thereof assessed and collected within the limits of any included municipality shall be paid and applied as follows: (1) To such municipality, twenty-five per cent. thereof. (2) To the highway district, seventy-five per cent. thereof."

So it will be seen that by the provisions of this law the taxes levied for bridge purposes and the proceeds of all taxes assessed and collected outside of the limits of included municipalities are paid to the highway district; that is, the highway district, exclusive of the territory included within the municipality, shall be paid and have the use of the entire proceeds of taxes levied for bridge purposes, and the proceeds of all taxes assessed and collected outside of the limits of cities, towns, and villages, and all taxes levied and collected by the highway board within the limits of any city, town, or village within a highway district shall be paid and applied as follows: "(1) To such municipality, twenty-five per cent. thereof. * * * (2) To the highway district, seventy-five per cent. thereof."

It will thus be seen by the provisions of

the act of 1911 that three systems are provided for assessing property within cities, towns, and villages for highway purposes: First, the city, town, or village; second, the county; third, the highway district. And that two different systems are provided by the act, for the apportionment of the fund arising by reason of assessments by the county and the highway district. The system of apportionment of the fund arising by reason of the assessment of the board of county commissioners under the provisions of this act is substantially the same as that provided by the laws of the state prior to the adoption of the act. The apportionment of the fund arising by reason of the assessment of the highway board relates to a fund arising wholly from the taxation made by the highway board under this statute, and it is especially this assessment which counsel for appellant claims is an additional taxation and amounts to double taxation of the property of cities, towns, and villages which may be included within a highway district.

[3] Whether this constitutes double taxation, or is a taxation which makes a double burden upon the property owners within cities, towns, and villages, depends in a large measure upon the question whether such taxation is used for the same purpose in both instances. A highway district, as intended by this act, is not a political municipality. It is not created for the purpose of government. It is an entirely different kind of municipality from that of a city, town, or village. Its powers are specially limited to the construction of highways upon the lines of benefits to the inhabitants and the property within the territory embraced within the district. It is made a taxing district, and consists of such territory as may be determined by the county commissioners in creating the same. It is contemplated by the provisions of the statute that the property and the people of the entire district are interested in the construction and improvement of the public highways of the district, and it is created for a special purpose, to wit, the assessment of property within the district for the sole and only purpose of improving the highways within the district.

[4] The subject of taxation is a matter within the province of the Legislature of the state, unless there is some specific limitation found in the Constitution. 27 Cyc. pp. 607-613; Elliott, Roads & Streets, vol. 1, § 475. The Legislature in this instance has seen fit to provide only for the creation of highway districts for the purpose of improving the highways of a section created into a district. It has determined this matter and what property is subject to taxation therein, and the method of apportioning the fund raised, and it was acting clearly within its constitutional right, and there is no attempt on the part of the Legislature

to impose taxes for the purpose of any county, city, town, or other municipal corporation, but a clear exercise of legislative authority granting to a community subject to certain restrictions the right to organize themselves into a municipal corporation with power of local taxation, and the issuing of bonds for public improvements, and the section of the Constitution above referred to in no way prohibits such legislative action. A highway district, as created in this act, is not a municipality such as a county, city, town, or village, but is an entirely different kind of municipality created for a specific purpose. *Fenton v. Board of County Commissioners*, 20 Idaho, 392, 119 Pac. 41; *Boise Irr., etc., Co. v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321; *Hettinger v. Good Road Dist. No. 1*, 19 Idaho, 313, 118 Pac. 721.

Where, therefore, the Legislature of the state, exercising its power over the subject of taxation, passes an act which provides for the creation of a municipality such as a highway district, and authorizes such district to tax the property of said district for the purpose of raising funds for the construction and maintenance of highways within such district, and such district organizes as such, and includes an incorporated city, town, or village, which city, town, or village has, by reason of its incorporation as such, power also to levy a tax within such city, town, or village, the taxation made by the highway district under the authority of the Legislature is not a double taxation upon the property within the city, town, or village. The construction of highways leading to a city, town, or village from a country district is not only a benefit to the country outside of such city, town, or village, but is a like benefit to such city, town, or village, and such taxation, being one based upon benefits, is not prohibited by any constitutional provision.

In the case of *Hettinger v. Good Roads District No. 1*, 19 Idaho, 313, 113 Pac. 721, this court had under consideration an act of the Legislature of the state of Idaho (Sess. Laws 1909, p. 172) in relation to the organization of good road districts, and in that case said: "Section 882 of the Rev. Codes authorizes the board of commissioners to levy a general tax upon all the property within the county, including the towns and cities, and the county is required to turn over to such towns and cities one-fourth of the fund thus raised to be expended by the municipalities upon its streets and alleys, and, under the provisions of section 2238 of the Rev. Codes, towns and cities are given authority to raise an additional fund by special taxation for the same purpose, and the same argument made in this case would apply to section 882 with reference to turning over a portion of the general tax levied to a municipality, and likewise many other sections of the statute would be affected by the same course of rea-

soning; but clearly these various provisions are not double taxation. *Bolse Irr., etc., v. Stewart*, 10 Idaho, 38, 77 Pac. 25, 321."

Mr. Elliott, in volume 1, § 475, on Roads and Streets, announces the general rule as follows: "The Legislature, in the absence of any constitutional provision to the contrary, may provide for taxing districts without regard to the boundaries of counties, townships, or municipalities, as well as by following existing political or municipal lines. Highway improvements may be made by a tax on all the property, real and personal, in the taxing district, or by local assessment against the real estate specially benefited. In other words, it is for the Legislature to determine in general, within constitutional limitations, on what persons and property the cost or expense of constructing and maintaining highways shall fall and the mode of taxation or manner of raising the fund." This same doctrine is also announced in *Page & Jones on Taxation by Assessment*, in volume 1, §§ 552, 553, and other sections following.

In the case of *Byram v. Marion County Commissioners*, 145 Ind. 240, 44 N. E. 357, 83 L. R. A. 476, the Supreme Court of Indiana had under consideration a statute which provided for assessing property in a city by the county board of turnpike directors for repairing, maintaining, and paying for material for free gravel roads or turnpikes within the county, although situated wholly without the limits of the corporation, where such statute makes the taxing district consist of the whole county, and the court says: "It is for the Legislature, and not for the courts, to determine whether or not city property included in a taxing district under a gravel road statute is benefited by the repair of the gravel roads, although they are outside of the city."

In the case of *State v. Arnold*, 136 Mo. 446, 38 S. W. 79, the Supreme Court of Missouri had under consideration a similar question, and said: "But, assuming that the section has general application to all cities and towns in the state, it only purports to exempt them from paying county road taxes when their charter or the general law by which they are governed exempt them." And held that property in a town incorporated by special charter and not located in a county under township organization is not exempt from liability for improvement of county roads outside the town where its charter does not provide for such exemption.

Judge Cooley, in his work on Taxation (page 113), says: "Taxing districts may be as numerous as the purposes for which taxes are levied. It is not essential that the political districts of the state shall be the same as the taxing districts, but special districts may be established for special purposes wholly ignoring the political divisions."

* * * The political subdivisions of the

state are necessarily regarded in taxation only when the tax itself is for a purpose specially pertaining to one of them in its political capacity, so that, as already stated, the nature of the tax will determine the district."

In the case of *Board of Commissioners v. Harrell*, 147 Ind. 500, 46 N. E. 124, the Supreme Court of Indiana had under consideration a similar question, and said: "The power of the Legislature in matters of taxation is unlimited, except as restricted by the Constitution. The Legislature, in the exercise of that power, in making local improvements may create a special taxing district without regard to the boundaries of counties, townships, or municipalities." In that case it appears that the taxing districts were the same as the town's boundaries, and that the town was a corporation and had power to make contracts and was represented by officers, and the court said: "The special tax levied by the board of commissioners upon all the property of the taxing district is not an indebtedness of the township or townships composing such taxing district, but is an indebtedness of the taxpayers, secured by a lien on their property, and for which only their property is liable; and is no more to be counted in ascertaining the indebtedness of a township than the individual indebtedness of the inhabitants of the township. The constitutional inhibition is a limit on the power to become indebted, and does not apply in any way to taxes and assessments upon property for the benefit thereof of a public improvement."

Under the principles announced in the foregoing decisions, and under the Constitution of this state, we think it is clear that the provisions made in the act now under consideration with reference to the improvement of highways of the state and the assessment of property therein were clearly within the power of the Legislature of the state, and that the Legislature was fully authorized to delegate to highway districts the power of local taxation.

[8] It is next contended that there are several provisions of the act which are not fully expressed in the title: First, it is argued that section 2 provides for the reorganization of highways, and that such subject-matter is not expressed in the title; second, that section 9 provides for the construction of the law, and that such subject is not embraced in the title; third, that section 23 provides for a penal offense, and that such subject is not expressed in the title; fourth, that section 13 declares every highway district organized under this act shall be a body corporate, and that such subject is not embraced in the title. There is no merit in this contention. The cases heretofore cited, decided by this court upon the sufficiency of the title to a bill passed by the Legislature, fully cover this subject. This court, in *Pioneer Irr. Dist. v. Bradley*, 8 Idaho, 310;

68 Pac. 295, 101 Am. St. Rep. 201, quotes with approval *People v. Parks*, 58 Cal. 624, in which the Supreme Court of California says: "Provisions of an act may be numerous; but however numerous, if they can be, by fair intentment, considered as falling within the subject-matter of legislation, or necessary as ends and means to the attainment of the subject, the act will not conflict with the Constitution." The objections made clearly fall within the rule approved above and are within the subject-matter stated in the title, and are necessary as ends and means to the attainment of the subject of organization and government of highway districts.

[5] It is also argued that the act involved is unconstitutional because it provides no method of dissolution of the body corporate into which a highway district is created. While it is true that the act itself makes no provision by which its corporate character may be dissolved, yet that fact would not make the act unconstitutional, inasmuch as the act creating such municipal corporation could be dissolved by the same power that created it, and there is no provision of the Constitution to which our attention has been called which would render such legislation unconstitutional because of a failure to provide for its dissolution. In 28 Cyc. 250, the general rule is declared: "The American doctrine in regard to municipal corporations seems to be that they can be dissolved only as the direct result of legislative action. This may be effected either by repeal of the charter or by express provision contained in the charter or general law that the corporation shall cease and determine for failure to comply with certain conditions therein prescribed; or by the expiration of the time limited for the existence of the corporation." If therefore the Legislature of the state should deem it proper to repeal such highway district law, or provide for the dissolution of highway districts, it would be competent and within the power of legislative authority.

[6] It is further contended that the trial court erred in rendering a judgment for the respondent for the reason that no registration was held for the election, held on the 2d day of November, 1911, for the purpose of voting upon the issuing of bonds for the said highway district. Section 59 of the highway district law, which provides for the holding of an election for the purpose of voting upon the issuing of bonds, among other things, provides: "Such election shall be conducted as nearly as practicable in accordance with the general laws of the state. If at said election, as provided for in this section, two-thirds of the qualified electors who are residents of such district, voting on such question at such election, assent to the issuing of said bonds and the incurring of the indebtedness thereby created for the purpose aforesaid, such bonds so authorized for

said purposes shall be issued in the manner hereinafter provided." This is the only provision contained in the act in relation to bond elections held for the purpose of issuing bonds, and no provision is made for the registration of voters. In this same section it is provided: "The resolution shall also provide for the holding of an election of the qualified electors of such district, of which notice in general terms shall be given by publication for ten days in a newspaper published in the county."

Under the general election laws of the state, section 394, as amended by Laws of 1911, p. 580, "the said board must prior to the first day of July next preceding any general election cause notice to be given for not less than fifteen days by publication in some newspaper published in the county. * * *". Under the highway district law it would be impossible to give this 15 days' notice by publication prior to the time of holding the election. If the highway board gave the notice as provided by section 59 of the highway district law, there would be only one day in which the people might be allowed to register, and there would not be time or opportunity to give a fair registration. By reference to section 344 of the Rev. Codes, we find that the Legislature has declared that the provisions of the statute with reference to elections do not apply to school elections "and such other elections as are not in these Codes elsewhere specifically provided." This section clearly excepts elections held for school districts, and other elections specifically provided for, from the provisions of the statute requiring registration for election of officers provided by the Constitution and the laws of the state, and therefore no registration is required for a bond election under the highway district law. There is no constitutional requirement that registration must be had for elections in special municipal corporations created by legislative enactment, such as irrigation districts, drainage districts, and good road districts, and such registration is entirely left to the Legislature.

[7] It is next urged that the trial court erred in rendering judgment in this case for the reason that Fred W. Gooding, president of the board of highway commissioners, was a member of the Legislature that created the said highway district; therefore that he was disqualified from acting as such highway commissioner. We shall not in this case determine whether Fred W. Gooding was qualified to accept the position of highway commissioner in a highway district under the act of March 8, 1911. He was appointed to such office of highway commissioner by the Governor of the state, the appointing authority designated by the laws of the state; he qualified as such, and has been actually in possession of the office and performing the duties attached thereto by

virtue of his appointment; no one has questioned up to the commencement of this action his authority to so act. He was therefore a de facto officer and held the office under the color of title to the office under appointment by the Governor of the state, the designated appointive authority.

In the case of *Reclamation District v. Sherman*, 11 Cal. App. 389, 105 Pac. 277, the Supreme Court of California, in a similar case, held in the syllabus as follows: "The office of commissioner to make an assessment for reclamation purposes is created by statute, and is a de jure officer, and, when one who is appointed qualifies and participates in the performance of the duties of the commissioners, he acts under color of office and is a de facto officer, and as such his acts are valid; an 'officer de facto' being one whose acts the law, upon principles of policy and justice, will hold valid as far as they involve the interests of the public and third persons where he holds under color of a known appointment, void because the officer is not eligible, such ineligibility being unknown to the public."

[4] But even though it be conceded that Gooding was ineligible as a member of such board, yet such fact would not invalidate the bonds involved in this case, for it appears by the law that the board consists of three members, and the proceedings of the board show in the calling of the election and the issuing of the bonds in controversy that the three members voted unanimously, and therefore, even though Gooding was disqualified, the majority of the board and the controlling power of the board approved and indorsed the entire procedure.

In the case of *People v. Hecht*, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 208, 45 Am. St. Rep. 96, the Supreme Court of California, in discussing a similar question, held: "If a majority possesses all the authority of the whole, then such majority must be competent to its exercise. For all practical purposes the majority becomes the full board. It is the receptacle—the reservoir—of all the authority conferred upon the whole, and its action, it is submitted, cannot be stayed by the nonaction, failure to qualify, absence, death, or want of eligibility of the minority."

Applying this rule to the case in question, the ineligibility of one member of the board—Gooding—was a minority of the board, and the majority, the other two members both being qualified and acting, was sufficient to exercise the power necessary to make such power the action of the board in the procedure calling an election and issuing the bonds, and therefore the action of the majority was the action of the board and fully authorized and legalized the procedure and action of the board in calling the election and issuing the bonds.

The judgment is therefore affirmed. Costs awarded to respondent.

SULLIVAN, J., concurs. AILSHIE, J., concurs in sustaining the validity of the statute.

BUSTER v. FLETCHER.

(Supreme Court of Idaho. June 20, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 842*)—REVIEW—QUESTIONS OF FACT—POWER OF APPELLATE COURT.

Under the provisions of section 4818, Rev. Codes, as amended by Sess. Laws 1911, p. 375, upon an appeal from a final judgment where the appellant furnishes this court with a copy of the notice of appeal, of the judgment roll, and of the reporter's transcript as prepared and settled as provided by section 4434, as added by Laws 1911, c. 119, and the insufficiency of the evidence is properly presented by specification of such insufficiency in the brief on appeal, this court has full power and authority to determine whether the evidence is sufficient to support the findings or the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

2. APPEAL AND ERROR (§ 867*)—REVIEW—QUESTIONS OF FACT.

Under the provisions of section 4439 and section 4440, as amended by Sess. Laws 1911, p. 377, the question of the insufficiency of the evidence is a ground for a new trial, and, on appeal from an order on motion for a new trial, such ground or the sufficiency of the evidence to justify the verdict or other decision may be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.*]

3. CONTRACTS (§ 184*)—CONSTRUCTION—PARTIES—JOINT OR SEVERAL CONTRACT.

Where a contract is entered into between B. as party of the first part and F. and 43 other persons as parties of the second part, whereby the parties of the second part employ the party of the first part to construct a butter factory and feed mill for the sum of \$4,000, and in such contract each of the persons signing said contract as parties of the second part agrees to pay the sum of \$100 as a part of the contract price, such contract is a joint contract in so far as employing the party of the first part to construct the butter factory and feed mill, and is several as to the agreement to pay the contract price for such work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 789; Dec. Dig. § 184.*]

4. CONTRACTS (§ 211*)—CONSTRUCTION—TIME AS ESSENCE.

It is a recognized rule of law that time is the essence of a contract, unless the contrary appears from the face of the contract, and in equity it may be said that time is not of the essence of a contract, and that it must affirmatively appear that the parties regarded time as an essential element in their agreement, or a court of equity will not so regard it. The above rule that time is the essence of a contract applies to building contracts in which a definite time for completing the work is stipulated for, such as building contracts and the construction of railroads and bridges.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 938-948; Dec. Dig. § 211.*]

5. CONTRACTS (§ 300*)—PERFORMANCE—EXCUSE FOR DELAY.

Where a contract is entered into between B. as party of the first part and F. and others as parties of the second part for the construction of a butter factory and feed mill, and such contract further provides that an executive committee of three shall be appointed by the parties of the second part "with full power and authority in a majority to represent them in all their interests herein, and from time to time inspect the work of the first party while he is building said factory and placing said machinery," and the contract further provides substantially that, in the event that B. should be delayed in the execution of his contract by reason of strikes, storms, unavoidable accidents, or other causes over which he had no control, the time limit for the completion of said factory would be extended for a period of time equal to such delay, and the executive committee notify B. that the weather is such that the construction of the building cannot be commenced, and that B. should not commence the same until a certain time in the future when the weather will permit and upon notification from such committee, and such committee notifies B. when to commence and B. proceeds in accordance with such notice and completes said building, such action of the committee is sufficient to excuse B. from commencing and completing said building within the time fixed in said contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372-1381; Dec. Dig. § 300.*]

6. CONTRACTS (§ 253*)—RESCISSION BY PARTIES—RIGHT TO RESCIND.

Where a contract of employment is made jointly by 46 persons, a majority of such persons have no authority to rescind such contract where there is a protest on the part of the remainder of such persons, and thus avoid liability arising out of such contract by reason of the agreement of the entire number.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1146-1148; Dec. Dig. § 253.*]

(Additional Syllabus by Editorial Staff.)

7. APPEAL AND ERROR (§ 846*)—REVIEW—SUFFICIENCY OF EVIDENCE—"DECISION."

The word "decision," as used in Rev. Codes, § 4434, as added by Laws 1911, c. 119, relating to the record wherein a desire to procure a review on appeal of the sufficiency of the evidence to sustain the verdict or decision, includes the trial court's findings of fact and conclusions of law where a case is tried to the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3347-3362; Dec. Dig. § 846.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1897-1902; vol. 8, p. 7629.]

Appeal from District Court, Washington County; Ed. L. Bryan, Judge.

Action by E. E. Buster against Ed. T. Fletcher on a written contract of employment to construct a building. From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

Ed. R. Coulter, of Welser, and C. H. Brittenham, of Midvale, for appellant. Frank Harris, of Welser, for respondent.

STEWART, C. J. Upon the 13th day of December, 1909, the plaintiff entered into a contract with the defendant and 43 other persons, and under the terms of such con-

tract the plaintiff agreed to build and construct and equip a butter factory and feed mill for the sum of \$4,000, and said defendant, together with each of the other persons who signed the contract with him, promised and agreed to pay the plaintiff the sum of \$100 upon the completion of said butter factory and feed mill, according to the terms of the contract. The contract provided, among other things, as follows: "Second parties agree to appoint an executive committee of three when this contract is closed, with full power and authority in a majority, to represent them and all their interests herein, and from time to time inspect the work of the first party while he is building said factory and placing said machinery. * * * Said factory shall be completed by first party within ninety days, or thereabouts after same is located as above provided. And payment for the same shall be due from date of completion, and shall draw 10 per cent. interest from that date; but if time is required by any of the subscribers hereto, first party agrees to accept one half of their subscriptions in cash and allow three months' time on the balance if a good note is given drawing 10 per cent. interest. In case first party shall be delayed in the execution of this contract by strikes, storms, unavoidable accidents or other causes over which he has no control, then the time limit for the completion of said factory shall be extended for a period of time equal to such delay." This action is founded upon said contract, and it is alleged in the complaint that on December 13th, after the execution of the contract, there was a meeting of the subscribers to the stock of the creamery held for the purpose of choosing an executive committee as provided in the contract, that Levi Keithley, E. B. Sherman, and William Towell were duly elected the executive committee, and on the 15th day of December, the subscribers, including the defendant, acting through the executive committee, entered into a contract with the plaintiff and selected a site, and that a supplementary contract was entered into whereby the plaintiff was authorized to build an icehouse on the site according to dimensions and specifications set forth in the contract. It is also alleged in the complaint that within a few days after the execution of the contract severe storms occurred at Midvale, Idaho, and that the thermometer dropped to a point below freezing, and there continued thereafter, for a period of four months, intense cold weather and storms of such character that it was impossible for the plaintiff to construct said buildings as required by the plans and specifications, and, on account of unavoidable accidents and other causes over which the plaintiff had no control, the work was delayed for a period of four months before it was possible for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

him to commence the construction of said buildings, and that, as soon as the weather and other conditions permitted, he began the construction of the building, well, icehouse, and things called for in the contract and supplementary contract, built the creamery, and installed equipment and stored ice, and finally completed the same, and had the same ready for acceptance on or about the — day of —, 1910; that within 90 days after the time when it was possible to commence work the plaintiff completed the same in all respects in conformity with the plans and specifications thereof, but that the subscribers and the defendant and the executive committee refused to accept, and still refuse to accept, the same, and that the plant and machinery have been idle ever since.

The defendant filed an answer and admitted the contract as alleged in the complaint, but denies that within 90 days after the execution of the contract severe storms occurred at Midvale, but does admit that the thermometer dropped to a point below zero, but denies that thereafter for four months cold weather or storms continued of such a character that it was impossible for the plaintiff to construct the building, or that it was impossible to procure help during that period, and denies that the plaintiff began the construction of said building as soon as the weather conditions permitted, or that he built the same and completed the same for acceptance of the defendant and the other subscribers or the executive committee on the — day of —, 1910, or that he began the construction except a small icehouse at any time prior to the 7th day of April, 1910, and denies that the contract was completed and the work constructed and equipped in accordance with the agreement. Defendant denies that the plaintiff, within 90 days after the time when it was possible to commence the building, completed it in conformity with the plans and specifications.

An affirmative defense is alleged by the defendant, that the contract set forth in the complaint was entered into as alleged in the complaint, and it is alleged that time is and was an essential element in the contract, and that it was necessary to have the creamery completed and equipped so that contracts could be made with farmers and stockmen having milk for market, and that milk could be turned over to said creamery, and that, after the execution of the contract, the plaintiff failed and neglected and refused to begin the work or to procure material therefor until after the 7th day of April, 1910, notwithstanding it could have been done and completed according to the contract; and that, as soon as the full time for the completion and equipment of the creamery had expired according to the terms and conditions of the contract, the

defendant and a large number of the subscribers elected and did rescind said contract, and have refused to accept the creamery.

Upon the issues thus presented, the findings were made by the trial court, and upon the findings and conclusions of law the court rendered a judgment that the plaintiff take nothing by his action, and that the same be dismissed and the defendant have costs. This appeal is from the judgment.

[1] Counsel for respondent contends that, this appeal having been taken from the judgment, this court cannot review the evidence. The record in this case contains the evidence taken at the trial, certified to by the stenographer, and settled and allowed by the trial judge. The notice of appeal in this case was served and filed on the 11th day of August, 1911, and was taken under the provisions of section 4807, as amended by an act approved February 20, 1911 (Sess. Laws 1911, p. 367), and the transcript and record filed was prepared in accordance with the provisions of sections 4818 and 4820a, as amended by an act approved February 25, 1911 (Sess. Laws 1911, p. 375), and section 4434, added to part 2, tit. 8, c. 7, of the Code of Civil Procedure, under an act approved February 25, 1911 (Sess. Laws 1911, p. 379). Section 4807, as amended, omits the one year allowed by the statute prior to such amendment within which to take an appeal from a judgment, and places a limit of 60 days after such judgment within which an appeal may be taken from a final judgment in an action or special proceedings commenced in the court in which the same is rendered, and also from a judgment rendered on an appeal from an inferior court, and also from a judgment rendered on an appeal from an order, decision, or action of a board of county commissioners. It also appears that the provision of the statute prior to the amendment that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment" is omitted, and, in lieu thereof, the amendment limits the different appeals authorized under this paragraph to 60 days, and no limitation is prescribed as to the questions which the court may review when the appeal is taken within 60 days. The record required to be submitted to this court on appeal from a final judgment is prescribed by section 4818, as amended by the act of February 25, 1911 (Sess. Laws 1911, p. 375), as follows: "On an appeal from a final judgment the appellant must furnish the court with copy of the notice of appeal, of the judgment roll or any bill of exceptions or reporter's transcript prepared and settled as prescribed in section 4434 upon which the appellant relies." And section 4434, as added, provides:

"Any party desiring to procure a review on appeal to the Supreme Court of any ruling of the district court made during the trial, or the sufficiency of evidence to sustain the verdict or decision, in an action or special proceeding, may, in lieu of preparing, serving, and procuring the settlement of a bill of exceptions as in this chapter provided, procure a transcript of the testimony and proceedings, including the instructions given or refused, and exceptions thereto, on the trial, or such part thereof as may be necessary, in the following manner." Then follows the method prescribed in procuring the reporter's transcript of the testimony and its settlement by the trial judge, and this transcript is the one referred to in section 4818 as reporter's transcript prepared and settled, and is required to be presented to this court on appeal from the judgment. Such transcript may be used either on an appeal from the final judgment, as provided by section 4818, or on an appeal from an order denying a new trial; and, if used on appeal from a final judgment, such transcript has the force and effect of a bill of exceptions duly settled and allowed and is adequate and sufficient to present for review on such appeal any ruling appearing therein to have been excepted to, or by the statute deemed excepted to, or any question of insufficiency of evidence which may afterward be properly presented by specification of insufficiency in the brief on appeal.

We therefore conclude that on an appeal from a final judgment, if the appellant furnishes the appellate court with a copy of the notice of the appeal, of the judgment roll, and of the reporter's transcript as prepared and settled, as provided by said section 4434, and the question of the insufficiency of the evidence is properly presented by specification of such insufficiency in the brief on appeal, the appellate court has full power and authority to determine whether the evidence is sufficient to support the findings or the verdict. It follows that it is not absolutely necessary for the appellant to move for a new trial in order to have determined the sufficiency of the evidence to sustain the findings or the verdict.

[2] These various provisions thus referred to in no way interfere with the procedure with reference to a motion for a new trial, and by the provisions of the act approved February 25, 1911, section 4440 is amended to provide: "When an application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section it must be made upon affidavits; for any other cause it may be made, at the option of the moving party, either upon the records and files in the action, or the minutes of the court." This chapter 118, which includes the above section and other sections, in no way alters or amends section 4439, Rev. Codes, which in subdivision 6 pro-

vides that "insufficiency of the evidence to justify the verdict or other decision, or that it is against law." This ground for a new trial still remains, and section 4807 provides that an appeal may be taken from an order granting or refusing a new trial. It will be observed by the provisions of section 4818 that on appeal from a final judgment the appellant must furnish the court with copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or reporter's transcript prepared and settled as prescribed in section 4434 upon which the appellant relies. Section 4434, as quoted above, shows that this record includes the evidence settled and allowed by the trial court, and also the instructions of the court, and upon this record this court is required to review any ruling of the district court made during the trial, and the sufficiency of the evidence to sustain the verdict or decision. This provision necessarily means that on an appeal taken from a judgment every question either of law or fact, which arises up to and including the judgment, may be reviewed upon appeal when presented in the manner prescribed by these various provisions of the statute, and it no doubt was the intention of the Legislature in enacting these various amendments and additions to the Code of Civil Procedure in relation to appeal to provide a plain and speedy method of appealing from a final judgment, whether upon a verdict of the jury or the decision of the trial court, and the provisions are so comprehensive in their general character as to provide for reviewing upon an appeal from a judgment every question occurring upon the pleadings and during the trial up to and including the entry of the judgment, as completely as the same may be reviewed upon motion for a new trial. Questions affecting the rights of the parties to the suit arising after the entry of judgment, and which may be urged as grounds for a new trial, can only be reviewed upon appeal from an order made upon motion for a new trial, setting forth such alleged errors, under the provisions of the act of February 25, 1911 (Sess. Laws 1911, p. 377), amending section 4440 and subsequent sections of the Revised Codes.

[7] The word "decision," used in section 4434, to sustain which the evidence may be reviewed on appeal, evidently was intended by the Legislature to mean where a cause is tried to the court and findings of fact and conclusions of law are made by the trial court, and the decision necessarily includes the trial court's findings of fact and conclusions of law. In other words, the decision of the court and the verdict of the jury are synonymous. The one is the result of the decision of the jury, and the other the trial judge. The judgment, however, upon either the verdict or the decision necessarily follows such decision. The judgment is entered by the

clerk, as provided by the statute. Sections 4407, 4450, and 4454, Rev. Codes. The appeal, therefore, in this case having been taken from the final judgment within the 60 days after the entry of such judgment, the evidence having been presented to this court in connection with the judgment roll as prescribed by the statute, such evidence may be reviewed for the purpose of determining the sufficiency of the evidence to justify the decision of the trial court, and whether the decision is against the law.

It is suggested, however, that, if a person desiring to appeal on the ground of the insufficiency of the evidence to support the verdict or findings is not required to move for a new trial, it will result in many more appeals being taken than if the motion for a new trial is required, because in many cases the trial court might grant a new trial. We do not believe there is anything in this contention for the reason that under the provisions of section 4807, Rev. Codes, before amendment, the question of the insufficiency of the evidence could be presented on appeal from the judgment, providing the appeal was taken within 60 days after the entry of judgment, and the result above referred to did not occur under such provision. *Holt v. Spokane & Palouse R. Co.*, 3 Idaho (Hasb.) 703, 35 Pac. 39; *Brady v. Linehan*, 5 Idaho, 732, 51 Pac. 761; *Mahoney v. Board of County Commissioners*, 8 Idaho, 375, 67 Pac. 108; *Cunningham v. Stoner*, 10 Idaho, 549, 79 Pac. 228; *Walker v. Elmore County*, 16 Idaho, 697, 102 Pac. 389.

We believe, also, there is a very cogent reason why attorneys will interpose a motion for a new trial whenever there is a substantial conflict in the evidence, and because of that there will be fewer appeals from the judgment. The reason is: Where there is a substantial conflict in the evidence, the trial court has the authority to set aside the verdict if such court concludes that substantial justice has not been done, whereas this court is prohibited from setting aside a verdict whenever there is substantial evidence to support the verdict. Rev. Codes, § 4824. A careful attorney, therefore, will interpose a motion for a new trial whenever there is substantial evidence to support the verdict, and in such case the trial court ought to grant a new trial whenever such court thinks substantial justice has not been done by the verdict, and not pass the case up to this court for final determination. Under the provisions of section 4824 of the Revised Codes, this court is powerless to set aside a verdict where there is substantial evidence to support it. From many records presented to this court upon appeals from motions for a new trial there appears a proneness on the part of the trial court not to pass upon the case, even though it appears to the trial court that substantial justice has not been done, and to pass the case up to this court

for decision, and to overlook the fact that this court can give no relief where there is substantial evidence to support the verdict. Where there is direct conflict in the evidence the trial court ought always to grant a new trial, if it is clearly of the opinion that substantial justice has not been reached by the verdict of the jury, and not shirk the responsibility imposed by the statute to grant a new trial, where there is a conflict in the evidence, although that court is of the opinion that substantial justice has not been done, and not pass the matter up to this court where no relief can be given in such a case.

The controlling question urged upon this appeal is that the evidence does not support the findings and judgment. The court finds, first, that the contract alleged in the complaint was executed on the 13th day of December, 1909, by the defendant and other parties as alleged in the complaint; that the plaintiff agreed to build and equip a butter factory and feed mill for the sum of \$4,000, the same to be constructed within 90 days or thereabouts after the site for the same was selected. The court also finds that by the contract the defendant agreed to pay the plaintiff the sum of \$100 upon the completion of the butter factory and feed mill in accordance with the contract. The court finds that on December 14, 1909, after the execution of the contract, there was a meeting of the subscribers to the stock of said creamery, and that Levi Keithley, E. B. Sherman, and William Towell were elected as the executive committee as provided in the contract; that on the 15th day of December, 1909, the subscribers to the contract, including the defendant, acting through the executive committee, selected a site for the location of said building. The court found that the contract provided "that, in the event the plaintiff should be delayed in the execution of his contract by reason of strikes, storms, unavoidable accidents, or other causes over which he had no control, the time limit for the completion of said factory would be extended for a period of time equal to such delays." The court finds that the plaintiff was not delayed in the execution of said contract by strikes, storms, unavoidable accidents, or other causes over which he had no control at any time beyond the time mentioned in the contract, to wit, 90 days, and that the plaintiff did not begin the construction of the building mentioned in the contract as soon as the weather conditions would permit, and did not begin the erection of the building until after the 7th day of April, 1910; that before the plaintiff began the erection of the factory, on the 7th day of April, 1910, the defendant and 24 others of the subscribers to the contract notified the plaintiff in writing that they and each of them elected to and did rescind said contract and did withdraw therefrom; that, after the receipt

of said notice, the plaintiff proceeded to construct the building and completed the same on or about the 13th day of June, 1910, and tendered the same to the defendant for his acceptance; that the defendant refused, and has refused, to accept the same. Upon these findings of fact, the court concluded that the plaintiff in not completing and equipping the butter factory on or about the 15th day of March, 1910, violated his contract, and thereafter the defendant had a lawful right to rescind the same on his part, and that on the 7th day of April, 1910, the defendant did rescind the contract on his part, and that he had a good and lawful right to rescind the same, and that the defendant is not liable on his contract, and that the action should be dismissed.

We think it must be conceded that the evidence conclusively proves that the contract sued upon in this action was made between the plaintiff and the defendant and forty-three other persons, and that the defendant and the other persons signing such contract employed the plaintiff to construct a butter factory and feed mill for the sum of \$4,000, and that each person signing such contract agreed to pay the sum of \$100 as a part of the contract price, and that, as provided in the contract, Levi Keithley, E. B. Sherman, and William Towell were elected as an executive committee. The provision in the contract providing for an executive committee is as follows: "Second parties agree to appoint an executive committee of three when this contract is closed, with full power and authority in a majority, to represent them in all their interests herein, and from time to time inspect the work of the first party while he is building said factory and placing said machinery." There can be no question but that this language means that an executive committee should be appointed by the subscribers, and that such committee should have full power and authority in a majority of such committee in all matters in connection with the construction of the building, and the carrying out of the contract after the contract was made. This provision, no doubt, was inserted in the contract by reason of the fact that a large number of persons had signed the contract, and that it might be a difficult and inconvenient matter to secure the assent of all the defendants as to the matters connected with the construction of the building, and the possible disagreement among them as to such matters, and therefore such power was vested entirely in an executive committee of three. The contract provides: "Said factory shall be completed by first party within ninety days, or thereabouts, after the same is located as above provided."

[4] It will be observed that the time for the completion of the building was about 90 days. The contract also provides that "in case first party shall be delayed in the execution of this contract by strikes, storms,

unavoidable accidents or other causes over which he has no control, then the time limit for the completion of said factory shall be extended for a period of time equal to such delays." It is recognized that at law the general rule is time is of the essence of the contract, unless a contrary intent appears from the face of the contract, and in equity the general rule may be said to be that time is not of the essence of the contract, and that it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or the court of equity will not so regard it. The rule announced above, that time is the essence of contracts at law, applies to building contracts in which a definite time for completing the work is stipulated for, such as building contracts, the construction of railroad and bridges, etc. 2 Page on Contracts, §§ 1160, 1161.

[5] It will thus be seen that time was not of the essence of the contract, and that the time fixed in the contract for the completion of the building was conditional, first, that the executive committee had full power and authority to extend the time of completion to a time different from 90 days; second, in case the party of the first part was delayed in the execution of the contract by strikes, storms, unavoidable accidents, or other causes over which he had no control, then the time limit for the completion of the factory should be extended for a period of time equal to such delay. The evidence is clear that the executive committee accepted the appointment as such and entered upon the discharge of the duties imposed upon them and continued in such capacity until the contract was completed, and made changes with reference to the construction of the buildings under subsequent contracts. Under the authority thus given, it is apparent that this executive committee had full power to determine whether weather conditions were such as would prevent the appellant from proceeding with his work, and whether proceeding with the work would be improper by reason of such weather conditions.

There is no conflict in the testimony as to this committee being appointed. It seems from the language used in the contract that there can be no question about the authority of the committee to act. There is no conflict in the evidence but that Sherman and Keithley, a majority of the executive committee, had a conversation and made an agreement with the appellant, in January, 1911, whereby it was agreed that the weather conditions were such that it was not advisable at that time to commence the construction of said creamery, and that these conditions continued during January, February, and March, and that this committee agreed with the appellant that they would notify him when the weather conditions became such that the appellant could safely

go ahead with the contract; that in March, along about the middle of the month, the two members of the executive committee in conversation with each other discussed when they would have the work resumed, one believing that the work should commence April 1st, and the other April 15th, and that a letter was written to the appellant notifying him to commence the work in the first part of April, and that they so notified the appellant, and that the appellant then commenced the constructive work and finished the same about the 13th day of June, 1911. So it is plain from the evidence that the executive committee gave consent that the work should not be commenced or continued until the committee notified the appellant, and that this did not take place until a short time before the appellant commenced the work, and that on the appellant's receiving notice from the committee he commenced the work and completed it within a reasonable time.

[6] The court, therefore, erred in findings of fact 8 and 9. Counsel, however, contend that, even admitting that the executive committee did consent to an extension, yet, before the appellant commenced the constructive work, the respondent and 24 others of the subscribers rescinded the contract for the construction of said building for the reason that the time limit had expired, and served written notice upon the appellant that the signers to the notice elected to rescind the contract for the reason that the time limit fixed by the contract had expired. This notice was served on the 6th day of April, 1911. This contention, however, cannot prevail under the terms and provisions of the contract involved in this case, for the reason that the joint action of 25 of the signers to the contract had no power to rescind the contract.

[3] It is apparent from the contract itself that the obligation of the defendant and the other signers to the contract is a joint obligation on the part of all the signers, and that such signers employed the appellant to construct such building, and the agreement to employ is a joint contract and not a several contract. The contract, however, to pay for the building, is a separate obligation of each signer that such signer will pay only \$100 of the sum agreed to be paid for such constructive work. So, under the contract, the employment of the appellant and the rescission of the contract being joint by the defendant and the other signers, such contract cannot be canceled or rescinded by the action of a majority or any number of such signers.

In the case of *Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80, the Supreme Court of Minnesota had under consideration a contract very similar to the one involved in this case, and the Supreme Court, after discussing whether an obliga-

tion of the parties was joint or several, said: "Nor can we gather from any part of the contract that there was any intent, except in the matter of payment, to make the obligation a several one. Certainly the subscribers did not so understand it, for the repudiation and renouncement relied upon by defendant were by means of a motion made and carried at a meeting held by them, a majority of all being present, but less than a majority of all voting in favor of the motion. We are therefore of the opinion that, while the obligation to pay was several and independent, the subscribers jointly shared the burden, and were united in interest in all other respects. Taken as a whole, the instrument was of a very peculiar character, and evidently, until a stock company was formed, * * * it was not intended that even a majority should govern or control. It follows that unanimous consent would have to be secured before the contract could be repudiated and renounced."

Applying this rule to the contract now under consideration, it is apparent that the several subscribers to the stock who agreed to pay \$100 for each share jointly engaged in an agreement to employ the appellant to construct the improvement for which such sums should be paid, and that they were all interested in the general project as a common body, and that the obligation entered into in employing the appellant was a joint obligation and that they were to share in the ownership of the property, in the proportion that the share owned by each bore to the entire capital for which the corporation was to be formed. *White v. Scott*, 26 Kan. 476. Referring now to the contract, we find that it provides: "We, the subscribers hereto, desiring a butter factory and feed mill of the following description, located at or near the town of Midvale, county of Washington, state of Idaho, hereby enter into this agreement with E. E. Buster of Boise, Idaho, as first party, the subscribers hereto being second parties, for the construction and equipment of a butter factory and feed mill to be built and equipped according to the descriptions indorsed hereon, on the following terms and conditions for the sum of four thousand dollars: This contract is not binding unless the amount of \$4,000 or more shall be subscribed, and it is understood and agreed that no subscriber is to be liable for a greater interest in said factory when the same is completed than is represented by the amount of his or her individual subscription. Each subscriber hereto hereby agrees to pay the amount paid by him or her to first party, his heirs or assigns, when the factory is completed and no more." This factory having been completed and more than the \$4,000 having been subscribed makes the obligation of the signers a joint contract in the employment of the plaintiff, and a several contract with reference to the payment to be made by each signer.

Laramie v. Tanner, 69 Minn. 156, 71 N. W. 1028; McArthur v. Board, 119 Iowa, 562, 93 N. W. 580; Davis v. Hendrix, 59 Mo. App. 444. It clearly appears by this agreement that the several subscribers to such contract were to incorporate and become the owners of the real property and the improvements made thereunder, and that their proportion was to be as the share of each to the entire capital stock for which the corporation was to be formed.

We have, then, in this case, 44 persons, including the defendant, who contract with the plaintiff to construct the creamery, and each agreed to pay \$100 personally upon the contract price. These 44 persons elected an executive committee under the provisions of the contract and the executive committee extended the time in which the plaintiff should complete such building. Twenty-five of the signers to the contract met and attempted to rescind the contract on account of the fact that the contract was not completed within the time fixed by the contract. The contract, however, was completed within the time given by the executive committee. The 25 who attempted to rescind the contract refused to pay their subscriptions. Nineteen of the subscribers paid their subscriptions. The building was completed and accepted by the executive committee, and is now held and now stands idle without occupancy with 19 subscribers having paid and 25 who refuse to pay. Under the rule announced in the case of Gibbons v. Bente above, we do not believe that the 25 persons had any power or authority to rescind the contract, that the contract was joint in so far as its being a contract of employment, and that such a contract could not be rescinded without the action of all the signers to such contract, and that the court erred in its conclusion of law that the plaintiff violated his contract, and that the defendant had a lawful right to rescind the same on his part, and therefore did rescind it, and that the plaintiff could not recover.

The judgment, therefore, is reversed, and a new trial is granted. Costs awarded to the appellant.

AILSHIE and SULLIVAN, JJ., concur.

In re DOMBROWSKI'S ESTATE.
(L. A. 3,117.)

(Supreme Court of California. July 9, 1912.)

1. WILLS (§ 111*)—VALIDITY—EXECUTION.

Under Civ. Code, § 1276, providing that all wills other than an holographic will must be subscribed at the end by the testator himself, or by some person in his presence and by his direction, and section 1278, providing that the person who subscribes the testator's name must write his own name as a witness to the will, but that a failure will not affect the will's validity, the subscription of the tes-

tatrix's name by another without the addition of the witness's name is a valid execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. § 111.*]

2. WILLS (§ 111*)—EXECUTION—VALIDITY.

Where a testatrix, who was too ill to sign her own name, requested one present to attach her name to her will, and he did so, and the testatrix added her mark thereto, her intention being to execute a will, the execution of a signature by another being sufficient, the execution was not insufficient because, if considered as a signing by mark there was no compliance with Civ. Code, § 14, providing that, where a subscription is by mark, the name of the person so signing is to be written near the mark by one who writes his own name as witness.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. § 111.*]

3. WILLS (§ 111*)—EXECUTION—INTENTION.

Unless made with the intention of authenticating the will, no subscription or signing will constitute a valid execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. § 111.*]

4. WILLS (§ 423*)—RECORD—RECITALS—EFFECT.

While Code Civ. Proc. §§ 1304, 1306, requires executors making petition for the probate of a will to make proof of the mailing of notice of the time appointed for probate to all others named as executors, a recital, in the order admitting the will to probate, that notice was given as required by law, sufficiently establishes the giving of notice unless the record affirmatively shows such recital to be untrue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1067, 1068, 1308; Dec. Dig. § 423.*]

5. APPEAL AND ERROR (§ 185*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

The appellate court will not, at the instance of one who appeared below and failed in any way to urge his objection, review the conclusions of the trial court as to facts essential to its jurisdiction, concerning which the lower court is vested with power to hear and determine.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1176, 1375; Dec. Dig. § 185.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. D. Arnot, Judge.

Robert H. Lovett and another filed a petition for the probate of the will of Fannie Dombrowski, deceased, which was contested by Walter Dombrowski and others. From a judgment for petitioners, contestants appeal. Affirmed.

Isidore B. Dockweiler, Walter R. Leeds, and Robert B. Murphey, for appellants. P. W. Thomson and Louis W. Myers, for respondents.

SLOSS, J. Two papers, claimed to be, respectively, the will and the codicil thereto of Fannie Dombrowski, deceased, were filed in the superior court of Los Angeles county by E. B. Studer, who petitioned for letters of administration with the will annexed. Subsequently a petition for probate and for letters testamentary was filed by Robert H. Lovett and Joseph W. Maple, two of the per-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sons named as executors. Walter, Elsa, and Flora Dombrowski, the children and sole heirs of the decedent, filed a contest, opposing probate on the ground that the papers had not been executed as required by the statutes governing the execution of wills. Studer dismissed his petition, and a hearing was had on the contest to the petition of Lovett and Maple. The findings were in favor of the petitioners, and the court, on June 16, 1911, made its judgment and order, admitting the alleged will and codicil to probate, and granting letters testamentary as prayed. The contestants appeal from such judgment and order, and from an order denying their motion for a new trial. There is also an appeal from an order made June 14, 1911, dismissing the contest; but the substantial questions involved are presented by the other appeals, and this one need not be separately considered.

The will was dated January 13, 1908, the codicil April 2, 1908. Upon these dates the decedent, Fannie Dombrowski, was a resident of Peoria, Ill., where all of the acts which, as respondents claim, constituted an execution of the papers as testamentary writings took place. Thereafter Mrs. Dombrowski moved to the county of Los Angeles, in this state. She was a resident of that county at the date of her death, March 31, 1911, and left considerable property in this state.

Except for a minor point, to be mentioned later, the due execution of the papers was and is the only question in controversy between the parties. It is conceded on all sides that this question must be decided by reference to the requirements of the laws of California. Civ. Code, §§ 1285, 1376.

The evidence shows that the manner of the attempted execution was substantially the same in the case of the will as of the codicil. It will suffice, therefore, to outline the facts surrounding the making of the will.

There were three subscribing witnesses, each of whom gave testimony by deposition. The document, which was in typewritten form, was declared by Mrs. Dombrowski to be her will, and she asked the three witnesses to sign as subscribing witnesses, which they did. Her own signature (if it was a signature) had been affixed, in the presence of the witnesses, as follows: She was, by reason of illness, unable at the time to write her name, and requested Mr. Maple, her legal adviser, and one of the persons named as executors, to write her name. This he did, adding the words "her mark," as follows:

her
"Fannie Dombrowski."
mark

Mrs. Dombrowski made a cross (X) in the space left between her given name and her surname, and the three witnesses signed the attestation clause, and also signed their names under the words "Witnesses to mark," which had also been written by Mr. Maple.

Mr. Maple did not, however, write his own name on the paper as witness or otherwise. There was testimony that the decedent requested the subscribing witnesses to sign as witnesses to her mark, as well as to become attesting witnesses to the will.

[1-3] Section 1276 of the Civil Code provides, among other requisites to the execution of a written will, other than holographic, that "it must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto." Section 1278 provides that "a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will." Since the testimony shows beyond all question that the name of the testatrix was subscribed by Mr. Maple in her presence and at her direction, it would seem that the requirements of the sections quoted had been fully met.

But the appellants argue that the decedent did not intend to perform the testamentary act by having her name written by another person; that what she in fact undertook to do was to sign her name by mark; that such signing was incomplete and ineffectual for want of compliance with the requirement of section 14 of the Civil Code; that, where a subscription is by mark, the name of the person so signing is to be written near the mark, by a person "who writes his own name as a witness." Here, as has been stated, the person (Maple), who wrote the name of Mrs. Dombrowski, did not write his own name as witness. While, accordingly, the writing of the testatrix's name by Maple would have been sufficient, if nothing more had been contemplated or done, yet, where such writing was merely a step in an ineffectual attempt to sign by mark, there was, it is claimed, no completed subscription by either method. The subscription by mark was defective for want of the signing as witness by the person writing the name. The execution was not sufficient under section 1276, because the decedent never intended that the writing of her name by Maple, without the making of her mark, should complete her act of formal execution.

The argument thus advanced rests upon rather refined and technical reasoning. The testatrix unquestionably intended to execute a will, and performed certain acts in order to carry out this intent. She did everything necessary, under the statute, to a valid execution. Is her act to be overthrown because, in addition, she tried to do something more? All that was done—the direction to Maple to write her name, his writing of it, the making of a mark—taken together, formed a single transaction, every part of which was influenced by the one intent of executing a will. To say that the decedent intended to sign *by mark*, rather than under section 1276, is to lose sight of the real nature

of her acts. What she intended was to execute a will. No doubt she thought that all of the acts performed were necessary, or at least proper parts of a valid execution. But there is no good ground for saying that she intended that one of them, rather than another, should accomplish the desired end. Her intent was to carry out and authenticate her testamentary purpose by means of all these acts. The essential facts are that she did everything which she designed to do in executing her will, and that what she did included the formalities required by the statute for such execution. This being so, the validity of that which was rightly done is not affected by the circumstance that she may have entertained and acted upon the belief that something more was needed.

The cases cited by appellants are not in conflict with these views. The one which comes nearest to supporting their position is *Main v. Ryder*, 84 Pa. 217. There Daniel Miner, the maker of the alleged will, directed one Thorpe to write his name, which was done in the manner here employed; that is to say, by leaving a space between the words "Daniel" and "Miner," and writing the words "his" and "mark" over and under, respectively, such words. The court held that if the testator had "directed his name to be written with the view of adding his mark, and thus making his signature," and had not in fact added his mark, there would have been no sufficient execution of the will. This was put on the ground that what was done, in the case supposed, was not intended as a full execution of the will. The correctness of this holding may well be conceded without affecting the soundness of the finding in the case at bar that the will of Mrs. Dombrowski was duly executed. There the acts intended to operate as a subscription of the will were never completed. Here, however, all that was contemplated was done. The testatrix intended to complete a valid execution by means of acts all of which were in fact done. *Robertson v. Hill*, 127 Ga. 175, 56 S. E. 289, also cited by appellants, goes no further than *Main v. Ryder*.

No doubt a subscription or signing of any kind will not constitute a valid execution of a will unless made with the intention, on the part of the testator, of finally and completely authenticating the will. The principle is well applied in such cases as *Everhart v. Everhart* (C. C.) 34 Fed. 82, where the alleged testator attempted to sign a will, but succeeded only in making a small mark or scratch, which, apparently, he did not intend as a substitute for a complete signature, or *Plate's Estate*, 148 Pa. 55, 23 Atl. 1038, 33 Am. St. Rep. 805, where the decedent, undertaking to sign his name, stopped after making one stroke, saying, "I can't sign it now," or *Waller v. Waller*, 1 Grat. (Va.) 454, 42 Am. Dec. 564, where the name of the alleged testator was written by him in the

body of the (holographic) will, but there was nothing written in a blank evidently left at the bottom for signature. But none of these cases, nor any other cited by appellants, lays down a rule that would justify the holding that the will here in question was not properly executed.

So far as authority in this state goes, the decisions, although made in cases not exactly like the one before us, are distinctly favorable to the position of the respondents. In *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83, the signature was similar to that here made; the testatrix making her mark. The person who wrote her name signed as a witness to the will, but not otherwise. This was held to be sufficient notwithstanding the objection that the party who wrote the name of the testatrix should have signed his name "as a part of the signature." Section 1278 of the Civil Code is quoted in support of the court's conclusion. In the case just cited, the party who wrote the name of the testatrix did witness the will, and to this extent the case differs in its facts from the one before us. The *Toomes* Case is, however, relied upon as authority in *Estate of Langan*, 74 Cal. 353, 16 Pac. 188, where the jury found that the name of the testatrix was signed to the will by another person in her presence and at her request, and also that the person who so signed her name did not write his own name near her signature as a witness to said signature. It was held that the latter finding was immaterial. The report of the case is brief, and does not fully disclose the facts. It appears, however, from the transcript, that the signature included a mark made by the testatrix.

We have assumed, in the foregoing discussion, that the undisputed evidence shows, as appellants contend, that the decedent contemplated making her mark when she directed the writing of her name, and that she did not intend that execution should be complete until all of the acts—the writing of her name by Maple, the making of a mark by herself, and the witnessing of her mark by the three who did witness it—should be accomplished. We have also assumed that the provision of section 14, requiring one who writes the name of a person signing by mark to write his own name, is applicable to the execution of wills. Both points are disputed by the respondents, but we think it unnecessary to express an opinion upon either. We prefer to rest our decision on the broad proposition that there is a valid execution where a person undertaking to make a will has done certain acts with the intention of thereby executing his will, leaving undone nothing which he undertook to do to carry out that intention, and the acts done include everything necessary, under our statutes, to the execution of a will.

[4] The appellants make the further point that the court was without jurisdiction to

hear the petition for probate, because the petitioners had failed to make proof of mailing of notice of time appointed for probate to three persons named as coexecutors of the petitioners and not joining in the petition. Code Civ. Proc. §§ 1304, 1306. But the record does not support the contention. The order admitting the will and codicil to probate recites that the petition "was duly set for the 31st day of May, 1911, and that notice of said hearing has been duly given as required by law. * * *." This recital of the giving of notice is sufficient to establish the truth of the fact recited, unless the record affirmatively shows that the recital is untrue. It does not so show.

[5] The appellants rely upon the fact that no proof of notice is contained in the bill of exceptions and that the bill states, at the outset, that "the foregoing proceedings, and none other, were had and taken." But it is apparent from the introduction and the specifications of insufficiency of evidence contained in the bill that it was designed merely to present for review the correctness of the findings of the court with respect to the issues raised by the petition for probate, the contest, and the answer thereto. The hearing was had on the merits, without any suggestion being made that the court had not acquired jurisdiction. Under these circumstances, it cannot fairly be said that the record affirmatively shows a want of proof of the notice required by the code. On the contrary, it indicates plainly that there was no question, in the court below, of the sufficiency of the steps required to give the court authority to proceed. As was said in *Estate of Latour*, 140 Cal. 414, 425, 73 Pac. 1070, 1074: "This court will not upon appeal review the conclusions of a trial court as to facts essential to its jurisdiction, concerning which such court was vested with the power to hear and determine, at the instance of a party who has appeared in that court in the action or proceeding, and has omitted there to in any way urge his objection, but has proceeded therein upon the theory that the court had jurisdiction."

The judgment and the orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

H. K. MULFORD CO. v. CURRY, Secretary of State. (S. F. 5,565.)
(Supreme Court of California. July 3, 1912.
Rehearing Denied Aug. 2, 1912.)

I. COMMERCE (§ 69*)—INTERSTATE COMMERCE—STATE INTERFERENCE—FOREIGN CORPORATIONS—LICENSE TAX.
Civ. Code, § 409, and Pol. Code, § 416, subd. 4, so far as they provide an annual license tax to be paid by corporations, domestic and foreign, in accordance with the amount of their capital stock, for the right to do business

in California, are an illegal interference with interstate commerce, and, so far as they relate to corporations, whether domestic or foreign, doing an interstate business, though also doing intrastate business, are invalid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 113-118; Dec. Dig. § 69.*]

2. COMMERCE (§ 13*)—INTERSTATE COMMERCE—STATE CONTROL OF FOREIGN CORPORATIONS.

The power of the state to prescribe the terms under which a foreign corporation may engage in intrastate business is subject to the limitation that, where such foreign corporation is engaged in interstate, as well as intrastate, business, no such term, condition, or requirement will be constitutional, if it imposes a burden on the interstate business, whatever its name or form.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 7; Dec. Dig. § 18.*]

3. CONSTITUTIONAL LAW (§§ 287, 230*)—COMMERCE (§ 69*)—EQUAL PROTECTION—DUE PROCESS OF LAW—FOREIGN CORPORATIONS—LICENSE OR PRIVILEGE TAX.

A license or privilege tax imposed on foreign corporations doing both interstate and intrastate business, based on the total capital or the total capital stock of such corporations, without just relation to the proportion which the capital or capital stock used in the state bears to the whole capital or capital stock, though in terms declared to be directed solely to the intrastate business of the corporation, is unconstitutional, as a violation of the equal protection and due process of law clauses of the fourteenth amendment of the federal Constitution, as an effort to tax the property of citizens of the United States situated beyond the jurisdiction of the taxing power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 905, 687; Dec. Dig. §§ 287, 230.* Commerce, Cent. Dig. §§ 113-118; Dec. Dig. § 69.*]

4. CORPORATIONS (§ 631*)—FOREIGN CORPORATIONS—POWERS.

A corporation, unless expressly forbidden, may acquire rights of contract and property in a foreign jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2489-2494, 2528; Dec. Dig. § 631.*]

5. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—REGULATION.

A state may absolutely exclude a foreign corporation not engaged in interstate commerce, but which proposes solely to engage in domestic business, from doing such business within its limits, and so may impose terms and conditions on which alone such business may be commenced within its limits, provided no unconstitutional condition is made a part of any actual agreement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505-2509; Dec. Dig. § 636.*]

6. CONSTITUTIONAL LAW (§ 92*)—CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—EXCLUSION.

When a foreign corporation has once engaged in domestic business within the state, the state may not thereafter exercise its powers of exclusion or regulation to the destruction of the corporation's property or its vested constitutional rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178-180, 225, 227; Dec. Dig. § 92.* Corporations, Cent. Dig. §§ 2505-2509; Dec. Dig. § 636.*]

7. CORPORATIONS (§ 687*)—CONSTITUTIONAL LAW (§ 287*)—FOREIGN CORPORATIONS—LICENSE TAXES—VALIDITY.

Civ. Code, § 409, and Pol. Code, § 416, subd. 4, in so far as they attempt to impose a license tax on foreign corporations, graduated according to the amount of the corporation's capital stock, whether invested and used in its business within the state or elsewhere, is unconstitutional, as depriving the corporation of its property without due process of law, since the state has no power to tax property permanently located beyond its limits.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 637;* Constitutional Law, Cent. Dig. §§ 881, 905; Dec. Dig. § 287.*]

8. CORPORATIONS (§ 687*)—COMMERCE (§ 69*)—FOREIGN CORPORATIONS—REGULATION—FILING ARTICLES.

Civ. Code, § 408, requiring foreign corporations, before doing business within the state, to file a certified copy of their articles with the Secretary of State, is a reasonable and proper requirement, not in restraint of interstate commerce, and is therefore valid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 637;* Commerce, Cent. Dig. §§ 113-118; Dec. Dig. § 69.*]

In Bank. Mandamus by the H. K. Mulford Company against O. F. Curry, Secretary of State. Mandate issued as prayed.

Hillyer, Stringham & O'Brien, for petitioner. U. S. Webb, Atty. Gen., and R. C. Van Fleet, Deputy Atty. Gen., for respondent.

HENSHAW, J. This is an original petition addressed to this court for a writ of mandate, requiring the Secretary of State to receive and file a certain document tendered to him by petitioner, designating and appointing one F. L. Clark as agent of petitioner upon whom process affecting petitioner may be served. Respondent refused to accept and file the tendered document, basing his refusal upon the declination of petitioner to tender therewith for filing a certified copy of its articles of incorporation, and to pay the fee prescribed by section 409 of the Civil Code, which last-named section is as follows: "For filing and issuing a certified copy as required in section four hundred and eight of this Code, corporations formed under the laws of another state, or of a territory, or of a foreign country, must pay the same fees as are paid by corporations formed under the laws of this state."

The fees herein referred to are fixed by section 416 of the Political Code which declares: "The Secretary of State, for services performed in his office, must charge and collect the following fees: * * * 4. For filing articles of incorporation, if the capital stock amounts to twenty-five thousand dollars or less, fifteen dollars; if the capital stock amounts to over twenty-five thousand dollars, and not over seventy-five thousand dollars, twenty-five dollars; if the capital stock amounts to over seventy-five thousand dollars, and not over two hundred thousand dollars, fifty dollars; if the capital stock

amounts to over two hundred thousand dollars, and not over five hundred thousand dollars, seventy-five dollars; if the capital stock is over five hundred thousand dollars, and not over one million dollars, one hundred dollars; if the capital stock is over one million dollars, fifty dollars additional for every five hundred thousand dollars or fraction thereof of capital stock over and above one million dollars," etc.

Having further relation to the matter is an act entitled "An act relating to revenue and taxation, providing for a license tax upon corporations, and making an appropriation for the purpose of carrying out the objects of this act." Section 2 of this act declares as follows: "It shall be the duty of every corporation, incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall hereafter engage in business in this state, to procure annually from the Secretary of State a license authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows: When the authorized capital stock of the corporation does not exceed ten thousand dollars (\$10,000) the tax shall be ten dollars (\$10); when the authorized capital stock exceeds ten thousand dollars (\$10,000) but does not exceed twenty thousand dollars (\$20,000) the tax shall be fifteen dollars (\$15); when the authorized capital stock exceeds twenty thousand dollars (\$20,000) but does not exceed fifty thousand dollars (\$50,000) the tax shall be twenty dollars (\$20); when the authorized capital stock exceeds fifty thousand dollars (\$50,000) but does not exceed one hundred thousand dollars (\$100,000) the tax shall be twenty-five dollars (\$25); when the authorized capital stock exceeds one hundred thousand dollars (\$100,000) but does not exceed two hundred and fifty thousand dollars (\$250,000) the tax shall be fifty dollars (\$50); when the authorized capital stock exceeds two hundred and fifty thousand dollars (\$250,000) but does not exceed five hundred thousand dollars (\$500,000) the tax shall be seventy-five dollars (\$75); when the authorized capital stock exceeds five hundred thousand dollars (\$500,000) but does not exceed two million dollars (\$2,000,000) the tax shall be one hundred dollars (\$100); when the authorized capital stock exceeds two million dollars (\$2,000,000) but does not exceed five million dollars (\$5,000,000) the tax shall be two hundred dollars (\$200); when the authorized capital stock exceeds five million dollars (\$5,000,000) the tax shall be two hundred and fifty dollars (\$250). * * * The license tax or fee hereby provided authorizes the corporation to transact its business during the year or for any fractional part of such year in which such license tax or fee is paid." Stats. 1905, p. 493, as amended by St. 1909, p. 458, § 1.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The uncontroverted showing is that the petitioner is a foreign corporation, duly organized and existing under the laws of the state of Pennsylvania. It has an authorized and issued capital stock of \$1,000,000, and was organized for and is engaged in the business of manufacturing and selling tablets, pills, triturations, fluid extracts, etc. It was so engaged within the state of California before the passage of the license law above quoted. Its principal place of business is in Philadelphia, Pa. It maintains branch houses in the principal cities of many other states, including the city of San Francisco, state of California. It maintains its plant and laboratory in Philadelphia, and sells its products in each and all of the various states and territories of the United States. It has maintained an agency in the state of California, for the purpose of receiving, and filling orders for articles of its own manufacture, at all times since the 1st day of December, 1908; and from its place of business at San Francisco, California, it ships goods upon orders received from the states of Oregon, Nevada, and Arizona. By section 405 of the Civil Code, every foreign corporation must, as this petitioner attempted to do, file in the office of the Secretary of State the "designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served." By section 406 of the same Code, no foreign corporation can "maintain or defend any action or proceeding in any court of this state until the corporation has complied with the provisions" of section 405 of the Civil Code.

By section 15 of article 12 of the Constitution of this state, it is declared that "no corporation organized outside the limits of this state shall be allowed to transact business within this state under more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." Petitioner's contention is that as to it, a foreign corporation, the exaction of these license taxes is the imposition of a direct burden upon its interstate commerce, in violation of the commerce clause of the Constitution of the United States. Const. U. S. art. 1, § 8, subd. 3.

[1] This court is forced to the conclusion that upon the authority of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 80 Sup. Ct. 190, 54 L. Ed. 355, *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, and *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423, this contention must be upheld. The consequences which follow this conclusion have not been overlooked. They are far reaching and serious, affecting to no inconsiderable extent the revenue and the revenue laws of this state. The decisions of the Supreme Court of the United States in the last-cited cases were rendered by a bare major-

ity of a sharply divided court. The decision of the case at bar was deliberately delayed to note whether any recession from the views expressed in these cases would follow from the change in the personnel of the court. No such recession, however, has followed, and, indeed, the Supreme Court of the United States as a body has acquiesced in and accepted these decisions, as is shown by *Atchison, Topeka & Santa Fé R. R. Co. v. Timothy O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, decided February 9, 1912, where Justice Holmes, who wrote the dissenting opinions in the earlier cases, delivered the opinion of the undivided court, based upon and in affirmance of those earlier cases.

[2,3] The principle of those decisions may be briefly stated. The admitted power of the state to regulate and prescribe terms under which a foreign corporation may engage in intrastate or domestic business is subject to this limitation that, where such foreign corporation is engaged in interstate, as well as intrastate, business, no such term, condition, or requirement will be constitutional, if it imposes any burden upon the interstate business of such corporation, whatever be its name or form. A license or privilege tax for the conduct of such intrastate business, based upon the total capital or the total capital stock of such corporation, without just relation to the proportion which the capital or the capital stock used in the state bears to the whole capital or capital stock, though in terms declared to be directed solely to the intrastate business of such corporation, is unconstitutional and void, (a) as being in violation of the commerce clause of the Constitution by the imposition of an illegal burden upon interstate commerce, and (b) because violative of the fourteenth amendment of the Constitution and its equal protection and due process of law clause, as an effort to tax the property of citizens of the United States, which property is situated beyond the jurisdiction of the taxing state, and is not amenable to its revenue laws.

The minutest investigation and the most careful consideration fail to disclose any ground upon which the case here at bar may be distinguished from those cited. The legal parallelism between this case and that of *Ludwig v. Western Union Telegraph Co.*, supra, is perfect. Both corporations were engaged in inter as well as intra state business. Both were so engaged before the passage of the excise law in question. The Arkansas law required every foreign corporation now or hereafter doing business in the state to file a copy of its articles of incorporation, etc., and to pay for the filing of such articles "a fee of \$25 where the capital stock is \$50,000 or under; \$75 where the capital stock is over \$50,000 and not more than \$100,000; and \$25 additional for each \$100,000 of capital stock." Laws Ark. 1907, p.

746, § 3. A foreign corporation failing to comply with the provisions of the act was forbidden to do any business in the state, and was subjected to fine. The Supreme Court of the United States, first meeting the argument that the statute should be construed as applying only to the intrastate business of foreign corporations, declared, in effect, that when such a question was presented its ultimate determination would always rest with that court which would of and for itself determine the meaning of such statutes solely from what it should conclude would be their operation and effect. It construed the provision of the statute before it to mean that, upon a failure of a foreign corporation to comply with the provisions of the act, such a corporation should be *forbidden* to do any business within the state, interstate as well as intrastate. Then, laying this construction aside, it declared that, if the provisions of the act were held to apply solely to the intrastate business of such corporations, the provisions were unconstitutional and void for the reasons above given; the court saying: "The capital stock of the company represents, we repeat, *all* its business, property, and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate business, may continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case \$25,050), based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, in effect, a direct burden and tax on its interstate business, as well as on its property outside of the state. The case cannot be distinguished in principle from *Western Union Telegraph Co. v. Kansas*, ante, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and *Pullman Company v. Kansas*, ante, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, recently decided. The difference in the wording of the Kansas and Arkansas statutes cannot take the present case out of the ruling of the former cases. On the authority of the Kansas cases, and for the reasons stated in the opinions therein, we hold the statute in question to be unconstitutional and void, as illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the state."

The parallelism between this case and the case at bar is, we repeat, so perfect as to render futile any attempt to distinguish them, and thus to save the California laws. This court is alive to the difficulties which the Supreme Court of the United States has frequently adverted to, and which arise from the complexity of state laws that, with or without design, trespass upon the reserved rights of the United States in its control of foreign and interstate commerce. It has full appreciation of the significance of the language of Chief Justice Marshall, in *Brown*

v. Maryland, 12 Wheat. 419, 6 L. Ed. 678: "It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great resolution which introduced the present system than the deep and general conviction, that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." It is just and right that the Supreme Court of the United States should sit as an ever watchful Warden of the Marches to repel either unintentional trespass or deliberate invasion upon this most important domain. It is but natural, too, that in the multitude of forms in which the question arises, and in the multitude of cases through which it is presented, apparent inconsistencies of expression should be found, and minds should differ over the question whether any given state law does in effect exceed the powers of the state and invade the domain reserved exclusively to federal control. But over one question there can be no doubt that in all this multitude of cases there is an absolute unanimity in the principle declared, namely, that the state is without power to impose any burden or regulation on interstate commerce "in a relatively immediate way." *Galveston, etc., Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031. So much we think it proper to say, in view of our further duty in pointing out for future legislative action the limitations upon the power of the state in dealing with foreign corporations.

[4-6] The limitations upon the power of the state to forbid a corporation from doing a domestic business within its borders, or to regulate the conduct of that business, may be thus summarized: A corporation, unless expressly forbidden so to do, may acquire rights of contract and property in a foreign jurisdiction. A state, however, may exclude absolutely a foreign corporation not engaged in interstate commerce, but which proposes solely to engage in domestic business, from doing such business within its limits, and so may, of course, impose terms and conditions upon which alone such business may be commenced within its limits, provided no unconstitutional condition is made a part of any actual agreement. *S. P. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942. When a foreign corporation has once engaged in domestic business within the state, the state may not exercise its powers of exclusion or regulation to the destruction of the property of the corporation or of its vested constitutional rights. And, finally, when such corpo-

ration is engaged both in interstate, as well as intrastate, business, no fee or regulation, though expressly directed to intrastate business, will be upheld, if, in the view of the Supreme Court of the United States, such exaction or requirement imposes a burden upon the interstate business of such corporation. *Bank of Augusta v. Earle*, 13 Pet. 579, 10 L. Ed. 274; *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 248, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317; *National Council v. State Council*, 203 U. S. 151, 27 Sup. Ct. 46, 51 L. Ed. 132; *U. S. ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025, and cases supra.

Under these principles of law, it is proper to point out that not only do these license taxes fall with respect to foreign corporations engaged in interstate, as well as intrastate, business in California, but of necessity fall as well with respect to domestic corporations engaged in such foreign business and having property without the state. *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1081. Since if a tax based on the total capital stock of a foreign corporation doing business within this state is a burden on interstate commerce, equally must it be so with a domestic corporation engaged elsewhere in interstate commerce and intrastate business and owning property without the state. The attention of the Legislature is thus directed to the fact that the law in question can apply only to domestic corporations nowhere engaged in interstate business, and to foreign corporations seeking to enter the state solely to do domestic business. For upon the right of a foreign corporation to enter the state to do an interstate business the state may impose no burden whatsoever. *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

[7] The invalidity of these license laws, if sought to be applied to foreign corporations engaged in domestic business within the state, and so engaged (as was this petitioner) at the time the law went into effect, rests upon entirely different constitutional provisions. As has been pointed out, the Supreme Court of the United States declared the Kansas laws under review in *Western Union Telegraph Co. v. Kansas* and *Pullman Co. v. Kansas*, supra, to be unconstitutional upon two separate, distinct and wholly unrelated constitutional grounds. The first, because the law violated the "commerce clause" of the Constitution of the United

States; and the second, because the law levied a tax, by requiring a fee to be paid, based upon the total capital stock of the foreign corporation, in violation of the fourteenth amendment of the Constitution of the United States, its "due process of law" and its "equal protection of the law" clauses. It attempted to tax the property of a corporation without the state, and therefore beyond the jurisdiction of the taxing power of the state. It is, of course, well established that a tax law of a state can have no extraterritorial operation. *State Tax on Foreign Held Bonds*, 15 Wall. 300, 21 L. Ed. 179; *Union Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493. It is, of course, equally apparent that, if a tax levied by a state upon all the capital stock of a foreign corporation is violative of the fourteenth amendment of the Constitution and confiscatory in character, it is equally violative of such constitutional amendment, whether such foreign corporation be engaged in interstate business or purely in domestic business. For this determination is not at all dependent on, but is entirely independent of and unrelated to, the consideration whether or not such corporation is engaged in interstate commerce. It is not, in other words, *because* a foreign corporation is engaged in interstate commerce and has property without the state that a state tax based upon its total capital stock is unconstitutional. It is unconstitutional in the case of any corporation, *solely because*, in taxing property beyond the jurisdiction of the state, it is in violation of the fourteenth amendment of the Constitution of the United States, an amendment which, as we have said, is in no way related to and is entirely independent of the commerce clause of the Constitution. In both the *Western Union Telegraph Company Case* and in the *Pullman Case*, the Kansas law was held to be unconstitutional upon both of these separate and distinct grounds. More attention was paid in the opinions to the consideration of the commerce clause than to a consideration of the fourteenth amendment, because, as pointed out by Mr. Justice White in his concurring opinion in the former of the two cases, "no one questions that the law which is here in dispute, imposed by the law of Kansas upon the corporation, is repugnant to the Constitution of the United States because wanting in due process, and that it is therefore confiscatory in character. The tax being thus conceded to be inherently vicious, there is, of course, no attempt to sustain its validity on its extrinsic merits." In the prevailing opinion in the same case, it is said: "We need not stop to discuss at length the specific question whether the state can by any regulation make the property of the company outside of Kansas contribute directly to the support of its schools; such being the effect of the requirement that it pay in to the state treasury, for the benefit of the

state school fund, a given per cent. of all its capital stock as a condition of its doing local business in Kansas. It is firmly established that, consistently with the due process clause of the Constitution of the United States, a state cannot tax property located or existing permanently beyond its limits. *Louisville, etc., v. Kentucky*, 188 U. S. 385, 398 [23 Sup. Ct. 463, 47 L. Ed. 513]; *Union Transit Co. v. Kentucky*, 199 U. S. 209 [26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493]. In the *Pullman Case*, the court sums up its reasons and conclusions under three heads. The first of these is that the tax is a burden upon interstate commerce. The second is that it is in violation of the fourteenth amendment; the court, in that connection, saying: "That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent. of its authorized capital was a violation of the Constitution of the United States, in that such a single fee, based, as it was, on all the property, interests, and business of the company within and out of the state, was, in effect, a tax both on the interstate business of that company and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the state and contribute from its capital to the support of the public schools of Kansas." While in the *Ludwig Case*, the court states the "vital question" to be the constitutionality of the Arkansas statute, which, "under the guise of regulating intrastate business, imposes a tax upon the interstate business of such corporation, as well as a tax on its property used and permanently located outside the state." And the court further said: "If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state or imposes a tax upon its property outside of such state, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute."

These constitutional questions thus decided are, as we have pointed out, in no way correlated, but are entirely separate and distinct. It is but the indulgence of futile and unwarranted speculation to say that the Supreme Court of the United States would call in the fourteenth amendment to the aid of a foreign corporation doing an interstate business to overthrow a state tax law, and would not invoke it in the case of a foreign corporation engaged in purely domestic business, notwithstanding that the tax upon the capital stocks of the foreign corporations (and thus the tax upon the property without

the jurisdiction of the state) was, in both instances, identically the same. Nor can relief be found in a refusal to call such a license fee a tax. A state court may call it a fee or an exaction or a regulation; but the Supreme Court of the United States will call it a tax if, in its effect, it partake of the nature of a tax. As to the license fee exacted by our own statute, it has been declared to be a tax by the Supreme Court of the United States, which says the condition that the company should, "in the form of a fee, pay to the state a specified per cent. of its authorized capital was a violation of the Constitution of the United States, in that such a single fee, based, as it was, upon all the property, interests, and business of the company within and out of the state, was, in effect a tax * * * on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas, * * * to waive its constitutional exemption from state taxation * * * on its property outside of the state."

[8] It follows from the foregoing that the requirement of section 408 of the Civil Code that petitioner file a certified copy of its articles, standing alone, is a reasonable requirement, an exaction not in restraint of interstate commerce, and therefore valid (*Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915), but that the further requirement of the law that, as a condition of such filing, the petitioner pay the license tax prescribed is invalid.

Let the mandate issue as prayed for.

We concur: LORIGAN, J.; MELVIN, J.; SHAW, J.

ANGELLOTTI, J. (concurring). In view of the recent decisions of the United States Supreme Court referred to in the opinion, I concur in the judgment and in the opinion, except so far as it intimates that subdivision 4 of section 416 of the Political Code and our so-called Corporation License Tax Law are not valid as to all foreign corporations doing a purely domestic business in this state, and in no way engaged in interstate commerce in any other state. I can see no distinction in this regard between those foreign corporations engaged in a purely domestic business within this state at the time these laws went into effect, and those since coming into the state for the purpose of doing such business.

I am not at all satisfied that there is anything in any of the opinions of the United States Supreme Court referred to, when considered in the light of the exact questions presented for consideration therein, that compels the conclusion on this point that is declared in the opinion herein.

I concur: SLOSS, J.

(183 Cal. 228)

UNION CONST. CO. v. WESTERN UNION TELEGRAPH CO. (Sac. 1,732.)

(Supreme Court of California. July 9, 1912.
Rehearing Denied Aug. 8, 1912.)

1. EVIDENCE (§ 237*)—DECLARATIONS OF ANOTHER—EXISTENCE OF AGENCY.

One is not bound by the declaration of another, not his agent, and expressly or impliedly authorized to make the declaration; and, unless a prima facie evidence of authority is shown, the declaration must be excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 604-613; Dec. Dig. § 237.*]

2. PRINCIPAL AND AGENT (§ 22*)—EXISTENCE OF RELATION—EVIDENCE.

Agency is not provable by the declarations of the agent, not made under oath or in the presence of the principal, unless communicated to and acquiesced in by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

3. EVIDENCE (§ 9*)—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.

The courts will take notice of all inventions that have become of common and general use, and of the manner of communicating by telephone.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 8; Dec. Dig. § 9.*]

4. EVIDENCE (§ 69*)—PRESUMPTIONS—STATUTES.

Business carried on over the telephone is subject to the operation of the disputable presumptions declared by Code Civ. Proc. § 1963, providing that the ordinary course of business has been followed, and that things have happened according to the ordinary habits of life; and, where nothing unusual occurs, there is a disputable presumption that a request to the central telephone operator to connect the caller with a named number in the directory, and to call the latter by means of a signal, has been complied with by making the proper connection with the number and giving the necessary signal at the other end of the line.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 90; Dec. Dig. § 68.*]

5. EVIDENCE (§ 258*)—TELEPHONIC COMMUNICATIONS—ADMISSIBILITY.

Where plaintiff and defendant maintained business offices in the same city, and each had a telephone in the office connecting with the same telephone system, with their respective names in the telephone directory, and plaintiff called on the operator at the central station in the usual way for a connection with defendant's office, and a connection was made at the central office with some line, apparently in the usual manner, and some one responded at the other end of the line and answered that he was at the office of defendant, there was prima facie proof that the person answering was defendant's agent, so that a conversation between plaintiff and such person could be proved against defendant; but the weight of the evidence was for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

6. EVIDENCE (§ 355*)—DOCUMENTARY EVIDENCE—ADMISSIBILITY.

A note of time of the reception of a message by a telegraph company for transmission, made by the company on a copy of the message delivered to the sendee, is evidence of the time of the reception of the message for transmission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. § 355.*]

7. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY OF MESSAGES—EVIDENCE—QUESTION FOR JURY.

Evidence held to support a finding that a telegraph company was guilty of gross negligence in delaying the delivery of a message.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63; Dec. Dig. § 66.*]

8. TELEGRAPHS AND TELEPHONES (§ 67*)—DELAY IN DELIVERY OF MESSAGES—EVIDENCE.

Where plaintiff's agents would have exercised the option to accept a contract with a third person for construction work, if messages sent by telegraph company had been promptly delivered; and, on the failure to receive messages, the agents made an agreement with the third person for an extension of the option, subject to the right of the third person to change the contract price, and plaintiff was required to pay a substantial sum for the work in excess of the price fixed by the original contract, the damages sustained by plaintiff in consequence of the delay in the delivery of the messages were substantial.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

9. APPEAL AND ERROR (§ 927*)—QUESTIONS REVIEWABLE—EVIDENCE.

The court on appeal, on reviewing a judgment of nonsuit, must give the evidence the construction most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

10. TELEGRAPHS AND TELEPHONES (§ 54*)—CONTRACT FOR TRANSMISSION OF MESSAGES—CONSTRUCTION.

A contract for the transmission of messages by a telegraph company, stipulating that, to guard "against mistakes or delays, the sender of a message should order it repeated," made by the company and printed on all its blanks provided for the use of the public, must, as required by Civ. Code, § 1654, be construed most strongly against the company; and it must be construed to provide only for delays and mistakes occurring in the forwarding of a message from the office where it is received to the office where it is written out and made ready for delivery to the addressee; and a delay in the delivery to the addressee is not excused by the failure of the sendee to order the message to be repeated.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39-47; Dec. Dig. § 54.*]

Department 1. Appeal from Superior Court, Tuolumne County; J. W. Hughes, Judge.

Action by the Union Construction Company against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Reversed.

Chickering & Gregory and F. W. Street, for appellant. Beverly L. Hodghead, for respondent.

SHAW, J. The plaintiff appeals from a judgment of nonsuit.

The action is to recover damages arising from the alleged negligence of the defendant in failing to deliver two telegrams sent to the plaintiff's agents in San Francisco.

The plaintiff was constructing a power

plant on the Stanislaus river, in Tuolumne county. On October 10, 1906, it made an agreement with the Risdon Iron & Locomotive Works, of San Francisco, by which the plaintiff was given the option to close a contract with said Iron Works, within 90 days from said date, for the construction by said Iron Works of a part of the plant, consisting of an additional pressure line, known as the "Mine Line," at a cost of \$143,000, to be paid by the plaintiff. The right to exercise this option expired at midnight of January 8, 1907. The determination whether or not plaintiff would accept said contract within that time was committed by plaintiff to its engineers, Sanderson & Porter, of New York. Plaintiff's headquarters for said construction work was at Vallecito, Tuolumne county, where H. F. Jackson, its manager, conducted the work. It also maintained an office in the Kohl building in San Francisco, in charge of H. P. Veeder. A day or two before January 8, 1907, Jackson went to San Francisco, expecting there to receive a telegram from Sanderson & Porter, accepting or rejecting the contract offered by the Iron Works, and for the purpose of at once closing the contract with the Iron Works, if it were accepted. In the afternoon of January 8th, he procured Mr. Field, the agent of the Iron Works, to come to the office of the plaintiff and remain in his company, so as to be ready to receive the acceptance for the Iron Works. In the evening, a little before 6 o'clock, no telegram having been received, Jackson and Field went out to dine together, leaving Veeder in the office. Plaintiff endeavored to prove at the trial that it was arranged between them that Veeder should remain in the office for the purpose of receiving the expected telegram, should it arrive, and bringing it to Jackson where he was dining with Field. The court refused to allow this evidence, and exception was taken to the ruling. If it appears that this evidence was material, the error would be injurious. In the consideration of the case, therefore, we must assume that such arrangement was made.

On that day Sanderson & Porter sent to plaintiff, at Vallecito, the following telegram regarding this option: "Wire Jackson that we will exercise option on mine line and header." The plaintiff's agent at Vallecito received this telegram, and thereupon wrote and delivered to the agent of the Western Union Telegraph Company at Vallecito, for transmission to Jackson at San Francisco, the following telegram:

"Vallecito, Cal., Jany. 8, 1907.

"H. F. Jackson, 909 Kohl Building, S. F. Cal.:

"Hobart Porter wires he will exercise option on mine line and header.

"[Signed] Union Construction Company."

This telegram was received by the telegraph company at its San Francisco office

at 8:35 p. m. of that day. It was not delivered to Jackson, or to plaintiff, until after 9 a. m. the next day. Porter had left New York for California, and had arrived at Chicago, on January 8th. He there delivered to the defendant for transmission the following telegram:

"Chicago, Jan. 8, 1907.

"H. P. Veeder, Kohl Building, San Francisco:

"Advise Jackson that we wired him Vallecito to close option on mine line and header. [Signed] Hobart Porter."

This message was received at the San Francisco office of the defendant at 6:57 p. m. that day. It was not delivered until after 9 a. m. the next day. These are the two messages which, it is alleged, the defendant negligently failed to deliver on the day on which they were received at defendant's San Francisco office. The Vallecito message was given to the defendant, by telephone, at San Andreas, Cal., at 7:55 p. m. of January 8th. The Chicago message was given to defendant for transmission at Chicago at 7:50 p. m. Chicago time, being the same as 5:50 p. m. California time;

The complaint alleges that, after the defendant had received the dispatches at its San Francisco office, and during the evening of January 8th, the plaintiff inquired of the defendant's agent at that office to learn whether or not said telegrams had been received by defendant, and was informed by said agent that they had not been received. Jackson testified, for the plaintiff, that he went out to dine with Field that evening, and remained at the restaurant with him until nearly 10 o'clock. As stated, he was not allowed to testify that he directed Veeder to stay at the office and bring or send him any telegrams that were received while he was at the restaurant. The court also refused to permit him to testify that, during his absence at dinner, he had inquired of Veeder by telephone in regard to the telegrams. Veeder testified that he remained at the plaintiff's office after Jackson went out to dine; that Jackson left at 6 o'clock; that he was himself absent at dinner from 6:30 to 7:15; that he then stayed in the office until 10:15 that evening; that no telegrams were received or delivered there during that time; and that when he reached the office after dining he looked about to see if a notice of a telegram had been left during his absence. Finding none, he then took down the telephone and called the central telephone office to connect him with the line running to the Western Union Telegraph Company's office in the city. The connection was made, and some one responded, apparently at that office. He then inquired if that was the Western Union Telegraph office, and received through the receiver the answer, "Yes." He did not recognize the voice of the person answering, and had no means of knowing that he was connected with the

defendant's office, except that he had made the call and received the response in the usual and customary manner of telephone communication. It was also shown, in effect, that the plaintiff had a telephone in its office as a part of the public telephone system then in operation in San Francisco; that the defendant's office had a like telephone connection; that the telephone company had printed and issued to its subscribers the usual directory, showing the name, address, and telephone number of each of its subscribers, among which were those of the plaintiff and defendant, respectively; and that the telephone company operated its system by means of operators at a central station to make connections between subscribers when called on to do so, and in the usual manner. The court refused to allow testimony of the conversation over the telephone between Veeder and the person answering for the defendant through the receiver. There is a sort of a suggestion in the defendant's brief that the court was not informed of the nature of the conversation sought to be produced. We do not understand, however, that it is claimed that it was not made to appear that it related to the receipt of a telegram by defendant for plaintiff at that time. In view of the allegation, above mentioned, on that subject, this must have been understood by court and counsel, and the ruling must have been made on the theory, that such a communication was not admissible to prove the allegation.

The Kohl building and the defendant's office were half a mile apart. A street car line was in operation from a point near the defendant's office to and beyond the Kohl building. The excuse offered by the defendant for failing to make delivery that evening was that it had no messengers at its office during the evening. The Kohl building was in the midst of the district destroyed by the great fire of April, 1906; and in January, 1907, there were few buildings near it that were occupied in the evenings after dark. The evidence offered, as will presently be more fully shown, would have a tendency to prove gross negligence of the defendant in relation to the delivery of the telegrams. For that purpose, it was material, and, in view of the fact that the court may be presumed to have granted the nonsuit because it believed no negligence was proven, it was very important to the plaintiff. Its exclusion is assigned as error.

[1, 2] The defendant claims that, under the circumstances we have stated, the telephone conversation was not admissible as evidence against it; that to render it admissible it should have been proven, by better evidence than was given, that the person answering the telephone call was an agent of defendant authorized to act for it in receiving and answering the communication. It is, of

course, a well-settled and just principle of law that no person is bound by the declarations of another, who is not his agent, and expressly or by implication authorized by him to make the declarations. Unless at least prima facie evidence of such authority appears, such conversations are not admissible. If, in the present instance, there is no sufficient evidence of the identity of the person answering the call as the agent of the defendant at its office, the evidence was properly excluded. It may be added that the statement of that person that he was such agent was not, in and of itself, competent evidence of the agency. Agency is not provable by the mere declarations of the agent, not made under oath or in the presence of the principal, unless communicated to and acquiesced in by the principal. We are of the opinion, however, that there was sufficient circumstantial evidence to make a prima facie case of identity and authority.

[3] The courts take notice of discoveries and inventions that have become of common and general use. The telephone has been in common use for more than 30 years past. For many years its use, especially in such large cities as San Francisco, has been well-nigh universal, more so than the telegraph, and almost as much so as the mails. The system and method of communication by that means is universally known among business men. Practically every business house and office has one or more of such instruments, and uses it daily and frequently. Large establishments maintain a local system, with a special operator at their place of business, with ear to the receiver, to hear calls and answer them, or connect the local wire with the person called for, or some one authorized to act in the particular matter. The telephone companies keep a large force of operators in their central stations constantly engaged in connecting the wires of the different subscribers who wish to speak to each other. The process of making these connections is so rapid and frequent that it becomes almost mechanical. The telephone companies are engaged in public service of the same character as that of a telegraph company or a common carrier, and they are in like manner subject to regulation by law, as quasi public servants. The contrivance has been found so satisfactory in actual use that a large volume of the important business of the country is now transacted by means of it. It may, therefore, be assumed that, as compared with the whole number, the number of mistakes in connections that are not immediately discovered by both parties is very small. These considerations are matters of common knowledge, and they enter into the question of the identification of the defendant's agent.

[4] They show that the telephone and its use have become so much a part of daily

life and experience that business carried on over it must be deemed to be subject to the operation of the disputable presumptions or inferences applicable to like affairs, as declared in section 1963 of the Code of Civil Procedure. We refer to the following subdivisions of that section: "That private transactions have been fair and regular." Subd. 19. "That the ordinary course of business has been followed." Subd. 20. "That things have happened according to the ordinary course of nature and the ordinary habits of life." Subd. 28. These presumptions have been recognized by the courts and applied to the cognate operations of the telegraph and the post office. If a letter or telegram is duly addressed, prepaid, and delivered in the post office receptacle, or to the telegraph company, there is a disputable presumption of fact, arising from the almost invariable result, that it has been transmitted and delivered in regular course to the person addressed. *Eppinger v. Scott*, 112 Cal. 371, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220; Code Civ. Proc. § 1963, subd. 24; 1 Greenl. on Ev. § 40; 1 Elliott on Ev. § 107; 1 Wigmore on Ev. § 95. For like reasons, if nothing unusual occurs in the process, there would be a disputable presumption that a request to the central telephone operator to connect the caller with a named number in the directory, and to call such subscriber by means of a bell or other signal, has been complied with by making the proper connection with the number and giving the necessary signal at the other end of the line.

[5] For these reasons, we conclude that when it appeared that plaintiff and defendant each maintained a business office in the same city, that each had a telephone in such office connecting with the same city telephone system, with their respective names and numbers in the regular telephone directory, that plaintiff called on the operator at the central station, in the usual way, for a connection with defendant's office, that a connection was thereupon made at the central station with some line, apparently in the usual manner, that some one responded at the other end of the line, and, being asked, answered that that end was the office of the Western Union Telegraph Company, there was sufficient prima facie proof that the person answering was the agent of the defendant at its said office, employed there by it to receive for it such communications as should come in that manner. All of these conditions were shown to exist upon the trial of this case, either by direct evidence, or by fair and reasonable inference, or as matters of judicial knowledge.

The question has never heretofore been considered by this court. It has frequently arisen in other states, and the decisions in the main support our conclusion. The following cases, in effect declare the rule to be as we have stated it: *Wolfe v. Railway Co.*

(1888) 97 Mo. 481, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; *Globe P. Co. v. Stahl* (1886) 23 Mo. App. 451; *Guest v. Hannibal, etc., Co.* (1898) 77 Mo. App. 262; *Kansas C. S. Co. v. Standard W. Co.* (1907) 123 Mo. App. 13, 99 S. W. 785; *Star B. Co. v. Cleveland F. Co.* (1907) 128 Mo. App. 517, 109 S. W. 802; *Rock I., etc., Co. v. Potter* (1889) 36 Ill. App. 592; *Rogers Grain Co. v. Tanton* (1907) 136 Ill. App. 533; *Godair v. Hamilton, N. B.* (1907) 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447; *General H. Soc. v. New Haven Co.* (1907) 79 Conn. 581, 65 Atl. 1065, 118 Am. St. Rep. 173, 9 Ann. Cas. 168; *Knickerbocker Ice Co. v. Gardiner Co.* (1908) 107 Md. 571, 69 Atl. 405, 16 L. R. A. (N. S.) 746; *Miller v. Leib* (1909) 109 Md. 425, 72 Atl. 466; *Conkling v. Standard O. Co.* (1908) 138 Iowa, 596, 116 N. W. 822; *Western U. T. Co. v. Rowell* (1907) 153 Ala. 314, 45 South. 73; *Barrett v. Magner* (1908) 105 Minn. 120, 117 N. W. 245; *Holabauer v. Sheeny* (1907) 127 Ky. 35, 104 S. W. 1084; *Gilliland v. Southern R. Co.* (1910) 85 S. C. 36, 67 S. E. 20, 27 L. R. A. (N. S.) 1106, 137 Am. St. Rep. 861.

There are a few decisions to the contrary. *Young v. Seattle T. Co.* (1903) 33 Wash. 225, 74 Pac. 375, 63 L. R. A. 988, 99 Am. St. Rep. 942; *Planters', etc., Co. v. Western U. T. Co.* (1906) 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180, *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590, and *Oberman B. Co. v. Adams*, 35 Ill. App. 540, take the opposite view. *Oberman v. Adams*, so far as applicable here, is overruled by the later case in the Court of Appeals and the Supreme Court of Illinois, above cited. In *Murphy v. Jack*, the point received slight attention. The other two cases, as is pointed out in 6 L. R. A. (N. S.) 1180, in a note to the Georgia case, are contrary to the weight of authority. The respondent cites the following cases, claiming that they also are contrary to the rule we have announced: *People v. McKane*, 143 N. Y. 474, 38 N. E. 950; *Stepp v. State*, 31 Tex. Cr. R. 349, 20 S. W. 753; *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573; *Deering Co. v. Shumplik*, 67 Minn. 348, 69 N. W. 1088; *Harrison G. Co. v. Penn. R. Co.*, 145 Mich. 712, 108 N. W. 1081; *Lord Electric Co. v. Morrill*, 178 Mass. 304, 59 N. E. 807. In each of these cases there was either a recognition of the voice of the other party, or other sufficient evidence of his identity; and the remarks indicating a contrary doctrine than here stated are obiter dictum. The Minnesota case, so far as it is contrary to the main current of authority, is, in effect, overruled by the later decision in *Barrett v. Magner*, supra.

In the application of the rule, many of the conditions we have mentioned are usually deemed matters of judicial knowledge, or as implied from other facts, and are not expressly shown. The general rule, as gathered from the foregoing decisions, is that,

where it is shown that the witness called up the other party at his place of business through the central station with which both were connected, and received a response as in the usual course of business over the telephone, this is sufficient *prima facie* identification of the speaker at the other end of the line as the party called, or his authorized agent; and that, upon such proof, the ensuing conversation, if otherwise admissible, may be testified to by the witness. It is proper to add that the weight of such evidence depends largely upon the circumstances of each case, and is always a question for the trial court or jury. The court below erred in excluding the evidence of Veeder and Jackson relating to this subject.

Each of the messages in question were written upon a blank provided by the defendant, containing a contract purporting to exempt it from liability for damages in excess of the charges for transmission. It is claimed that this relieves the defendant from the damages here claimed. The contract is as follows: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in transmission or delivery, or for nondelivery of any *unrepeated* message, beyond the amount received for sending the same; nor for any mistakes or delays in the delivery of any *repeated* message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. * * * Correctness in the transmission of a message to any point on the lines of this company can be *insured* by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charges for repeated messages, viz., one per cent., for any distance not exceeding 1,000 miles, and two per cent. for any greater distance."

This contract is identical with those considered by this court in *Hart v. Western U. T. Co.*, 66 Cal. 581, 6 Pac. 637, 56 Am. Rep. 119, *Redington v. Pacific P. T. C. Co.*, 107 Cal. 321, 40 Pac. 432, 48 Am. St. Rep. 132, and *Colt v. Western U. T. Co.*, 130 Cal. 661, 63 Pac. 84, 53 L. R. A. 678, 80 Am. St. Rep. 153, except that the words "whether happening by negligence of its servants or otherwise," occurred in those messages in the second paragraph immediately after the words "unrepeated message," and before the word "beyond." It was decided in those cases that the taking of such contract was a reasonable precaution by the company; that it

was lawful and binding upon all senders of messages who assented to it; and that it exempted the telegraph company from liability, except as stated, for any cause except willful misconduct or gross negligence.

It is admitted that the usual tolls for such messages were in each instance paid to the defendant, and that each was an *unrepeated* message. Upon the trial, however, the plaintiff expressly waived any claim for the amount of the tolls paid as damages. For this reason, if no further damage appeared, the court below was justified in granting the nonsuit.

[8, 7] The message from Porter at Chicago to Veeder at the Kohl building in San Francisco was received at the main office of the defendant in the Ferry building in San Francisco at 6:57 p. m. of January 8th. The defendant claims that this was not proven. The evidence shows, however, that a note of that time was made by the defendant upon the copy of the message delivered by it to Veeder; and, from what was said at the trial, concerning this fact, by the court and counsel, it is a fair inference that these figures were intended by the defendant as a note of the hour and minute of the arrival of the message at its office in the Ferry building. It therefore constitutes evidence of that effect. Street cars were then running frequently from a point near the Ferry building, along California street, and directly in front of the Kohl building, to which the message was directed. According to the evidence offered and improperly excluded, we must assume that the plaintiff would have been able to prove thereby that, within half an hour after defendant had received this message, and while the copy for delivery was lying among the messages in its possession at the Ferry building office, and then awaiting delivery, Veeder inquired of defendant's agent at said office to learn if such message had been received by the defendant, and that he was informed by defendant's agent that none such had been received. After receiving this information that the telegram was important, and that Veeder could be communicated with by telephone, the defendant failed to deliver either this telegram, or the one received later from Jackson, apparently on the same subject, on that evening, and, so far as appears, made no effort to do so, or to inform Veeder thereof. If these facts had been proven, they would have tended to prove gross neglect on the part of the defendant in failing to deliver the Veeder message on that day, or to inform Veeder of its arrival. Such evidence would support a finding of gross negligence. It is fully as strong as that held sufficient in *Redington v. Pacific P. T. C. Co.*, *supra*. It follows, therefore, that, under any tenable theory of the effect of the contract, the plaintiff was deprived of the opportunity of proving such gross negligence.

[8, 9] The respondent contends that the evidence does not show that the plaintiff has sustained any damage, except to the amount of the charges, which, as above stated, the plaintiff waived. Taking the evidence as a whole, it is plain that, if either message had been received by the plaintiff's agents during the evening of January 8th, the option would have been exercised by them on behalf of the plaintiff. In that event the Iron Works would have been bound to furnish the pipe and construct the mine line for \$143,000. After waiting until late that evening for the expected telegram, Jackson and Field agreed that the option should be extended for an additional period of 15 days, but that the Iron Works should be entitled to change the price mentioned in said contract. Within the 15 days thus allowed, the plaintiff and the Risdon Iron Works agreed to and executed a modification of the contract. The evidence shows that this was the best contract the plaintiff could obtain for the mine line. By its provisions the price for the mine line, instead of being fixed at \$143,000, was to be at the rate of 8 cents per pound for the weight of metal furnished for the mine line. Jackson testified that this change added to the price of the mine line the sum of \$21,252 in excess of the sum of \$143,000 fixed by the first contract. He further testified that the price of steel had raised in the interval between the making of the first contract and the 8th day of January about one-quarter to one-half a cent. There was a provision in the first contract that, if the price of steel rose before the option was exercised, the price fixed should be increased accordingly. Jackson stated that he was not sure that the increase was no more than half a cent per pound. From this respondent argues that the actual advance may have been enough to cover the difference in price between the two contracts, and hence that no loss was shown. It is apparent, however, from all of the evidence that Jackson did not intend to suggest that so great an advance was made as would be necessary to cover this difference. It would have required a raise of $1\frac{1}{2}$ cents per pound to have had that effect. His remark was evidently intended as a mere suggestion that there was some raise in the price of steel, which would have increased somewhat the stated price in the original contract. Such is the fair inference from the whole testimony, and, upon a motion for nonsuit, all reasonable inferences must be resolved in favor of the plaintiff. We add that in stating the effect of the evidence we have kept in mind the rule in motions for nonsuit, and have accordingly given it the construction most favorable to the plaintiff. We think a substantial loss and damage from the failure to exercise the option on January 8th was sufficiently shown.

The California decisions, above cited, are all cases of mistakes made in the words of the message in transmitting it through the wires, or in receiving it at the office of its destination. The negligence complained of in the present case is a delay in the delivery of the message after it had been correctly transmitted. The plaintiff contends that there is an obvious distinction between errors or delays in transmission and a delay in the delivery of a message after its arrival. It is argued that, since the repeating of a message would have no tendency to prevent a delay in delivery, but merely secures accuracy in transmission, it has no logical relation to any other object; that, as the provision for insurance applies only to accuracy of transmission, and the contract as a whole affords the sender no means of protection against a delay in the subsequent delivery, the question of the reasonableness of such a contract, and its accordance with public policy, is not settled by said decisions. Able and exhaustive arguments are presented on each side of this question.

The question whether the restriction of liability for errors in transmission is void, because contrary to public policy, has produced an unusual conflict in the authorities. In a comparatively few jurisdictions outside of California, the contract is declared to be valid, unless there is gross negligence or wilful misconduct. These are as follows: Maryland, in *U. S. Telegraph Co. v. Glidersleeve*, 29 Md. 232, 96 Am. Dec. 519; Massachusetts, in *Wheelock v. Postal, etc., Co.*, 197 Mass. 125, 83 N. E. 313, 14 Ann. Cas. 188; Michigan, in *Birkett v. W. U. T. Co.*, 108 Mich. 361, 61 N. W. 645, 33 L. R. A. 404, 50 Am. St. Rep. 374; New York, in *Halsted v. Postal, etc., Co.*, 193 N. Y. 503, 85 N. E. 1078; 19 L. B. A. (N. S.) 1021, 127 Am. St. Rep. 952; Rhode Island, in *Stone v. Postal, etc., Co.*, 31 R. I. 180, 76 Atl. 762; Texas, in *Womack v. W. U. T. Co.*, 58 Tex. 176, 44 Am. Rep. 614; the United States Supreme Court, in *Primrose v. W. U. T. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; and in England, *McAndrew v. Telegraph Co.*, 17 Com. B. 8, 25 L. J. C. B. 26. In South Dakota and Kansas, there are decisions which concede its validity for the purposes of the case, but affirm the judgment against the company, on the ground that gross negligence was proved. *Lothian v. W. U. T. Co.*, 25 S. D. 319, 126 N. W. 621; *W. U. T. Co. v. Crall*, 38 Kan. 688, 17 Pac. 309, 5 Am. St. Rep. 795. Pennsylvania decisions seem to conflict with each other. *Passmore v. W. U. T. Co.*, 78 Pa. 288, treats the case as an action in tort, and seems to hold such contract valid as a rule of business, the violation of which by the sender will exonerate the company, as in a case of contributory negligence. In the later case of *Bailey v. W. U. T. Co.*, 227 Pa. 529, 76 Atl. 739, 19 Ann. Cas. 895, the court

states the rule to be settled that a telegraph company "cannot stipulate for exemption from liability caused by its own negligence."

For the opposite side, the following states declare such contracts to be against public policy and void as a protection to the company against its own ordinary negligence. We cite but one case from each state: Alabama, in *American, etc., Co. v. Daugherty*, 89 Ala. 196, 7 South. 660; Arkansas, in *W. U. T. Co. v. Short*, 53 Ark. 440, 14 S. W. 649, 9 L. R. A. 744; Florida, in *W. U. T. Co. v. Milton*, 53 Fla. 496, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; Georgia, in *W. U. T. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 490; Illinois, in *W. U. T. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; Indiana, in *W. U. T. Co. v. Meredith*, 95 Ind. 94; Idaho, in *Strong v. W. U. T. Co.*, 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55; Iowa, in *Harkness v. W. U. T. Co.*, 73 Iowa, 193, 34 N. W. 811, 5 Am. St. Rep. 672; Kentucky, in *W. U. T. Co. v. Eubanks*, 100 Ky. 601, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; Maine, in *Ayer v. W. U. T. Co.*, 79 Me. 497, 10 Atl. 493, 1 Am. St. Rep. 353; Mississippi, in *Postal, etc., Co. v. Wells*, 82 Miss. 740, 35 South. 190; Missouri, in *Reed v. W. U. T. Co.*, 135 Mo. 668, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; New Mexico, in *W. U. T. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; North Carolina, in *Williamson v. Postal, etc., Co.*, 151 N. C. 228, 65 S. E. 974, overruling *Lassiter v. Telegraph Co.*, 89 N. C. 334, on this point; Ohio, in *Telegraph Co. v. Griswold*, 37 Ohio St. 313, 41 Am. Rep. 500; Oklahoma, in *Blackwell v. W. U. T. Co.*, 17 Okl. 381, 89 Pac. 235, 10 Ann. Cas. 855; Tennessee, in *Pepper v. Telegraph Co.*, 87 Tenn. 559, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; Utah, in *Wertz v. W. U. T. Co.*, 7 Utah, 449, 27 Pac. 172, 13 L. R. A. 510; Vermont, in *Gillis v. W. U. T. Co.*, 61 Vt. 466, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; Wisconsin, in *Fox v. Postal, etc., Co.*, 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490.

In this connection it may be observed that it is somewhat difficult to reconcile the California decisions with our Civil Code. Section 2162 provides that "a carrier of messages for reward must use great care and diligence in the transmission and delivery of messages." Section 1667 declares that a contract which is contrary to an express provision of law, or to the policy of express law, is unlawful. Section 1668 declares that "all contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own * * * violation of law, whether willful or negligent, are against the policy of the law." It is essential to the legal existence of a contract—that is, to its recognition by the law as a contract—that it shall have a lawful

object. Section 1550. Where the object of a contract is unlawful, the contract is void. Section 1598. It seems clear that if the law requires the telegraph company to use great care and diligence in the transmission and delivery of messages, and the object of this contract, directly or indirectly, is to relieve it from responsibility for the damages caused by its failure to use great care and diligence in so doing, or, in other words, by its negligent violation of section 2162, then, by the express provision of section 1668, the contract is against the policy of the law. If that be the case, section 1667 makes it unlawful, and section 1598 declares that it is void. A person guilty of ordinary negligence has certainly failed to use great care and diligence. It appears logically to follow that a decision that such a contract will exempt the company from everything, except gross negligence or willful misconduct, is directly in the teeth of these statutory provisions. There is much force in the statement which Justice Ross, the author of the opinion in *Hart v. W. U. T. Co.*, supra, afterwards made, as Judge of the United States Circuit Court, in *W. U. T. Co. v. Cook*, 61 Fed. 629, 9 C. C. A. 684, declaring a contrary doctrine, as follows: "It would be against reason and public policy to hold that it is permissible for such a company to stipulate for immunity from liability for a failure to exercise the care and diligence that the statute under which it operates declares it shall exercise."

[10] Under these circumstances, we may consider whether or not the contract in question should be construed to apply to delays in delivery of a message which has been correctly transmitted. These contracts are prepared by the telegraph company and printed upon all of its blanks provided for the use of the public. They are not often the result of negotiation between the parties. The sender has no choice, nor any reasonable opportunity to make terms not specified in the printed contract. Although he does not sign it, he is presumed to have seen it; and from his failure to object he is taken to have assented to it. Hence, if it is uncertain in any particular, its language on that point is to be interpreted most strongly against the company. Civ. Code, § 1654. The subject to which it was intended to relate and the delays and mistakes against which it was intended to provide are shown by the opening words, to wit: "To guard against mistakes or delays, the sender of a message should order it repeated." Where a guard is offered against mistakes and delays, which are not more particularly described, a reasonable construction of the language is that the mistakes and delays intended are those which the proposed guard would prevent; in this case, mistakes and delays which a repetition of the message would disclose, so that they could be immediately corrected or

avoided. That this was the object and meaning of the contract is further shown by the final proposal to insure "correctness in the transmission of a message to any point on the lines of this company." This language does not suggest, as some of the decisions holding the contract valid intimate, promptness in delivery after arrival. It plainly confines the insurance to the subject of correctness or accuracy in transmitting it to the company's delivering office on its lines, and does not refer to delays in subsequent delivery. The company has power only to make reasonable regulations. If the condition sought to be imposed requires an act to be done to protect the sender against a certain mischance, and such act would have no tendency to do so, the regulation could not be deemed reasonable. The contract should, therefore, not receive this construction, unless no other meaning can reasonably be deduced. For these reasons it should be interpreted to provide only for delays and mistakes occurring in the forwarding of a message from the company's desk, where it is received from the sender, to the company's office, where it is written out and made ready for delivery to the addressee.

There are some cases in the states, which hold the contract valid as to errors in transmission, which extend the rule to delays in subsequent delivery. But the better reason and the greater number of cases uphold the views we have stated. In Texas the contract is held valid as to mistakes in transmission, but invalid with respect to delays in delivery. *Gulf, etc., Co. v. Wilson*, 69 Tex. 741, 7 S. W. 653; *W. U. T. Co. v. Bennett* (Tex. Civ. App.) 124 S. W. 154. In *Barnes v. W. U. T. Co.*, 24 Nev. 140, 50 Pac. 438, 77 Am. St. Rep. 791, and *W. U. T. Co. v. Graham*, 1 Colo. 234, 9 Am. Rep. 136, it is conceded that it is valid against errors in transmission, but held to be void as to delays in delivery. In all of these cases the distinction we have pointed out is held to be good. In *Box v. Postal T. Co.*, 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566, the court says: "Although the regulation purports to be made to guard against mistakes or delays, it should be construed to refer to such mistakes or delays as could be corrected or avoided by repetition or comparison." In *Beatty v. W. U. T. Co.*, 52 W. Va. 412, 44 S. E. 310, the court declares that "this condition has no relevancy, except as to such failure or error as might be cured by repetition; it is only to errors preventable by repetition that such a condition logically applies." The company in that case was held liable for a negligent failure to deliver, notwithstanding the contract in question.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

TAYLOR v. DARLING. (Civ. 1,117.)

(District Court of Appeal, First District, California. June 4, 1912.)

1. APPEAL AND ERROR (§ 113*)—APPEALABLE ORDER—REFUSAL TO VACATE JUDGMENT.

An order denying the motion under Code Civ. Proc. §§ 663, 663a, to vacate and set aside, as not supported by the facts found, the judgment rendered and entered, is within section 963, declaring appealable any special order after judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758-785; Dec. Dig. § 113.*]

2. HUSBAND AND WIFE (§ 239*)—ACTION AGAINST WIFE—JOINDER OF HUSBAND.

The fact that one sued alone for conversion was a married woman not living separate and apart from her husband, requiring, under provision of Code Civ. Proc. § 370, that her husband be joined as a defendant, being pleaded by the answer and found by the court, defeats right to recover against her in such action.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 856; Dec. Dig. § 239.*]

Appeal from Superior Court, City and County of San Francisco; Franklin J. Cole, Judge.

Action by Catherine M. Taylor, administratrix of Catherine Kenny, deceased, against Agnes Darling. From an order denying her motion, defendant appeals. Reversed, and motion ordered granted.

George A. Connolly, for appellant. Neal Power, for respondent.

HALL, J. [1] This is an appeal from an order made after final judgment, denying defendant's motion made under sections 663 and 663a of the Code of Civil Procedure to vacate and set aside the judgment rendered and entered against defendant as not supported by the facts found.

1. The contention of respondent that such order is not appealable is fully answered by the cases of *Bond v. United Railroads*, 159 Cal. 270, 113 Pac. 386, *Condon v. Donohue*, 160 Cal. 749, 118 Pac. 113, and *Rahmel v. Lehdorff*, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154. The order denying such a motion is one made after final judgment, and is appealable under the provisions of section 963, Code of Civil Procedure.

[2] 2. Defendant was sued alone for the alleged conversion of \$1,000. She answered and pleaded in abatement that she "is a married woman, not living separate and apart, or separate or apart, from her husband, and that her husband has not been made a party to this action," and the court found this allegation of her answer to be true, but nevertheless rendered judgment against her as prayed for. A married woman not living separate and apart from her husband cannot be sued without joining her husband as a party defendant, except where her husband

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is the plaintiff. Section 370, Code Civ. Proc.; McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817. The defect of parties defendant in this case did not appear upon the face of the complaint but defendant pleaded the facts in her answer, and the court found in accordance therewith. Such finding necessarily defeated plaintiff's right to recover against defendant in this action. Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618; McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817; section 370, Code Civ. Proc.

The court therefore erred in denying defendant's motion and the order is reversed, and the court directed to grant said motion.

We concur: LENNON, P. J.; KERRIGAN, J.

PEOPLE v. MILES. (Cr. 379.)

(District Court of Appeal, First District, California. June 1, 1912. Rehearing Denied July 1, 1912. Denied by Supreme Court July 31, 1912.)

1. LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY. Evidence held to show that defendant was a fellow conspirator with his codefendants, and an active participant in the entire scheme by which the larceny was committed.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. § 55.*]

2. LARCENY (§ 68*)—EVIDENCE—QUESTION FOR JURY:

Where, in a larceny case, the evidence showed that the victim of a "seance" scheme was fraudulently induced to part with her money in exchange for a postdated receipt for money paid for stock to be issued by a corporation not yet formed, and it also appeared that she was promised part of her money back shortly if she wished it, the question whether it was intended that the title to the money should remain in the victim until the stock was delivered, so that the offense would be larceny and not the obtaining of money by false pretenses, was for the jury.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.*]

3. CRIMINAL LAW (§ 1137*)—APPEAL—INVITED ERROR.

Where defendant, subsequent to the rejection of an offer of improper proof, made a vague and general offer of testimony, and stated that the court had "practically ruled on that," he invited the ruling against him, and could not complain of it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

4. INDICTMENT AND INFORMATION (§ 129*)—DIFFERENT OFFENSES RELATING TO THE SAME TRANSACTION.

Under Penal Code, § 954, as amended in 1905 (St. 1905, p. 772), permitting different offenses to be charged in different counts where they all relate to the same transaction, the offenses of larceny, false pretenses, or embezzlement, relating to the same transaction, may be charged in the same accusation, and should be so charged where there is any doubt which offense the evidence will disclose.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414-418; Dec. Dig. § 129.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

E. C. Miles was convicted of larceny, and he appeals. Affirmed.

William Maxwell and N. C. Coghlan, for appellant. Attorney General U. S. Webb, for the People.

HALL, J. Appellant was jointly indicted with Mr. and Mrs. Arnold and one Emma Smith for the larceny of \$1,000 of the property of Olive Griesse and Henry Griesse. Appellant was tried separately and by the jury found guilty as charged, and from the judgment rendered upon such conviction appealed to this court.

In the methods resorted to by appellant and his codefendants to obtain the money from the prosecuting witnesses this case bears a close resemblance to the case of People v. Tessie Arnold, 17 Cal. App. 68, 118 Pac. 729, in which all of the same parties were indicted for stealing \$150 from one Francis Shaw, and in which case the conviction of Tessie Arnold was by this court sustained. It is urged by the appellant that the verdict is not sustained by the evidence.

[1] The evidence shows that at all the times referred to by the witnesses Tessie Arnold was residing at 1237 O'Farrell street in the city and county of San Francisco, and at her apartments there conducted from time to time what she was pleased to call "seances," at which, as she represented to her patrons, voices from the spirit world audibly spoke to her and to those participating in the seances. The prosecuting witnesses first visited Mrs. Arnold's apartments in the latter part of December, 1909, or in the early part of January, 1910, and became interested in the "seances." They kept up their visits at frequent intervals for about four months. They were early induced by Mrs. Arnold to have a "seance." At the invitation of Mrs. Arnold they entered a small apartment or cabinet, in the center of which was a small table, upon which was placed a music box and a trumpet. The room was hung with curtains, apparently against the walls, and was illuminated by artificial light. During the "seances" this was turned down so as to give but a very dim light, and the music box was set running so as to give forth strains of music. Mrs. Arnold and the prosecuting witnesses being seated at the table, voices were heard, apparently coming from the trumpet, and which Mrs. Arnold represented to be from the spirit world. One of these called himself Dr. Winthrop, and claimed to be the guide and "control" of Mrs. Arnold, while the other called himself Abde-water, and claimed to be the guide and "control" of Mrs. Griesse. We have no doubt but that the jury from the subsequent developments correctly believed that these voices came from the throats of Mr. Arnold and

appellant Miles, and that they were confederates of Mrs. Arnold in a scheme to mulct Mr. and Mrs. Griesse of their little savings.

The confederates, as we shall hereafter term them, soon learned that Mr. and Mrs. Griesse were the owners of a lodging house. Thereafter at each "seance" the voices advised and urged Mr. and Mrs. Griesse to sell their lodging house, to the end that the money could be invested under the directions of "Dr. Winthrop" and "Abdewater." By means of urging, cajoling, and bullying repeated at frequent "seances," the confederates finally induced the Griessees to dispose of their lodging house, for which they received the sum of \$1,400, and which they promptly on the 18th day of April, 1910, deposited in the Anglo, London & Paris National Bank in such a manner that it could be withdrawn upon the order of either Mr. or Mrs. Griesse. Shortly afterwards Mr. and Mrs. Griesse, at the invitation, over the telephone, of Mrs. Arnold, visited her, and were given a "seance," at which the voices urged and advised the Griessees to invest their money in a wonderful invention originated by an "honest man" whom they had been "developing" as an inventor. At the conclusion of the "seance" the Griessees were conducted by Mrs. Arnold to another room, where they were introduced to appellant as the inventor and to Mr. Arnold. The merits of his "fountain tooth brush" and the wonderful business prospects of the "American Fountain Tooth Brush Company," to be organized to market and exploit this invention, not yet completed nor patented, were explained to Mr. and Mrs. Griesse by appellant, and the "confederates" earnestly and persistently urged the Griessees to invest in the stock of the company, but without immediate success. The Griessees went home without coming to a decision.

On April 21, 1910, Mrs. Griesse visited Mrs. Arnold, and was again treated to a "seance," at which she was urged and advised by the voices of "Dr. Winthrop" and "Abdewater" speaking through the trumpet to invest in the stock of the company. At the "seances" some sort of incense was burned, but at this one more than usual, and she was urged by Mrs. Arnold to inhale of it, so as to more fully come under the "control." This she did to such an extent as to become dizzy. At the conclusion of the "seance" she was conducted to another room, where she again met Mr. Arnold and appellant, and, after more talk and persistent urging in which she was told among other things that she could at any time get back \$250 of her money and in a short time all of it, she signed and delivered to appellant a check on the bank for \$1,000, payable to him, and which he promptly cashed. Appellant upon the receipt of the check gave her an instrument, signed by him, as follows: "San Francisco, California, 6/21/1910. Received of Olive M. Griesse, on account of purchase

price of ten thousand shares of the capital stock of the American Fountain Tooth Brush Company (now being organized), owner of patent rights for U. S. Patent application No. 546289, now pending. Stock to be issued and delivered as soon as printed and to be fully paid and nonassessable.—A. C. Miles, Agent." This transaction occurred and the check was dated April 21, 1910.

It is urged that the evidence does not support the verdict, in that, as it is claimed, no criminal connection of appellant is shown with the scheme to fleece Mr. and Mrs. Griesse, and because, as it is claimed, the evidence shows that the crime committed was not that of larceny, because, as it is claimed, the evidence shows that Mrs. Griesse intended to part with the title to her money when she gave the check.

As to the first contention there can be no doubt, from the evidence as we have detailed it, as well as from other matters in evidence not adverted to, that appellant was a fellow conspirator and an active participant in the entire scheme.

[2] The other point, to wit, that the evidence shows that Mrs. Griesse intended to and did part with title to the money when she made the transfer of possession, and that, therefore, the case is one of obtaining money by false and fraudulent pretenses, and not a case of larceny, is more plausible. The court very correctly and clearly explained to the jury what constituted larceny by trick and device, and the difference between such a larceny and the crime of obtaining money by false and fraudulent pretenses in accordance with the rule as laid down in *People v. Delbos*, 148 Cal. 734, 81 Pac. 131, and the cases there cited. It must be conceded, we think, that the jury would have been justified in finding that Mrs. Griesse did intend to and did in fact part with title to her money in the transaction with appellant. It may well be that such would have been the more logical conclusion to draw from the facts disclosed by the evidence.

But from this it does not follow that a contrary conclusion may not be supported by the evidence. Mrs. Griesse had been told that she could at any time have the return of \$250 of her money, and could shortly get it all back if she wished. The transaction occurred and the check was dated April 21, 1910. At this time the corporation had not been formed, nor indeed had any steps been taken to form the corporation. No stock was yet issued or printed. The receipt was dated by appellant as of June 21, 1910 (6/21/1910), two months later than the date of the check. From this significant fact in connection with the other circumstances, the jury may well have found that it was intended and understood that until such date arrived, June 21, 1910, and the stock could be delivered and the transaction finally closed, the title to the money should remain with Mrs. Griesse, and the possession only be in appellant, for the

purpose of paying for the stock when it could be issued by the company to Mrs. Griesse. This view of the transaction finds substantial support in the evidence, and for that reason we cannot say that the verdict of guilty of grand larceny is not supported by the evidence.

[3] The defendant also complains of the ruling of the court in sustaining an objection to appellant's offer to prove that the stock of the company was of some value. Without determining whether or not such evidence was at all pertinent or material in view of the peculiar facts of the case, we do not think the court in its ruling committed any error of which appellant can be heard to complain. Before this offer of testimony occurred, appellant had offered in evidence certain letters from various persons which, though not set forth in the record, seem to have been addressed to appellant, and to have contained statements bearing upon the value of the invention and the like. Upon objection these letters were ruled out, and appellant very properly makes no complaint as to such rulings. When he made his offer, of the ruling out of which he does complain, he did not put his witnesses upon the stand nor ask them any question. They were not shown to have had any knowledge of the company or of the value of the so-called invention. Appellant made a somewhat vague and general offer of testimony along certain general lines, and concluded his offer by the statement that "your honor has practically ruled on that." By this statement counsel manifestly referred to the ruling of the court in rejecting the letters that had previously been offered, and we think in so doing really invited the ruling of the court that was thereupon made as to his present offer. The matter was certainly so presented to the court as to convey the idea that the same point was involved as had been ruled on. In this way the action of counsel was well calculated to mislead the court (unintentionally of course) as to the purpose of the offer. The previous ruling was clearly correct; and we think, under the circumstances above detailed as attending the last offer, appellant should not be heard to complain of the ruling which he in effect invited.

Appellant also complains of the refusal of the court to give some instructions requested by appellant, but an examination of the record satisfies us that, so far as such instructions correctly stated the law, they were substantially given in other instructions. The instructions given were correct, and fully charged the jury on the matters of law involved in the case.

[4] In concluding this opinion we deem the occasion opportune to call attention to the provisions of section 954 of the Penal Code, as amended in 1905 (St. 1905, p. 772). This section is clearly intended to permit the

charging of different offenses in different counts of the same indictment or information, where different offenses all relate to the same act, transaction, or event. The section as it is now written has been the law of this state since 1905, and yet no case has yet been before this court where the prosecuting officer has availed himself of its provisions. It is certain that, by following the rule prescribed in this section, any excuse for an appeal could be frequently avoided where any doubt may exist as to whether the evidence will disclose a case of larceny, false pretenses, or embezzlement. In charging under this section, it is, of course, necessary that care be taken to make it clearly appear that the offense set forth relates to but one act, transaction, or event (*People v. Jailles*, 146 Cal. 303, 79 Pac. 965); but, if this be done, no harm can result from charging under different counts so as to meet every plausible view of the facts.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

BANK OF VENICE v. HUTCHINSON. (Civ. 1,091.)

(District Court of Appeal, Second District, California. May 31, 1912. Rehearing Denied June 29, 1912. Denied by Supreme Court July 29, 1912.)

1. APPEAL AND ERROR (§ 914*)—RECORD—PRESUMPTION—SUMMONS—AFFIDAVIT FOR PUBLICATION.

An affidavit for publication of summons, which Code Civ. Proc. § 412, though not requiring it to disclose its date, clearly indicates must be presented and verified at the time of the application for order of publication, will be presumed to have been made at the time of its presentation, as recited in the order of publication; its recital of occurrences of a month later than the date appearing in the jurat showing such date to have been a mistake.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3693-3698; Dec. Dig. § 914.*]

2. PROCESS (§ 86*)—PUBLICATION—PERSONS SERVABLE BY PUBLICATION.

Where an attachment is sought against a wife's separate estate, jurisdiction of the husband can be obtained by publication.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 100; Dec. Dig. § 86.*]

3. PROCESS (§ 45*)—ALIAS SUMMONS—TIME OF ISSUANCE.

Code Civ. Proc. § 408, with reference to the time when an alias summons may be issued, has no reference to service of such a summons when parties are brought in by stipulation, or by order of the court, under section 389.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 42-45; Dec. Dig. § 45.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the Bank of Venice against Susan N. De Luna Hutchinson, sued as Susan N. De Luna. Judgment for plaintiff; defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Anderson & Anderson, for appellant. Tanner, Taft & Odell, for respondent.

ALLEN, P. J. The action was against defendant and appellant as guarantor of a promissory note, and was originally brought against Susan N. De Luna, under which name and style she executed the contract of guaranty. The complaint was filed August 1, 1908. Defendant and appellant appeared thereto and subsequently, on December 14, 1908, filed her answer, setting forth, among other things, that she was a married woman; that her husband's name was W. C. Hutchinson; and that her husband was absent from his home temporarily, but that the parties were not living separate and apart. Thereupon plaintiff asked for and obtained leave of court to amend its complaint, alleging the marriage, the husband's name, and asking that he be made a party to said proceeding. This was pursuant to a stipulation, which further agreed that the answer theretofore filed might stand as an answer to the amended complaint. This amendment to the complaint and the stipulation were filed on June 3, 1909. The court, by its order made October 13, 1909, directed the issuance of an alias summons. The original summons was returned and filed November 12, 1909. Thereafter an affidavit for publication of summons was filed, which set forth the time of the filing of the complaint, that the original summons had been returned on the 12th day of November, 1909, the issuance of an order for the alias summons, that the same could not be served upon W. C. Hutchinson, and generally setting forth facts sufficient to authorize the issuance of an order for publication of summons. The jurat attached to the affidavit bears date of October 11, 1909. Due publication and mailing is shown by the record, and the default of Hutchinson duly entered. Thereafter judgment was entered in favor of plaintiff, and against defendant and appellant, and a new trial denied, from which judgment and order Susan N. De Luna appeals upon a bill of exceptions.

[1] Appellant's chief contention is that the affidavit for publication of summons is shown to have been made a month before the order for publication was issued, and, upon the authority of *Forbes v. Hyde*, 31 Cal. 351, could not be used as the basis for an order of publication. It will be conceded that the affidavit should be with reference to conditions existing at the time of the application for the order; but we are not prepared to say that, under the facts presented by the record in this case, it can be said that such rule has been violated. In the body of the affidavit for publication, it recites occurrences of November 12, 1909. The date appearing in the jurat, we think, was obviously a mistake, and was inserted by the notary inadvertently and carelessly. Reading the affi-

davit, it is certain that it was sworn to and subscribed on or after the 12th day of November, 1909. Otherwise it would not have been possible to have incorporated therein the occurrences of that date. Section 412 of the Code of Civil Procedure does not provide in terms that the date of the affidavit should be disclosed therein, but does indicate clearly that it must be presented and verified at the time of the application. We are of opinion that, had the jurat omitted any date, and nothing to the contrary appeared, it would be presumed that it was made at the time of its presentation. The order of publication so recites. The case of *Hibernia, etc., Society v. Churchill*, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73, is an authority upon the proposition that, the statute not requiring the date of a summons to be made a part thereof, such summons is not void on account of an improper date being inserted therein; and *People v. McDaniels*, 141 Cal. 115, 74 Pac. 773, is to the effect that the primary object and purpose of the signature of the officer to the jurat is to witness the signature of the affiant to the affidavit.

[2, 3] We think there is no merit in appellant's suggestions, which she has not dignified by an argument, to the effect that jurisdiction of the husband, where an attachment is sought against the wife's separate estate, cannot be obtained by publication. Section 408 of the Code of Civil Procedure, with reference to the time when an alias summons may be issued, we think, has not reference to the service of such summons where parties are brought in by order of court, or by stipulation, under the provisions of section 389 of the Code of Civil Procedure. We perceive no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

HYNES v. ALL PERSONS et al. (Civ. 940.)
(District Court of Appeal, Third District, California. May 27, 1912.)

1. QUIETING TITLE (§ 34*)—STATUTORY ACTION—AFFIDAVIT.

St. 1906, Ex. Sess. p. 78, providing a special action to quiet title, requires that the action shall be commenced by the filing of a verified complaint, and that plaintiff at the time of filing the complaint shall file with the same an affidavit setting forth the character of plaintiff's estate in and possession of the property, the period during which it has existed, from whom obtained, whether or not he has ever made any conveyance of the property, or any part thereof, or interest therein, and, if so, when and to whom, also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon, that he does not know and has never been informed of any other person who claims an interest therein or lien thereon, etc. The statute also requires that the complaint and summons contain a particular description of the property. *Held* that, where the summons and complaint particularly

described the property in controversy, it was not necessary that it should be again particularly described in the affidavit, but it was sufficient that the affidavit embraced the description in the summons and complaint by reference.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69-72, 76, 77; Dec. Dig. § 34.*]

2. QUIETING TITLE (§ 34*)—ACTION — AFFIDAVIT—NATURE OF PLAINTIFF'S ESTATE.

St. 1906, Ex. Sess. p. 78, is remedial in its nature, and should be liberally construed, so that, where the affidavit contains such a full and complete statement of plaintiff's interest as will enable the defendants to verify the same, prevent fraud, and safeguard their own rights, it is sufficient without setting forth every probative fact relating to the derivation of plaintiff's estate.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69-72, 76, 77; Dec. Dig. § 34.*]

3. QUIETING TITLE (§ 34*)—SOURCE OF TITLE — AFFIDAVIT.

In an action to quiet title, a statutory affidavit filed with the summons and complaint alleged that plaintiff derived the property from the estate of her father and from deeds from her mother, sister, and brother, all being specifically named; that the property was inclosed by fences and occupied by buildings, and was resided on by plaintiff; that plaintiff and her grantors have been the owners in fee simple, and in the actual and peaceable possession of the same and every part thereof for more than 20 years last past. *Held*, that the affidavit sufficiently set forth the character of plaintiff's estate and the duration of its existence, etc., as required by St. 1906, Ex. Sess. p. 78.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69-72, 76, 77; Dec. Dig. § 34.*]

4. PLEADING (§ 406*)—NATURE OF ACTION—STATUTES — AFFIDAVIT — OBJECTION — WAIVER.

St. 1906, Ex. Sess. p. 78, creating a special action to quiet title, provides (section 12) that, except as therein otherwise provided, the provisions and rules of law relating to evidence, pleading, practice, new trials, and appeals applicable to other civil actions shall apply to actions under such act. *Held*, that where defendant appeared and answered in an action under such statute, and went to trial without objection, either by demurrer or answer to the jurisdiction or subject-matter, and the issue of ownership was submitted and decided, and an appeal taken from the judgment on that issue, she thereby waived any right to object that the affidavit required to be filed with the summons and complaint did not sufficiently set forth the nature of plaintiff's estate, the duration of her possession, etc.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1356-1359, 1361-1365, 1367-1374; Dec. Dig. § 406.*]

5. QUIETING TITLE (§ 47*)—JUDGMENT—DETERMINATION OF INTERESTS.

St. 1906, Ex. Sess. p. 78, created a special action to quiet title, and section 11 declared that the judgment should ascertain and determine all estates, rights, titles, interests, and claims in and to the property and every part thereof, whether the same was legal or equitable, present or future, vested or contingent. Defendant in an action under such act filed a cross-complaint, alleging that she was the owner of an estate of inheritance in the property, and was seized in fee in every part thereof, etc. *Held*, that a finding of title in plaintiff, and that defendant and cross-com-

plainant had no right, title, interest, or claim in or to the property described in the complaint or any part thereof, sufficiently disposed of the issues raised by the cross-complaint.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 95-97; Dec. Dig. § 47.*]

6. TRIAL (§ 396*)—FINDINGS—EVIDENCE.

In a suit to quiet title, a finding on the question of rents, issues, and profits was properly omitted where there was no evidence on which to base it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

7. QUIETING TITLE (§ 47*)—FINDINGS—SUFFICIENCY.

A finding of the fact of title or ownership is good without a finding on the particular facts on which the title or want of title depends.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 95-97; Dec. Dig. § 47.*]

8. APPEARANCE (§ 24*)—SPECIAL ACTION — SUMMONS—MEMORANDA.

St. 1906, Ex. Sess. p. 78, creating a special action to quiet title, provides (section 4) that there shall be appended to the summons memoranda stating the date of the first publication of the summons, and, second, the names and addresses of such adverse claimants as are disclosed by the affidavit of plaintiff on filing the complaint. *Held*, that the omission of the second requirement was not fatal, where the only adverse party mentioned in the affidavit and interested in having the memoranda noted appeared and disclaimed any interest in the property.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. § 24.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabanias, Judge.

Action by M. J. Hynes, special administrator of the estate of Frances J. Graham, deceased, against All Persons, etc., interested in certain real property. From a judgment for plaintiff, E. A. Leigh, substituted in the place of Mary S. Knoll, deceased, appeals. Affirmed.

J. J. Dunne and J. Walter Scott, for appellant. Cullinan & Hickey (A. Everett Ball, Sullivan & Sullivan, and Theo. J. Roche, of counsel), for respondent.

CHIPMAN, P. J. This is an action to quiet title to certain two lots or parcels of land in the city and county of San Francisco under the provisions of the so-called McEnerney act. Stats. 1906, p. 78. The action was commenced by Frances J. Graham, and, while yet living, judgment passed in her favor. Subsequently the present plaintiff was substituted in her stead. Defendant Knoll appealed from the judgment and order denying her motion for a new trial. Subsequent to the appeal said defendant Knoll died, and E. A. Leigh, the duly appointed, qualified, and acting executor of her last will and testament, was substituted in her place and stead, and now prosecutes the appeal.

The complaint and affidavit were filed on July 28, 1909, and on October 29, 1909, defendant Knoll filed a general and special de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

murrer, which was overruled, and on November 15, 1900, she filed her answer.

The complaint appears to set forth, by proper averments, all the facts required to be stated by the McEnerney act, and we do not understand that its sufficiency is now questioned. Defendant denies the averments of the complaint, "and for a further and separate and distinct ground of defense, * * * and by way of cross-complaint, defendant alleges that this defendant is the owner of an estate in inheritance, to wit, an estate in fee simple absolute in and to that real property, situate, lying, and being," etc. (describing parcel 2 of the land mentioned in the complaint). She alleges that she "is the owner and seised in fee of and was at all times herein mentioned the owner and seised in fee of the above-described real property and every part thereof." The answer or so-called cross-complaint was not accompanied by an affidavit as required by section 5 of the act to be filed by the plaintiff, nor does it contain averments "fully and explicitly setting forth and showing the character of his (her) estate, right, title, interest or claim in and possession of the property," as is required to be stated by a plaintiff in his affidavit. It states that defendant has made no conveyance of said lot other than as explained in the cross-complaint, and likewise avers no knowledge of any claim or interest adverse to defendant except as explained. Defendant's prayer is for a decree of the court "quieting the title of said defendant to said real property against said plaintiff and all persons claiming any interest in or lien upon said real property * * * and declaring said defendant to be the owner in fee simple of each and every, all and singular of said real property," and that the deed executed by defendant to plaintiff be declared void and ordering that it be canceled.

The point principally relied on by defendant is "that the affidavit required to be filed at the time of filing the complaint was and is fatally defective." The grounds of this contention are (1) that the affidavit fails to identify any specific real property; (2) that it "fails to set forth and show, fully and explicitly, the derivation of the affiant's asserted title"; (3) that it fails to show in like manner "during what period the affiant's asserted title has existed." The affidavit states, among other things: "(1) That the character of plaintiff's estate, right, title, interest, or claim in, and possession of, the real property described in the complaint in this action and herein referred to, is as follows, to wit: That the plaintiff is the owner in fee simple absolute, and either by herself or by her tenants and agents, or persons holding under her, is in the actual and peaceable possession of all of that certain real property, situate in the city and county of San Francisco, state of California, and particularly described in the said complaint, to

which reference is hereby made, and made a part of this affidavit. That the real property described as 'parcel No. 1' and 'parcel No. 2' was derived from the estate of her father, Joseph H. Cording, deceased, and from deeds from Mary S. Knoll, her mother, Alice Leigh, her sister, and Frederick A. Cording, her brother. That all of said real property is inclosed by fences and buildings. Parcel 1 is inclosed by a fence, and parcel 2 is inclosed by fence and occupied by buildings, and is resided upon by affiant. That plaintiff and her grantors have been the owners in fee simple and in the actual and peaceable possession of the same and every part thereof for more than 20 years last past."

[1] The objection that the particular description of the property should have appeared in the affidavit and that the omission was not cured by reference to the complaint made part of the affidavit wherein, as well as in the summons, it was particularly described, we think without merit. The practice is quite common to make exhibits part of a complaint by reference thereto. Under the McEnerney act it is expressly provided that "the action shall be commenced by the filing of a verified complaint" (section 2); but "at the time of filing the complaint, the plaintiff shall file with the same his affidavit" (section 5). The complaint and affidavit are so closely related that we can see no reason why the reference here made to the complaint should not be held sufficient. The statute expressly requires the complaint to contain "a particular description of such real property," as also must the summons. The statute does not require the affidavit to contain a particular description of the property. It necessarily relates to the property, and may properly, and perhaps should, embrace a description of it for identification. But we think this may be accomplished by reference to the complaint. The general rule is discussed in *Santa Rosa Bank v. Paxton*, 149 Cal. 195, 86 Pac. 193. In *Estate of Cook*, 137 Cal. 184, 191, 69 Pac. 968, 971, the court said: "We regard the rule as well settled that a necessary allegation in a complaint or petition must be distinctly averred in the complaint or petition, and, if omitted, it cannot be supplied by a reference to an exhibit; but, if the allegation be defective, it may be aided by an express reference to an exhibit for that avowed purpose." The property is mentioned in the affidavit as situated in the city and county of San Francisco and is several times referred to but is not particularly described otherwise than by reference to the complaint. The defect, if any, we think was removed by such reference.

[2] Much attention is given by appellant, in support of his testate's objections to the affidavit, to the alleged unique character of the McEnerney act, and cases which have arisen under it are cited to show that "scrupulous care should be exercised by the

court when examining the sufficiency and regularity of proceedings taken under the act." And it is hence claimed that one who proceeds under a special statute, such as this is, must comply with the conditions necessary to his recovery under that statute, "and no recovery can be had unless the plaintiff alleges exactly those facts which the statute names as the basis for the right conferred." In short, though in its nature remedial, the act must be strictly construed.

On the other hand, respondent contends that, being remedial, it is to be liberally construed. Of the statute, Mr. Justice Lorigan, for the court, in *Lofstad v. Murasky*, 152 Cal. 64, 67, 91 Pac. 1008, 1009, said: "While it is true that the act in question is of a remedial nature, and should be liberally construed so as to effect the purpose contemplated by it, a court is not warranted under the guise of liberal construction in giving to a term or phrase a different meaning than such as it is generally understood to possess"—this in discussing the meaning of the term "actual possession" used in the act. In *Estate of Patterson*, 155 Cal. 626, 638, 102 Pac. 941, 945 (28 L. R. A. [N.S.] 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625), the court said of the amendment of 1907 (St. 1907, p. 122) to section 1339 of the Code of Civil Procedure, which relates to the proving of a will "destroyed by public calamity," and refers to the same cause which gave rise to the McEnerney act: "It is remedial in its nature and is designed to preserve the testamentary right. * * * Such laws should be given a liberal construction to promote the purposes for which they are designed." Appellant cites with confidence *Potrero Nuevo Land Co. v. All Persons*, 158 Cal. 731, 112 Pac. 303. That case was decided on a motion to dismiss for insufficiency of the affidavit which merely stated, as to the source of title: "That said title to said property was sold and conveyed by the state of California to one John Bensley in 1855, and by him, through divers mesne conveyances, conveyed to said plaintiff, who is now the owner and holder thereof, and has been for the last 10 years." Referring to the statute, the court, by Mr. Justice Henshaw, said: "A requirement of a full and explicit showing of the period during which a plaintiff has enjoyed this estate and a full and explicit showing of the person or persons from whom obtained is not met by the affidavit here presented. To say that one has owned an estate for 10 years and more is not fully and explicitly showing how long in fact he has owned and enjoyed it. A statement that one acquired title by 'divers mesne conveyances from one John Bensley, to whom the state conveyed the property in 1855,' is not a full and explicit showing, description or characterization of the person 'from whom obtained.'" The opinion points out that "the provision of the statute requiring a full and complete statement of these particulars is

manifestly designed for the benefit of the defendants, in enabling them, by verifying plaintiff's claim, to prevent fraud and safeguard their rights," and hence the court says, "A full and fair compliance with the provisions is a just exaction from every plaintiff." In a concurring opinion, Mr. Justice Shaw said: "I agree that the procedure prescribed in the act should be followed closely." But how closely? With what degree of minuteness must the plaintiff set forth the history of his title and its enjoyment in order to meet the terms of the statute requiring him to file an affidavit "fully and explicitly setting forth and showing the character of his estate, right, title, interest or claim and possession"? It cannot be reasonably held that the plaintiff must set forth every probative fact relating to what appellant terms "the derivation of affiant's asserted title" and every probative fact showing for "what period the affiant's asserted title has existed," in which respects it is claimed the affidavit is defective. The purpose of a full and complete statement showing the person or persons "from whom obtained" and how long in fact the affiant "has enjoyed the property," as was said in the *Potrero Nuevo Case*, is "for the benefit of the defendants, in enabling them, by verifying the plaintiff's claim, to prevent fraud and safeguard their own rights."

[3] A statement that meets these requirements is sufficient. The affidavit here is much more explicit than the affidavit in the *Potrero Nuevo Case*. It shows that plaintiff derived the property "from the estate of her father, Joseph H. Cording, deceased, and from deeds from Mary S. Knoll, her mother, Alice Leigh, her sister, and Frederick A. Cording, her brother"; that the property is inclosed by fences and occupied by buildings, and is resided on by affiant; "that plaintiff and her grantors have been owners in fee simple and in the actual and peaceable possession of the same and every part thereof for more than twenty years last past." It seems to us that there is sufficient here to enable defendants "to verify plaintiff's claim," and "to prevent fraud and safeguard their rights." Unlike the affidavit in the case cited, it is explicit in showing from whom the estate was derived and the period during which plaintiff and her grantors named have enjoyed the estate. A still later expression by the Supreme Court is found in *Sober v. Cabaniss*, 119 Pac. 911, in which the *Potrero Nuevo Case* is cited. It throws some fresh light upon the question as to the requirements of the statute in the particulars we have been noticing.

[4] But we have this situation here. Defendant Knoll appeared and answered and went to trial, without objection, by demurrer or answer, either to the jurisdiction of the person or subject-matter. The issue of ownership between the respective parties was submitted, and decided, and the appeal is

from the judgment on that issue. So far as appellant is concerned, the affidavit has performed its office, and she has no cause to complain. The evidence fully and explicitly showed the facts which appellant claims should have more fully appeared in the affidavit.

Section 12 of the McEnerney act provides: "Except as herein otherwise provided, the provisions and rules of law relating to evidence, pleading, practice, new trials, and appeals applicable to other civil actions shall apply to the actions hereby authorized." Appellant appeared voluntarily and answered, which is equivalent to personal service of the summons and copy of the complaint. Code Civ. Proc. § 416. It was said, in the Potrero Nuevo Case, supra, as applicable here: "Defaulting defendants are not adverse parties to other defendants when there is no joint relation alleged between them, and a judgment against each is several and independent. * * * The rules of practice relating to appeals under the McEnerney act are those applicable to other civil actions (section 12)." It was held in *Adams v. Hopkins*, 144 Cal. 30, 77 Pac. 716, that a defendant who has appeared cannot take advantage of any defect in the service or return of summons; "nor can the appellants avail themselves of defects in the service of summons on other parties." See *In re Yoell*, 131 Cal. 581, 63 Pac. 918. The doctrine of waiver of irregularities not amounting to nullities is fully discussed in *Clapp v. Graves*, 26 N. Y. 418. The rule stated by Coleridge, J., in *Holmes v. Russell*, 9 Dowl. 487, is quoted approvingly: "It is difficult, sometimes, to distinguish between an irregularity and a nullity, but I think the safest rule to determine what is an irregularity, and what is a nullity, is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity. If he cannot, it is a nullity." What office the affidavit is intended to perform was pointed out in the Potrero Nuevo Case, and we do not doubt that the filing of an affidavit in substantial compliance with the statute is jurisdictional, at least so far as it concerns defendants who do not appear. And if it be conceded that the proceedings would be a nullity as to all defendants for want of jurisdiction, whether appearing or not, where no affidavit is filed, or where the affidavit lacks the essential averments required by the statute, still we think the affidavit was sufficient in the present case to confer jurisdiction.

[5] It is contended that the judgment should be reversed because the court failed to find upon material issues raised by the cross-complaint. Section 11 of the McEnerney act provides: "The judgment shall ascertain and determine all estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent." The finding of the court as to

plaintiff's title, set out above, is abundantly supported by the evidence and so also the finding as to defendant's title, also given above. But it is urged that there should have been a specific finding negating defendant's equitable interest claimed in the cross-complaint and also negating the averments of fraud and undue influence.

It appeared that title to the property in question vested in defendant Knoll, the then wife of Joseph H. Cording, deceased, and mother of plaintiff's intestate, Mrs. Graham. By the decree of distribution, the property of the said Cording was distributed in accordance with his will, half to Mrs. Knoll, then Mrs. Cording, and the remaining half to her in trust, for the support, education, and benefit of the three children, of whom Mrs. Graham was one. The will provided and the decree adjudged that Mrs. Cording should "have full and entire control and right of disposition of all and every part of said property, both real and personal, during her natural life, to sell and convey, lease, mortgage or hypothecate the same or any part thereof without an order of probate, or any other court, or any of the legal proceedings in, about or concerning such matters." It further appeared that, for reasons shown, Mrs. Knoll made a division of this remaining property among her children, conveying to Mrs. Graham the parcel in question, and in this deed the other children joined. This deed was delivered and placed in escrow with a bank in San Francisco under an agreement that it was to be recorded after the death of Mrs. Knoll. Thus far there is no conflict in the testimony. There was evidence that subsequently this deed was, by the written consent of Mrs. Knoll and her children, surrendered by the bank and recorded, and is the deed on which plaintiff relies. It was in evidence that the deed was recorded because Mrs. Knoll was involved in some litigation, and desired to place the title in Mrs. Graham. This deed was one of three deeds by which she undertook to convey this trust property directly to the beneficiaries. There was no evidence that any fraud was attempted to be practiced on her, or that she acted under any undue influence. There was some evidence that Mrs. Graham agreed to furnish a home for her mother, and she testified that she had kept that promise. The principal fact in controversy was whether the deed had been taken out of escrow and recorded by the direction and with the consent of Mrs. Knoll. And all these matters were brought out in support of her claim of title and to disprove Mrs. Graham's title. In fact, the real and only issue presented by the pleadings was that of ownership—both parties claiming a fee simple absolute, and the relief sought by defendant was to quiet such title in her.

The court found title in Mrs. Graham, and "that the defendant Mary S. Knoll, has

no right, title, interest, or claim in or to said property described in said complaint, or any part thereof." It seems to us that the ultimate fact involved in the issue presented by the answer is here directly found upon and that no further finding was necessary. The death of Mrs. Knoll has been suggested since the cause was transferred to this court, which has terminated any life estate or interest she may have had in the property.

[8] If a question of rents, issues, and profits should be suggested, suffice it to say that there is no evidence on which any finding could have been made. We do not think the point now urged would warrant a reversal of the judgment. The finding of ownership includes the probative facts. *Montecito Valley W. Co. v. Santa Barbara*, 144 Cal. 578, 594, 77 Pac. 1113.

[7] A finding upon the fact of title or ownership is good without a finding of the particular facts upon which such title or want of title depends. *Cooley v. Miller & Lux*, 156 Cal. 510, 523, 105 Pac. 981. See *Black v. Black*, 74 Cal. 522, 16 Pac. 311; *Bulwer Cons. M. Co. v. Standard Cons. M. Co.*, 83 Cal. 589, 23 Pac. 1102.

[8] Section 4 of the *McEnerney* act directs that two certain memoranda be appended to the summons on the posting and publication thereof—first, the date of the first publication of summons; and, second, the names and addresses of such adverse claimants as are disclosed by the affidavit of plaintiff upon filing the complaint. The second requirement was omitted. The affidavit showed that the city and county of San Francisco claimed an adverse interest. The city and county of San Francisco appeared by answer and disclaimed any interest in the property. Conceding that appellant could take advantage of this omission, which we doubt (*Adams v. Hopkins*, 144 Cal. 30, 77 Pac. 712), the appearance of this, the only adverse party mentioned in the affidavit and interested in having the memoranda noted, cured the defect.

Discovering no prejudicial error in the proceedings, the judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(19 Cal. App. 197)

DELGER v. JACOBS et al. (Civ. 950.)

(District Court of Appeal, Third District, California. May 27, 1912.)

1. LANDLORD AND TENANT (§ 291*)—FORCIBLE DETAINER—COMPLAINT—SUFFICIENCY.

A complaint in forcible entry and detainer, alleging that plaintiff leased certain premises in writing to defendant J. for five years, at a specified rental; that J. entered under such lease, which contained covenants against assignment and subletting, providing that any assignment or subletting should work a for-

feiture at the lessor's option; that J. assigned his interest without plaintiff's consent to certain other defendants, whereupon plaintiff served notice to quit; and that defendants had refused to quit and surrender the premises—was sufficient and not subject to demurrer.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1269; Dec. Dig. § 291.*]

2. WITNESSES (§ 219*)—PRIVILEGE—WAIVER.

Where defendant's attorney and a stenographer were permitted to testify with reference to the execution of an assignment of a lease, without objection, defendant was not entitled to have the evidence stricken on the ground that the witnesses were privileged.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.*]

3. WITNESSES (§ 200*)—ATTORNEY—ACTS OF SCRIVENER—CONFIDENTIAL COMMUNICATION.

Where an attorney in preparing an assignment of a lease acted as a scrivener and not as confidential attorney of any of the parties, his evidence as to the execution and delivery of the assignment was not privileged.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 752, 757; Dec. Dig. § 200.*]

4. EVIDENCE (§ 178*)—BEST AND SECONDARY EVIDENCE—ASSIGNMENT OF LEASE—CONTENTS.

Where an alleged assignment of a lease had been lost, its contents could be proved by any witness who had read it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 722-725; Dec. Dig. § 178.*]

5. TRIAL (§ 412*)—RECEPTION OF EVIDENCE—TRANSCRIPT.

In an action of unlawful detainer, plaintiff read in evidence portions of a transcript of the tenant's testimony in a bankruptcy proceeding as containing admissions against interest. Defendants demanded an inspection of the transcript, which plaintiff declined to give because of certain private notes thereon which had not been erased. At defendants' request the whole record was introduced; they being permitted to call the court's attention to such additional matter as they desired, and to inspect it after the notes had been erased. *Held*, that defendants could not complain thereafter of their own failure to inspect such transcript.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 182, 974-977; Dec. Dig. § 412.*]

6. JUDGMENT (§ 580*)—FINAL JUDGMENT—SATISFACTION.

Code Civ. Proc. § 1049, provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal is passed, unless the judgment is sooner satisfied. *Held*, that where a judgment against a tenant in a prior proceeding, to the effect that he had leased the premises in controversy from plaintiff, had been fully satisfied by him, it was not objectionable, when offered in evidence as an estoppel, on the ground that the case had been appealed and that the judgment was not final.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1024; Dec. Dig. § 580.*]

7. EVIDENCE (§ 207*)—ADMISSION AGAINST INTEREST—JUDGMENT.

Where a judgment in a prior action by a landlord against his tenant determined that the tenant had leased the premises in question and was in possession under such lease, the judgment, even though it did not constitute an estoppel, was admissible, in a subsequent ac-

tion by the landlord against the tenant, as an admission against interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 707-712; Dec. Dig. § 207.*]

8. APPEAL AND ERROR (§ 204*)—EVIDENCE—FAILURE TO LIMIT—NECESSITY OF OBJECTION.

Where evidence was admissible as against one of several defendants, the others could not object to its admissibility against them on appeal; they having made no such objection at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.*]

9. ESTOPPEL (§ 110*)—EQUITABLE ESTOPPEL—PLEADING.

Proof of an alleged equitable estoppel against plaintiff is inadmissible where estoppel is not pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

10. APPEAL AND ERROR (§ 880*)—RIGHT TO CLAIM ERROR.

Where the tenant did not appeal from an adverse judgment in an action of unlawful detainer, other defendants, to whom the landlord had assigned an interest in the lease, who did appeal, were not entitled to review an issue of fraud raised in the tenant's cross-complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584-3590; Dec. Dig. § 880.*]

11. TRIAL (§ 387*)—DECISION OF COURT—REQUISITES.

The decision on which the judgment is required to be entered by Code Civ. Proc. § 633, is not the clerk's entry in the minutes, but the decision which by section 632 is to be given in writing and filed with the clerk, prior to which there is no decision on which judgment can be entered, and no authority to enter judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 903-907; Dec. Dig. § 387.*]

12. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—USE AND OCCUPATION—DAMAGES FOR DETENTION.

In unlawful detainer, plaintiff is entitled to recover the value of the use and occupation, together with damages for the detention of the property to the date of the findings.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1269; Dec. Dig. § 291.*]

13. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—PARTIES—JUDGMENT.

Where an action of unlawful detainer was brought to recover rented premises for breach of a lease consisting of an assignment of the tenant's interest therein, without the landlord's consent, in violation of covenant, and it appeared that the assignment was for the purpose of operating a business on the leased premises by means of a partnership or corporation, it was error to order judgment against persons who never became members of the partnership or were in any wise interested in the business.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1269; Dec. Dig. § 291.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Edward F. Delger against Abe Jacobs and others. Judgment for plaintiff,

and defendants other than Jacobs appeal. Affirmed in part, and reversed in part.

L. S. Melsted and E. H. Williams, for appellants. Matt I. Sullivan, E. M. Gibson, Sullivan & Sullivan, and Theo. J. Roche, for respondent.

BURNETT, J. This action of unlawful detainer was brought to secure restitution of certain leased premises in San Francisco, a forfeiture of the lease, and for damages in the value of the use and occupation of the property during the period of detention. Besides Jacobs, the lessee, the others were made parties defendant upon the theory that they had entered under and by permission of said lessee and were doing business on the demised premises by his authority. The complaint sets forth: That "on the 15th day of July, 1910, plaintiff, by agreement and lease in writing, leased to said defendant Abe Jacobs" certain premises (describing them) for the term of five years from the 1st day of July, 1910, at the monthly rental of \$650, "to be paid on the 1st day of each and every month in advance." That, by virtue of said agreement and lease, the said Jacobs entered into possession and occupation of said property and still continues to occupy the same. That the lease contained certain terms, conditions, and covenants, among which was that: "The lessee shall not sublet said premises, or any part thereof, nor assign this lease or any rights thereunder without the written consent of the lessor. Any assignment of this lease or any right thereunder, either directly or by operation of law, shall work a forfeiture of the same at the option of the lessor." That after the execution of said lease and said entry of Jacobs "and prior to the 1st day of October, 1910, and contrary to the conditions and covenants of said lease, said defendant, Abe Jacobs, without the consent in writing or otherwise of said plaintiff, assigned interests in said lease to said defendants B. T. Molsness, H. A. Moss, and Bristol Commercial Company, a corporation, and let and sublet said demised premises to said defendants." The violation of certain other covenants is also alleged, but this feature of the case we deem unnecessary to notice. It appears further that said defendants "are now, ever since the 1st day of October, 1910, have been, and were at the time of the service of the notice to quit hereinafter mentioned, in the possession of said demised premises"; that plaintiff served upon the defendants "three days' written notice to quit said premises and deliver possession thereof to plaintiff"; that defendants "have refused and neglected and still refuse and neglect to quit said premises or deliver possession thereof to plaintiff." A demurrer interposed by defendants was overruled by the court, and they filed an answer in which they denied positively the making

of the lease, that Jacobs entered into possession thereunder, that there was ever any assignment of said lease or any part thereof by said Jacobs, or that he sublet said premises or any part thereof to any person in any form or manner, that any of the defendants violated any of the other covenants of the lease or that defendants B. T. Molsness, H. A. Moss, and Bristol Commercial Company, or any of them, "are now, or ever since the 1st day of October, 1910, have been, or were at any time or at all, in the possession of said demised premises," or that any of the defendants was served with "three days' notice to quit, such as specified in section 1161 of the Code of Civil Procedure or otherwise or at all." There are also some affirmative allegations of fraud against the plaintiff in connection with the leasing of said premises, which will be considered hereafter. From the judgment in favor of plaintiff all the defendants except the said Abe Jacobs have appealed; the last named having filed a waiver of "any and all rights that I may have to move for a new trial of the above-entitled matter, or to prosecute an appeal from the judgment rendered in said matter on the 18th day of November, 1910, in favor of plaintiff and against defendants."

[1] There can be no doubt that the demurrer to the complaint was properly overruled. It is equally clear that there was sufficient evidence to support the material findings, with one exception hereafter to be noticed.

As to the execution of the lease itself, it may be said that, while apparently disputed in the opening brief of appellants, in their closing brief they declared that "everybody knows and admits that a lease was signed and delivered, but our answer shows that it was secured through fraud," and, to explain the denial of its execution in the answer, it is stated that, "where a lease is secured through fraud, its execution must be denied, for the obvious reason that the meeting of minds essential to the creation of a valid contract does not take place." In view of this statement and of the fact that no evidence of fraud in connection with the lease is exhibited, it is manifestly unnecessary to direct specific attention to the showing made as to this particular finding of the court.

Of the evidence that there was a violation of the covenant of the lease in reference to assignment, it is deemed sufficient to set forth the following: The plaintiff testified that he never gave any consent, in writing or otherwise, to Jacobs to assign any interest in the lease, or to assign the lease itself, or to sublet any of the premises described in the lease, and the court was justified in the inference that, on the 16th day of July, 1910, defendant Jacobs executed and delivered to B. T. Molsness and Henry A. Moss a written instrument in the following form: "San Francisco, July 16, 1910. I hereby certify and declare that the bill of sale taken in my name

from Morris Steinberg, covering the saloon known as the 'Bristol' 1001 Market street, San Francisco, also the lease covering the said premises from the owner, and the municipal liquor license which has been taken in my name and has been received by me for the use and benefit of B. T. Molsness, Henry A. Moss and myself the undersigned, each of which parties is entitled to an undivided one-third interest in and to all of said property, and I hereby sell, assign and transfer to each of said B. T. Molsness and Henry A. Moss, an undivided one-third interest in and to all of said property." It is stoutly insisted by appellants that no such instrument was executed; but, in answer to this contention, it is sufficient to set forth the following testimony, which manifestly justifies the court's finding as to the assignment: Mr. Leon E. Prescott, a witness for plaintiff, was interrogated concerning the foregoing purported assignment, and he stated that he dictated it to his stenographer, Miss Whelan, at the request of Mr. Jacobs, "the three gentlemen being present at the time, Mr. Moss, Mr. Molsness, and Mr. Jacobs, and it was transcribed and signed by Mr. Jacobs, and a copy given to Mr. Molsness, and a copy given to Mr. Moss, and Mr. Jacobs kept the third." Miss Whelan testified that she took the dictation of this instrument from Mr. Prescott and transcribed it into longhand and delivered it to the latter in the presence of Moss, Jacobs, and Molsness. Mr. Morris Steinberg testified that, on said July 16th, at his place of business, he had a conversation with Mr. Jacobs in reference to the premises leased by the latter, and that Jacobs said that "he could not sign over the saloon and license and lease, as he agreed, to me for advancing him money, for the reason that Mr. Moss and Molsness compelled him that day to sign over a one-third interest to each of the parties at Mr. Prescott's office," and that Mr. Jacobs handed him the paper which had been executed, and that it was "the same thing in sum and substance" as the aforesaid purported assignment, and that it was signed by Abe Jacobs. The defendants Moss, Molsness, and Jacobs testified that an instrument was executed by Jacobs on said date and one copy delivered to Moss and another to Molsness, but they denied that it constituted an assignment, but claimed that it was simply a mortgage or pledge to secure the repayment of money that had been advanced for the purchase of the saloon fixtures. None of these witnesses, however, could give the contents of the instrument, nor did any of them produce a copy of it or satisfactorily account for its loss. The court was indeed justified in regarding with grave suspicion their testimony upon this point. There are other circumstances, unnecessary to detail, that lend support to the theory of assignment.

[2] In this connection we may notice the claim of appellants that the testimony

of Mr. Prescott and Miss Whelan should have been excluded as privileged for the reason that Mr. Prescott was the attorney for Jacobs, Moss, and Molsness, and Miss Whelan was his stenographer. As a matter of fact, the testimony of these two witnesses showing the execution of said assignment was given without objection, and hence the ruling of the court refusing to strike it out could be justified on that ground. Miss Whelan identified the instrument, marked "Plaintiff's Exhibit 7," as a copy of Mr. Prescott's dictation already referred to. Not only was this evidence received without objection, but it must be plain that to these preliminary matters the rule of privilege would not extend. The essential facts as to the contents of said instrument and its execution and delivery were declared by Mr. Prescott, as aforesaid, in response to questions to which no objection was made. Appellants, to take advantage of the rule, should have objected promptly, of course, to any testimony as to these matters when it appeared that the witness sustained the relation that the law holds inviolate.

[3] But, assuming that the objection was timely, we think the facts take the case without the operation of said rule. It seems clear that the purpose of the meeting of the parties on said July 16th was the preparation and execution of an instrument that would afford Moss protection for the money that he had invested. Nothing transpired in the nature of a confidential communication that the law protects from disclosure. Mr. Prescott acted rather as a scrivener than attorney in the transaction. In 1 Greenleaf on Evidence (16th Ed.) § 239, it is said: "On the other hand, the person must be at the time acting as legal adviser, hence a communication with an attorney merely, as with a lender of money, a friend, or a scrivener, is not privileged."

In *Borum v. Fouts*, 15 Ind. 50, it is held that "when the terms of a contract have been agreed upon between the parties, and an attorney is afterwards employed as a scrivener merely to reduce the contract to writing, and no inquiry is made of him as to its legal effect, communications made to him while thus engaged will not be regarded as privileged."

In *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371, it is held, as stated in the syllabus: "An attorney who is requested to prepare a deed or mortgage, no legal advice being required, is not privileged and may testify as to what comes to his knowledge in connection with such a transaction."

In *Hebbard v. Haughian*, 70 N. Y. 61, the Court of Appeals declared that: "The objection that the attorney by whom the deed of April 4th was prepared could not give evidence of the directions he received from the parties and of the transaction between them at the time was not well taken.

He testified of facts within his knowledge, acquired in the transaction of the business between the parties, and they were not communicated to him as an attorney to enable him to perform his duties to a client. Knowledge acquired under such circumstances is not within the class of privileged communications."

[4] The material question here was whether, at the end of said transaction, an instrument in writing was executed by Jacobs, and, if so, what were its contents. The only disputed point, indeed, was as to what it contained, and, if it had not been lost, the instrument would speak for itself. Having been lost, its existence and contents could be proved by any witness who had read the assignment. *Greer v. Greer*, 58 Hun, 254, 12 N. Y. Supp. 778; *Chapman v. Peebles*, 84 Ala. 283, 4 South. 273. "It is a sound public policy which provides that an attorney or counsel should not be allowed to testify to any of the transactions or conversations between himself and his client which led up to the preparation of any document. But, when the document, be it a will or a contract or what not, has been executed, its contents are no longer confidential, the reason for the rule ceases, and the counsel may as well testify to the contents as may any other witness who knows such contents." *Fayerweather v. Ritch* (C. C.) 90 Fed. 13. We think this position is sound and is amply sustained by the authorities, in this and other jurisdictions.

[5] Appellants complain bitterly of the action of the court in reference to a transcript of testimony in the possession of respondent. They declare that the court denied to them the right to inspect it after it was actually introduced in evidence. They have, however, entirely misconceived the situation. Plaintiff had in his possession what purported to be a transcript of the testimony of Abe Jacobs taken in a certain proceeding in bankruptcy, and respondent read in evidence certain portions of it as containing admissions against interest. Appellants demanded an inspection of the transcript, but respondent declined to give them his copy for the reason that he had written upon it certain private notes that he had not erased. There is no claim made that respondent misread the quotation, or that it was not a correct transcription of said testimony of Mr. Jacobs. We must assume, also, that appellants could have secured a copy from the original source if they had so desired. Besides, on the request of appellants that the "whole record go in," with the exception of the testimony of a certain Mrs. Pyper which was claimed to be "fragmentary," the court said: "I expect that is probably the best course to take, to admit the whole, and then you gentlemen can call my attention to the other part. It will be admitted in evidence and marked as Plaintiff's Exhibit No. 8" and considered as read and hereafter

counsel can refer to any part of it." Appellants claim that the "other part" was not called to the attention of the court; but, if they neglected to do so, they have only themselves to blame. After the said order was made, appellants requested the court to "permit us to inspect the copy of that record that he has there," and the court replied: "After he has erased his notes. You do not want to see his notes on it, I presume." It does not appear whether appellants ever inspected that copy, but this circumstance seems unimportant in view of the fact that the whole deposition was received in evidence and is set out in full in the record.

[8] Plaintiff offered in evidence all the papers, including the notice of motion for an order to be restored to possession, in the case of *Edward F. Delger v. Abe Jacobs*, No. 31,073, tried in the same court and decided in favor of plaintiff, September 2, 1910; his counsel stating in explanation: "There is a judgment against the defendant Abe Jacobs in this case, to the effect that the premises were leased by Delger to Jacobs, and he was in possession under the lease, and that judgment is, of course, an estoppel as to the material averment in his answer here, because he denies in his answer that he ever executed a lease." Appellants objected as follows: "We object to that, if the court please. We have asked to be restored to nothing but our estate there, and so distinctly provided, and we repudiated this lease in that suit, and we repudiate it in this." After said papers were received in evidence, appellants made the particular objection that "that case is on appeal and has not been finally decided, and is not a final judgment of the case, and ought not to be introduced as a part of this record, and that it is incompetent, irrelevant, and immaterial evidence." The objection ought, of course, to have been made before the ruling of the court; but, since the record shows the payment by defendant Jacobs "of the sum of \$1,388.50 in full payment, discharge, and satisfaction of the judgment in said action," and the acknowledgment of satisfaction by plaintiff therein, it cannot be said that the action was still pending, and the cases cited by appellant are therefore not in point. As to this it is probably sufficient to quote section 1049 of the Code of Civil Procedure that "an action is deemed to be pending from the time of its commencement until its final determination upon an appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." As we have seen, the judgment was satisfied by Jacobs, and hence the action was no longer pending.

[7] But if we concede that said judgment did not constitute an estoppel, it was, in connection with said satisfaction, at least evidence of an admission against interest upon a material issue and proper to be considered by the court.

[8] If it be admitted that the other defendants in the present action, being strangers to the former suit, might have urged successfully an objection to the consideration of said record as evidence against themselves or have maintained that it be limited in its application to Mr. Jacobs, it is sufficient to say that no such claim was presented to the trial court, and appellants are in no position now to make it, and Mr. Jacobs is presumably satisfied, since he has not appealed.

[9] The court did not err in excluding testimony tending to show a waiver on the part of the landlord of breaches of covenant under the lease. This claim was in the nature of an equitable estoppel, and it was necessary to plead it in order to introduce evidence in its support. *Clarke v. Huber*, 25 Cal. 593; *Etcheborne v. Auzeais*, 45 Cal. 125; *Newhall v. Hatch*, 134 Cal. 278, 66 Pac. 266, 55 L. R. A. 673; *Chapman v. Hughes*, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. There is no pretense of such plea in the answer. An amendment to the answer was filed in which an attempt was made to plead estoppel as to certain covenants in the lease. This amendment was stricken out by the court. But if we were to consider it as a part of the pleadings, it is not contended that it covers the breach of the covenant not to assign; counsel for appellants having stated to the lower court that: "Under those circumstances, I did not understand that we were to plead against an assignment. We have not pleaded here against an assignment, and we claim that there was no assignment."

[10] The second count of the answer of defendant Jacobs contained allegations of fraud against plaintiff, and there was a prayer for affirmative relief. It is urged that this constituted a cross-complaint and that the court's ruling was erroneous in sustaining an objection to evidence offered to support its averments. But, conceding that it stated a cause of action, it could only be so in behalf of Jacobs himself, and appellants are not aggrieved parties. They are not in any way connected with the purported cause of action, and therefore we are not called upon at their instance to review the alleged error.

[11] Appellants say that: "The court in its minute order holds the plaintiff entitled to judgment against all of the defendants for \$650. In its findings it holds that plaintiff is entitled to judgment against all of the defendants except Melsted for \$1,020. This is a distinction not justified by any reason, either in law or in evidence." The clerk's entry in the minutes is not the decision of the cause. "The decision upon which by section 633 of the Code of Civil Procedure the judgment is to be entered is that which by section 632 is to be given in writing and filed with the clerk; and until so given and filed there is no decision upon which judgment can be entered, and consequently no authority for entering any judgment." Crim

v. Kessing, 89 Cal. 486, 26 Pac. 1074, 23 Am. St. Rep. 491.

[12] The value of the use and occupation of the premises for one month was \$650, and the difference between that amount and \$1,020 is accounted for by the fact that the court allowed plaintiff damages for the detention of the property to the date of the findings. This was proper. *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440.

[13] Justification for the judgment against the defendants other than Jacobs is urged by respondent, on the ground that, "under the statute providing for summary proceedings in unlawful detainer, persons may be made defendants who have entered upon or succeeded to the possession of the premises, from or through the tenant between whom and the landlord the conventional relation of landlord and tenant has been established." It is claimed that said defendants are brought within this rule by reason of the fact that they were all in the possession of said premises by consent of the tenant and without the consent of the landlord. There is, probably, no doubt that all of said parties expected to be interested in the use and occupancy of said premises. We think, however, it can hardly be said that any of them except Jacobs and Moss were actually in possession of the property and liable for the value of its use. Mr. Moss testified that, in the beginning, "we expected to make a co-partnership or an incorporation"; but, when he found he was the only one who had put up any money, he did not propose "to take Mr. Jacobs or Mr. Molsness in the partnership in a business for which I was paying and they had paid no money whatever." He testified further, substantially, that he discharged Mr. Jacobs, telling the latter "to go back to his tailoring business," and as "a matter of fact there is nobody interested in the actual ownership of the place but me, and my word has been final in every case. There is absolutely not one dollar of anybody else's money in there but mine," and that he had "absolutely the right to exercise control over the place." Without quoting further, we think it should be held that, as far as the judgment awards damages and costs against Molsness and the Bristol Commercial Company and costs against Melsted, it should be reversed, and affirmed in every other respect. The necessity for a new trial, however, upon this issue can probably be avoided if plaintiff will consent to such modification of the judgment in the court below.

We think no other point demands specific attention.

In conclusion, it may be suggested that, while counsel in their briefs have displayed much industry and learning, they are justly subject to censure for their apparent forgetfulness of the dignity and courtesy that should ever prevail in contests like this. It must be manifest that their untoward vitu-

peration affords no credit to themselves and likewise neither entertainment nor enlightenment to the court.

All of said judgment is affirmed except that portion which orders, adjudges, and decrees that plaintiff have and recover from defendants, B. T. Molsness and the Bristol Commercial Company, the sum of \$1,020 for the use and occupation of said property and the sum of \$100 for attorney's fee and \$76, costs of suit, and except that portion which decrees that plaintiff recover said costs of \$76 of defendant Melsted.

We concur: CHIPMAN, P. J.; HART, J.

OLDERSHAW v. MATTESON & WILLIAMSON MFG. CO. et al. (Civ. 1,019.)

(District Court of Appeal, Second District, California. May 27, 1912.)

1. HUSBAND AND WIFE (§ 133*)—SEPARATE PROPERTY—EVIDENCE.

Evidence *held* to support a finding that property was the separate property of a married woman, and was not subject to the debts of her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 487-494; Dec. Dig. § 133.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—CONFLICTING EVIDENCE.

The trial court trying a case without a jury must weigh the conflicting evidence, and determine whether a fact is established by clear and convincing evidence, and its finding will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

3. HUSBAND AND WIFE (§ 133*)—SEPARATE PROPERTY OF WIFE—EVIDENCE—SUFFICIENCY.

A finding that property is the separate estate of a married woman must be based on clear and convincing evidence.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 487-494; Dec. Dig. § 133.*]

4. HUSBAND AND WIFE (§ 131*)—SEPARATE PROPERTY OF WIFE—PRESUMPTIONS—"SEPARATE ESTATE."

The presumption as to the character of property arising from the fact that a married woman engages in business is overcome by the fact that the property was purchased with funds derived from moneys owned by her before her marriage or acquired afterward by gift or bequest constituting her separate estate within Civ. Code, § 162, and hence the property is her separate property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 471-483; Dec. Dig. § 131.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6413, 6414.]

5. HUSBAND AND WIFE (§ 149*)—SEPARATE PROPERTY OF WIFE—CONTRIBUTIONS BY HUSBAND—EFFECT.

The fact that a husband contributed all his time and skill in the conduct of a business of his wife, or joined in the execution of notes for money wherewith to purchase the business,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

does not give him any interest in the property, in the absence of any agreement to that effect.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 573, 574; Dec. Dig. § 149.*]

6. APPEAL AND ERROR (§ 692*)—QUESTIONS REVIEWABLE—EXCLUSION OF DEPOSITIONS—RECORD.

Where depositions excluded on the ground that they are incompetent, irrelevant, immaterial, and not proper cross-examination are not incorporated in the bill of exceptions, the ruling is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

7. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where the issue was whether property was the separate property of a wife, or the property of her husband and subject to the claims of his creditors, and it appeared that the wife was the only member of the marital community who possessed any estate, the error, if any, in permitting officials of a bank which had made loans to the wife to testify that in making loans they recognized her as the party borrowing the money, and extended the credit to her, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Annie Cox Oldershaw against the Matteson & Williamson Manufacturing Company and another. From an order denying defendants' motion for new trial, they appeal. Affirmed.

W. B. Beazley, Louis Luckel, and J. P. Jones, for appellants. W. W. Kaye and Kaye & Siemon, for respondent.

SHAW, J. Appeal from an order denying defendants' motion for a new trial.

By stipulation filed it was agreed by counsel for the respective parties "that no briefs need be printed in the cause, but that the same may be heard and submitted upon the printed briefs filed in the case of W. H. Esdohr, Plaintiff and Appellant, v. Annie Cox Oldershaw and C. D. Oldershaw, Defendants and Respondents, 125 Pac. —, L. A. No. 2,979, in the Supreme Court, * * * and that printed copies of the briefs in said last-mentioned cause may be filed in the above entitled cause as the briefs of the respective parties." Accordingly, no briefs other than copies of those filed in case No. 2,979 in the Supreme Court have been filed herein. These briefs, however, were not prepared with reference to the record in this case; and, while numerous citations are made therein designating folios and pages of the transcript in the case of Esdohr v. Oldershaw, filed in the Supreme Court, no copy of that transcript has been filed herein or otherwise presented to this court. These briefs are of little value as an aid to the court in reaching a conclusion upon the questions presented, and our consideration of the appeal, in the absence of

the presentation of the points, is necessarily independent and based upon what is disclosed by the transcript.

The complaint alleges that in 1897, and prior to the marriage of plaintiff with C. D. Oldershaw, the defendant Matteson & Williamson Manufacturing Company obtained a judgment against the latter in the superior court of Los Angeles county. In November, 1903, 10 years thereafter, said judgment creditor caused an execution to be issued out of said court and placed in the hands of defendant Kelly, sheriff of Kern county, who, as directed, levied the same upon the sum of \$310.10 owned by plaintiff, but deposited in the Bank of Bakersfield in the name of C. D. Oldershaw, and which sum, notwithstanding plaintiff's verified claim and demand for the release thereof made to Kelly as sheriff, he collected from the bank and paid to Matteson & Williamson Manufacturing Company, which converted it to its own use; that said sum of \$310.10 was the proceeds derived from a grocery business then and for a long time theretofore owned entirely by plaintiff as her separate property, and which she conducted under the name and style of C. D. Oldershaw & Co. The only issue raised by the answer was by a denial of the alleged ownership in plaintiff, defendants claiming that said grocery business, together with the \$310.10 so levied upon and converted, was the property of C. D. Oldershaw, the judgment debtor. As to this issue, the court found in favor of plaintiff and gave judgment accordingly.

[1] The chief contention of appellants is that the evidence is insufficient to sustain the finding of the court upon which the judgment was based. Without quoting it at length, it is sufficient to say that the evidence tends to show that the grocery business which produced the \$310.10 so converted was purchased by plaintiff with her separate funds, the original source of which was money inherited by plaintiff from an aunt, and which, beginning with 1900, was invested in real estate, plaintiff from time to time selling and re-investing the proceeds of the same, all of which deals appear to have been successful in yielding her a considerable profit. The grocery business was purchased in 1905 by plaintiff and one Wheadon. Of the purchase price plaintiff paid \$1,000, which sum she borrowed from the bank, and a short time thereafter she purchased Wheadon's interest for \$880, which was paid by check drawn upon her account in the bank. By writing, she authorized the bank to honor checks drawn upon her account by the husband, and also gave the husband a general power of attorney to transact business for her. Sundry notes in various sums were executed to the bank by plaintiff through her husband as attorney in fact, payment of which was secured by mortgage upon the separate estate of plaintiff, and in all of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which transactions the bank recognized plaintiff as the party to whom it extended credit. The direct testimony of both plaintiff and her husband is that the entire purchase price of the business was paid out of her separate funds, and that he, having no estate of his own, paid no part of the consideration therefor. He farmed her land, superintended the grocery business, and conducted all her business affairs without compensation other than the support of himself and family.

[2] While there may have been evidence and proof of circumstances inconsistent with the testimony of plaintiff and her husband, nevertheless, it was for the trial court to weigh and determine the same, and its finding based thereon will not be disturbed.

[3] While in cases of this nature a finding that property is the separate estate of the wife should be based upon clear and convincing evidence, the question as to whether or not the evidence offered is clear and convincing is for the trial court. *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357; *Estate of Pepper*, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092. Much of the evidence offered on the part of defendants was hearsay, and, at most, tended to prove that plaintiff permitted C. D. Oldershaw to hold himself out as the owner of the property. The judgment upon which the execution was issued was for an indebtedness contracted by the husband long before his marriage with plaintiff, and the record discloses no facts which constitute an estoppel against plaintiff. Nor is there disclosed any act on the part of plaintiff whereby she transmuted her separate estate into community property; indeed, the execution to him of a general power of attorney is inconsistent with such intent.

[4] In our opinion any presumption as to the character of the property arising from the fact of a married woman engaging in business is, in this case, overcome by the fact that it was purchased with funds and the rents, issues, and profits (Civ. Code, § 162; *Estate of Higgins*, 65 Cal. 407, 4 Pac. 389) derived from moneys owned by plaintiff before marriage, or acquired afterwards by gift or bequest.

[5] Neither the fact that the husband contributed all his time and skill in the conduct of the business, or that he joined his wife in the execution of notes given for money wherewith to make the purchase (assuming that he did), in the absence of any agreement to that effect, gave him any interest in the property. *Walsh v. Walsh*, 84 Cal. 101, 23 Pac. 1099; *Diefendorff v. Hopkins*, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; *Flournoy v. Flournoy*, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39; *Heney v. Pesoli*, 109 Cal. 53, 41 Pac. 819; *Estate of Pepper*, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092; *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49; *Carle v. Heller*, 123 Pac. 815.

[6] Among other errors of law specified is that the court erred in excluding the depositions of C. D. Oldershaw and Annie Cox Oldershaw. It appears that the depositions of these parties were offered in evidence and objection thereto sustained upon the ground that the same were incompetent, irrelevant, immaterial, and not proper cross-examination. The depositions, however, are not incorporated in the bill of exceptions, and hence the record contains nothing upon which the alleged erroneous ruling of the court can be reviewed.

[7] Officials of the bank which made loans to plaintiff were called as witnesses and permitted to testify that in making said loans they recognized plaintiff as the party borrowing the money and extended the credit to her. We perceive no prejudicial error in the ruling, particularly as it was shown that she was the only member of the marital community who possessed any estate whatsoever.

Our examination of the record discloses no error, and, our attention being called to none, the order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

WITTMAN v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO. (Civ. 1,011.)

(District Court of Appeal, First District, California. June 1, 1912.)

LIMITATION OF ACTIONS (§ 58*)—COMPELLING RESTORATION TO POSITION IN POLICE DE- PARTMENT—ACCRUAL OF CAUSE OF ACTION.

Plaintiff, on charges preferred to the board of police commissioners, was found guilty and, by resolution of the board on March 24, 1905, was dismissed from his position as chief of police and as a member of the police department, and thereafter was not recognized as a member of the department. On March 20, 1908, he demanded of the board that they assign him duty as a captain of police, which was refused, and on April 9, 1908, he filed a petition for mandamus to compel his restoration to duty as a captain of police. Code Civ. Proc. § 338, subd. 1, provides a three-year limitation in actions upon a liability created by statute, other than a penalty for forfeiture. *Held* that, as the dismissal was the wrong sought to be redressed, and as the demand to be made as a condition precedent to legal relief could have been made at any time, the cause of action accrued upon dismissal, and the action was barred.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 324-328, 346, 347; Dec. Dig. § 58.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Mandamus by George W. Wittman against the Board of Police Commissioners of the City and County of San Francisco. Writ denied, and plaintiff appeals. *Affirmed*.

H. M. Owens, Frank H. Gould, and J. J. Dunne, for appellant. Percy V. Long and John T. Nourse, for respondent.

HALL, J. This is an appeal from a judgment denying plaintiff's petition for a peremptory writ of mandate, commanding the defendants to restore and assign petitioner to duty as captain of police of the city and county of San Francisco.

Defendants pleaded, among other things, as a defense to plaintiff's action, that the same was barred by the provisions of section 338, subd. 1, of the Code of Civil Procedure. The court made findings of fact in accordance with this contention of defendants, and entered judgment for defendants. It is this finding of the court that presents the only point necessary to be decided upon this appeal.

Appellant was appointed a member of the police department of the city and county of San Francisco in 1885, and subsequently, on the 31st day of July, 1895, he was appointed a captain of police of said city and county. On the 21st day of November, 1901, he was regularly appointed chief of police of said city and county. On the 15th day of February, 1905, charges were preferred against him as such chief of police, to the board of police commissioners, which were heard and examined by said commissioners, who found him guilty thereof, and thereupon, on the 24th day of March, 1905, adopted a resolution in the words following, to wit: "Resolved, that George W. Wittman be and he is hereby dismissed as chief of police of the police department of the city and county of San Francisco and as a member of said department." And since said date defendants have not recognized or treated appellant as a member of the police department. On the 20th day of March, 1908, appellant demanded of defendants, the board of police commissioners of said city and county, that they assign appellant to duty as a captain of police, which demand they refused.

This proceeding to compel defendants to comply with such demand was instituted by the filing of a petition in the superior court for a writ of mandate on the 9th day of April, 1908, which was more than three years after appellant's formal dismissal from the department, but less than one month from the date of his demand to be assigned to duty as such captain of police.

Although the petition in form asks that the board be compelled to assign petitioner to duty as captain of police, the effect of granting the writ prayed for would be to reinstate petitioner in an official position from which he was formally, if not legally, dismissed more than three years before the institution of this action.

The contention of appellant is that the statute of limitations did not commence to run against appellant's cause of action until

he made the demand on the 20th day of March, 1908. The argument is that, because, in a petition for a writ of mandate to enforce a private right, it is necessary to allege a demand and refusal, no cause of action in mandate exists until such demand and refusal; and therefore the statute does not begin to run until the date of such demand and refusal.

We cannot accede to this view of the law as applied to the facts of this case. Appellant was in form dismissed from the department on the 24th day of March, 1905, and ever since has been debarred from exercising any of the functions of a member of the department. For reasons not now necessary to be discussed, he claims that such attempted dismissal was illegal and void, and did not have the effect to remove him from his position of captain of police. It is the dismissal from the department that really lies at the bottom of appellant's cause of action. It is this alleged wrong that he seeks to have redressed by the action of the court, invoked more than three years after its commission. The denial of his right to hold a position in the police department occurred when he was formally dismissed by the board of police commissioners from the department. This dismissal occurred at a definitely fixed time, and was an unequivocal denial of his right to longer hold the position of captain of police, or any other position in the department. If his contention as to the illegality of such dismissal is well founded, he could immediately upon his dismissal have perfected his right to the remedy by mandate by making his demand for reinstatement or assignment to duty as such captain of police.

These considerations bring the case within the rule followed and recognized in many cases that, where a right has fully accrued, except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running. *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605; *Harrigan v. Home Life Co.*, 128 Cal. 531, 548, 58 Pac. 180, 61 Pac. 99; *Union Sav. Bank of San Jose v. Leiter*, 145 Cal. 696, 79 Pac. 441; *San Luis Obispo v. Gage*, 139 Cal. 398, 73 Pac. 174; *Barnes v. Glide*, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153. Otherwise, as is pointed out in the cases above cited, he might indefinitely prolong his right to enforce his claim or right by neglecting to make the demand until it suited his convenience so to do.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

THRUSH v. THRUSH et al.

(Supreme Court of Oregon. July 9, 1912.)

1. DEEDS (§ 58*)—DELIVERY TO THIRD PERSON—EFFECT.

Where, on the execution of a deed, it is deposited with a stranger to be delivered to the grantee on the grantor's death, and the grantor intends to and does retain possession and control over it after such delivery, it is not effectual to pass the title, but, if the grantor parts with the possession and control of the deed absolutely at the time of delivery, reserving no right to recall it, the delivery is complete, and the grantee will succeed to the grantor's title on his death.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 130-135; Dec. Dig. § 58.*]

2. DEEDS (§ 208*)—DELIVERY TO THIRD PERSON—INTENT OF GRANTOR—EVIDENCE.

Evidence held to warrant a finding that a delivery of certain deeds to a third person, with directions that they be delivered to the grantees on the grantor's death, was absolute at the time of delivery, without any intention on the grantor's part to reserve any right to recall or alter the provisions of the deeds, and that he could not therefore avoid the passing of title by obtaining possession from the custodian and destroying the deeds during his lifetime.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632, 634; Dec. Dig. § 208.*]

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by Emory H. Thrush against Abram Thrush and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Abram Thrush, who is about 87 years old, in 1902 executed to each of four of his children a deed to a portion of his real estate: To Emory H. Thrush, 80 acres; to Abram Lincoln Thrush, 112½ acres; to Orville H. Thrush, 40 acres; and to Mary Thrush, 40 acres, as a final disposition of so much of his property. The deeds were placed in the custody of Mary Thrush not to be delivered to the grantees therein until the death of the grantor who was to have the possession and the proceeds therefrom during his life. A few months before this suit was commenced, Abram Thrush procured from Mary the deeds in favor of the plaintiff and Abram Lincoln Thrush and destroyed them, and on November 19, 1909, executed to plaintiff a deed to 40 acres of the tract included in the first deed to him, and conveyed to Abram Lincoln Thrush the other 40 acres included in the first deed to plaintiff. Thereupon plaintiff brought this suit against Abram Thrush, Abram Lincoln Thrush, and Mary Thrush to cancel the later deed to Abram Lincoln Thrush of date November 19, 1909, and to remove the cloud cast upon plaintiff's title thereby. To this complaint the defendant Abram Thrush answered, alleging that the deeds executed in 1902 were not delivered and were subject to his control, and that he destroyed them for the purpose of making other disposition of his property.

Upon the trial the court found that the deed executed in 1902 in favor of the plaintiff was delivered to Mary Thrush to be held by her until the death of Abram Thrush, and then to be delivered to the grantees; that it was not subject to recall by the grantor; and rendered a decree accordingly.

James O. Watson, of Roseburg (Cardwell & Watson, of Roseburg, on the brief), for appellants. B. L. Eddy, of Roseburg (Brown & Eddy, on the brief) for respondent.

EAKIN, C. J. (after stating the facts as above). So far as disclosed by the evidence, the deed in this case is an ordinary warranty deed and contains no conditions for reservations. The condition as to the disposition of the deed was oral, by which the deed was to be held by Mary Thrush, and the evidence as to the terms thereof is somewhat conflicting.

[1] It is established by the weight of authority that, if upon the execution of a deed it is deposited with a stranger to be delivered to the grantee upon the death of the grantor, and the grantor intends to and does retain possession and control over it after such delivery, such delivery is not effectual to pass the title; but if he parts with the possession and control of it absolutely at the time of the delivery, reserving no right to deliver it or alter its provisions, it is a good delivery, and the grantee will, upon the death of the grantor, succeed to the title. *White v. White*, 34 Or. 141, 148, 50 Pac. 801, 55 Pac. 645; *Hoffmire v. Martin*, 29 Or. 240, 45 Pac. 754; *Footo v. Lichty*, 60 Or. 542, 547, 120 Pac. 398.

[2] And there is but one question for decision here, namely, Was the deed delivered unconditionally to Mary Thrush to be held by her until the death of Abram Thrush, and then to be delivered to the grantee? The effect is the same whether there was some consideration for it or whether it was intended as a voluntary gift. *Fain v. Smith*, 14 Or. 82, 84, 12 Pac. 365, 58 Am. Rep. 281. There is some conflict in the evidence upon that point. Abram Thrush testifies that he retained possession of the deed, and that Mary was only the custodian of it for him. Mary testified to the same effect: "They (the deeds) were laying on the table, and after dinner was over Mr. Wells gathered those deeds up and handed them to Father and Father handed them to me and told me to take care of them until he called for them, and until after his death, and then to be handed to the boys if he did not call for them." Also Nina Baldwin, a granddaughter of Abram Thrush, who was a witness to the deeds, testified that Abram Thrush delivered the deeds to Mary "to put away and keep for him until he called for them, or until after his death to give them to the boys."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

To the contrary is the testimony of Mrs. Ella Jenney, also a granddaughter of Abram Thrush, and a witness to the deeds. She testified that the deeds "laid on the table until after dinner, and then Mary Thrush picked them up * * * and was to keep them until Grandfather died, and then they were to be turned over to the boys and recorded. * * * Q. Did your grandfather say anything about taking care of them for him or for the boys? A. She was to take care of them for the boys, not for him, but for the boys, and hers for herself. * * * He said the deeds were not to be recorded until after his death, and then they were to be turned over to each one, and they would have their own recorded."

Abram Lincoln Thrush came to the house just after the execution of the deeds, while the family were at dinner. He testified that "my father said that he concluded to have his papers made out just as he wanted them made out; he wanted to deed this land over to the children; that he deeded me 100 acres of the Sam Belleu place. * * * Father said them deeds should not be recorded until after his death, * * * and he was to have all the proceeds that came off the place. * * * He said Mary is to hold the deeds; they are there in the chest, until after his death, and then each one take his own deed and have it recorded."

Mr. W. R. Wells, a justice of the peace, drew the deeds and took the acknowledgements thereto, and Abram Thrush consulted with him as to the manner of disposing of his property, whether by deed or by will, and Mr. Wells advised him that, "if he made deeds, the deeds could be delivered to some party to hold until his death, and then they could be delivered over, and there would be no cost to it, and that is the way he decided to do it. * * * I put the deeds * * * in an envelope and handed them to Mary, according to his instructions, to hold the deeds until his death, and then deliver them to the parties that they were drawn to." Other witnesses testified to the fact that Abram Thrush said to them that the deeds were delivered to Mary to be held until his death, and he was to have the crops until that time; also that Mary had made several statements in conflict with her testimony here.

The preponderance of the evidence is convincing that the deeds were delivered unconditionally to Mary Thrush to be held until her father's death, and then to be delivered to the grantees, and they were beyond the control of Abram Thrush. Therefore the destruction of the deed by the grantor did not affect its operation or revert the title in him. *Chambers v. Stewart*, 2 Ohio N. P. 287; *Ellington v. Currie*, 40 N. C. 21; *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 25 Am. St. Rep. 186. See *Munro v. Bowles*, 187 Ill.

346, 58 N. E. 331, 54 L. R. A. 865, note "e," page 903.

Plaintiff was entitled to the decree given in the circuit court and the decree is affirmed.

THRUSH v. THRUSH et al.

(Supreme Court of Oregon. July 9, 1912.)

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by Abram Lincoln Thrush against Abram Thrush and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James O. Watson, of Roseburg (Cardwell & Watson, of Roseburg, on the brief), for appellants. B. L. Eddy, of Roseburg (Brown & Eddy, on the brief), for respondent.

EAKIN, C. J. This suit presents the same issue as the case of *Emry H. Thrush v. Abram Thrush et al.*, 125 Pac. 267, in which the opinion has been filed to-day, but involves the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and lots 1 and 2 of section 7, township 29 south, range 8 west, Willamette meridian.

The cases were tried together upon the same evidence and briefs, and upon the authority of that case the decree is affirmed.

WHITTON v. KNIGHT et al.

(Supreme Court of Oregon. July 31, 1912.)

BOUNDARIES (§ 37*)—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to quiet title, held to sustain finding for plaintiff as to location of disputed boundary line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Wilbur F. Whitton against Frank Knight and another. Decree for plaintiff, and defendants appeal. Affirmed.

This is a suit to quiet the title to 5.38 acres of land in Multnomah county and a right of way appurtenant thereto, described as follows: "Beginning at a point eleven chains and forty-five and one-half links (11.45½) east of the southwest corner of the Ezro Johnson donation land claim in township one (1) south of range two (2) east of the Willamette meridian, and running thence south twenty and one-half (20.50) chains to the south boundary of the Jacob Johnson donation land claim; thence east along the said south line of said Johnson's claim two (2) chains and sixty-two and one-half (62½) links; thence north twenty and one-half (20.50) chains; thence west two (2) chains and sixty-two and one-half (62½) links to the place of beginning, containing five and thirty-eight one-hundredths (5.38) acres, more or less. Also a perpetual right of way over and across the real property belonging to said defendants, described as follows: Commencing at a point on the south line of Jacob Johnson D. L. C. No. 53, township 1 S., R. 2

E., of the Willamette meridian (where the said claim line intersects on the center line of the county road, which runs due north from the quarter section post on south side of section 23, said township and range), and from said starting point running north 20 and $50/100$ chains to the north line of said Johnson claim; thence west 9 chains and 76 links to a point on north line; thence south 20 and $50/100$ chains to a point on south line of said Johnson D. L. C.; thence east 9 chains and 76 links to the place of beginning, containing 20 acres more or less. Which said right of way is more particularly described as follows: Beginning at the northeast corner of said land owned by the said defendants, running thence west along the north line of the said Jacob Johnson donation land claim about 40 rods, to the land owned by this plaintiff, as above described, said right of way being 12 feet in width, and to be constructed and kept in repair by the plaintiff with the right on the part of the defendants to maintain gates at either end of said right of way, and being the same right of way referred to and particularly described in that certain deed therefor, from the said defendants to Frederick Hager and Godfrey Hager, dated the 11th day of March, 1908, and recorded on the 31st day of May, 1910, in Book 493, page 289, of records of deeds of said Multnomah county, state of Oregon, and is appurtenant to plaintiff's land first described."

Defendants deny plaintiff's title and set up title in themselves to the following described tract: "Commencing at a point on the south line of the Jacob Johnson D. L. C. number fifty-three (53), township 1 south, range 2 east, of the Willamette meridian (where the said claim line is intersected on the center line of a county road which runs due north from the quarter section post on the south line of section twenty-three [23], said township and range), and from said starting point running north 20.50 chains to the north line of said Johnson claim; thence west 9.76 chains; thence south 20.50 chains to a point on the south line of said Johnson D. L. C.; thence east 9.76 chains to the place of beginning, containing twenty (20) acres more or less, and also: Beginning at the northeast corner of a tract of land sold by Wm. League and wife to F. P. Hunt and recorded in Book 248, page 445, of Deeds; thence south along east line of said tract to the southeast corner thereof; thence east to center of county road number 397; thence along center line of county road northerly to the place of beginning, containing one and one-half ($1\frac{1}{2}$) acres more or less."

C. E. Lenon, of Portland (Jeffrey & Lenon, of Portland, on the brief), for appellants. John Van Zante and A. H. Tanner, both of Portland (Johnson & Van Zante, of Portland, on the brief), for respondent.

PER CURIAM. It is apparent that if defendants' contention that the beginning point of the survey of his tract is where a line, extended due north from the quarter section post on the south line of section 23, intersects the south line of the Jacob Johnson donation land claim be true, then plaintiff has no land whatever, and the deed to him conveyed nothing. On the other hand, if the location of the line is according to plaintiff's contention, each party will have all the land he bought. The contention hinges upon the location of the initial corner of defendants' tract, which is described in their deed as a point on the south line of the Jacob Johnson D. L. C., where the line is intersected on the center line of a county road which runs due north from the quarter section post on the south line of section 23, township 1, range 2 E. There is no county road running due north from the quarter section post named. The only survey for a county road, crossing the south line of the donation land claim referred to, runs in a northwesterly direction from the quarter post above named, and then crosses a line drawn north from the quarter post, and runs in a southeasterly direction, crossing the south line of the Johnson claim about 5.8 chains east from the intersection of a line drawn north from the quarter post before mentioned.

It is claimed by defendant that the survey, as shown by the field notes, intersected the south line of the Johnson claim 8 chains east of the point last mentioned. The testimony of Mr. Bonser, who made a survey for defendants several years before the hearing of this case, explains this apparent discrepancy by suggesting that a call for a course 60 degrees east is an error, and that the course is, in fact, 6 degrees east. This seems to correspond more closely to monuments upon the ground, and is reconcilable with the assumption of common sense on the part of the locators, as a course 60 degrees east would disregard the topography of the county and run the road unnecessarily over rough ground and into a difficult canyon; while, accepting 6 degrees as the proper angle, it would place the road upon good ground and practically correspond with the road as actually traveled. The fact that there is no such road, either by survey or upon the ground, puts the matter at large, so far as this call in the description is concerned, and we are left to determine where the road referred to was actually located, as it seems certain that the call for a beginning point in the center of the road was predicated upon the presumption that the road as actually traveled was a located county road, and we shall take the center of that road as the beginning point of the survey of Knight's 20 acres.

We are satisfied that it is a point about 5.8 chains east from the point of intersection of a line prolonged due north from the quar-

ter corner before referred to; and that the court below properly located this corner. This was recognized by the defendants as the true corner, and an iron post was set there by surveyors employed by them, until later they concluded that, by adhering to a construction of a conveyance which would place their corner due north of the quarter post on the south line of section 28, they would gain land which evidently they never bought. There was an attempt made to show that a county road was surveyed along this line; but there is no record of such survey, and the fact that it was made rests in the alleged parol declaration of a party now deceased. We are not satisfied that such a survey was ever made; and if it was made it is clear that it was never accepted.

The decree of the circuit court is affirmed, and its findings are adopted as the findings of this court.

BOWSMAN v. ANDERSON et al.
(Supreme Court of Oregon. Aug. 6, 1912.)

On petition for rehearing. Petition denied.
For former opinion, see 123 Pac. 1092.

PER CURIAM. We have carefully considered the matters discussed in the petition for rehearing, and have again gone over the testimony in the case. We still adhere to the result reached in our former opinion. It would be unjust to Mr. Slater, the guardian ad litem of George Austin Bowsman, to allow anything said in our former opinion to be construed as intimating that his course as such guardian was dictated by any sinister motive to benefit himself, or to do any injustice to the plaintiff in this suit. No one appeared in the ejectment action for plaintiff in this suit, who was a defendant in that action, and Mr. Slater was, no doubt, appointed, as guardians ad litem not infrequently are, at the request of the counsel for the plaintiff. Being a layman and a friend and acquaintance of Anderson, he no doubt accepted the representations of the parties thus interested as true, and acted upon them, and thus became the unconscious and innocent instrument through which Anderson was enabled to perpetrate a fraud upon plaintiff. That he intentionally participated in it, we do not believe.

The petition for rehearing is denied.

LITTLE WALLA WALLA IRR. UNION et al.
v. FINIS IRR. CO. et al.

(Supreme Court of Oregon. July 30, 1912.)
WATERS AND WATER COURSES (§ 143*)—IRRIGATION—ADMEASUREMENT OF AMOUNT.

Where the rights to water appropriated for irrigation purposes were in conflict, the amount to which the respective parties are entitled must be measured at the point of diver-

sion from the stream, in the absence of evidence showing the amount of loss by seepage and evaporation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 152; Dec. Dig. § 143.*]

On motion for rehearing. Former opinion corrected and affirmed.

For former opinion, see 124 Pac. 666.

EAKIN, C. J. Defendants Orpha Johnson and others move the court to correct errors in the original decree of the circuit court affecting their property.

A tract of land belonging to Orpha Johnson is erroneously adjudged as entitled to water from the Perkins ditch. Finding 11, p. 279, Record. The finding describes two tracts. The second tract is situated in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 35, township 6 N., range 35 E., and is irrigated from the Powell ditch, and the finding is hereby corrected to read: "The said 7.50 acres have for 20 years been irrigated from the Little Walla Walla River, through the Powell ditch; 6.29 acres thereof being in garden and small fruits." And such tract is added to and included in the 271 acres of the 33 defendants mentioned in the former opinion of this court (124 Pac. 672).

R. B. Lawler is the owner of 1.39 acres of land in section 2, township 5 N., range 35 E., which has been irrigated for six years from the Powell ditch. This was omitted from the circuit court's decree, and it is hereby corrected to include the same, and is added to and included with the land of the 33 defendants, mentioned in the former opinion of this court.

Elvira Sanders and Charlotte Tanke are plaintiffs in the complaint of the Little Walla Walla Irrigation Union, and the owners of 10 acres of land in section 25, township 6 N., range 35 E., and their rights are adjudicated in finding 32 on page 372 of the record. It now appears that their interests have been transferred to Geo. B. Dexter, who was originally made a defendant as to other lands, and the decree is hereby corrected, substituting Dexter for Sanders and Tanke, in the water rights decreed to such 10 acres, and is included with the 31 plaintiffs on page 14 of the opinion of this court.

Jay Holman is the owner of .51 of an acre of land, all in garden, in the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 25, township 6 N., range 35 E., which has been irrigated from the Powell ditch for 15 years. This was omitted from the decree, and it is hereby added to and included in the land of the 33 defendants, who irrigate 271 acres directly from the stream mentioned on page 13 of the opinion of this court.

Fannie Holman's 10 acres are adjudicated in the findings of the circuit court at page 351 of the record as irrigated from the Little Walla Walla, as shown by Book of Data, p. 32, being No. 29 on sheet 13, and is in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cluded with the 83 defendants mentioned in the former opinion of this court.

The Milton Irrigation Company, Perkins Irrigation Ditch Company, and the Tumalum, defendants, ask the court to specify the point at which the water allotted to their several ditches shall be measured to them, whether at the head of the ditch or at the point at which it is delivered from the ditch, and, if the former, to allow an additional amount for loss by seepage and evaporation. In determining the amount of water to which the various parties, both plaintiffs and defendants, are entitled, and in determining the amount needed for an acre, the amount of loss by seepage and evaporation was taken into account. The manner of arriving at the amount needed per acre by the witnesses, both the users and the experts, was largely by reference to the measurements or estimates at the head of the ditches, and the same is true of the millrace where the loss will ordinarily be much greater from a flume than from a ditch. There is no testimony as to the amount of loss from these causes, but in an ordinary ditch, where the distribution of water to users begins at its head and the length of the ditch is only one, two, or three miles, the per cent. of loss is small, and should be shared proportionately by all. The United States Department of Agriculture gives the result of investigation as to such loss, and it ranges from 1 to 2 and 3 per cent. per mile. In one ditch mentioned the loss was 14 per cent. per mile, but with a 2 per cent. loss per mile in a ditch three miles long, the water being taken from it the whole distance, the average loss for the whole ditch would not exceed 3 per cent. However, we have no data upon which to fix the per cent. of loss on any of these ditches, and in arriving at the conclusions of the opinion we considered this element, both as to the mill and the irrigation ditches, and the amount of the appropriation of the respective parties hereto as here determined shall be measured at the point of diversion from the stream.

With the corrections mentioned, the opinion is adhered to, each party to pay his own costs in this court.

(63 Or. 377)

STATE v. CLATSOP COUNTY et al.

(Supreme Court of Oregon. July 16, 1912.)

1. PLEADING (§ 7*)—MATTERS OF PRESUMPTION.

In an action by the state against a county for the county's proportion of state taxes, the complaint need not allege the steps in the proceedings taken by the state board in making the apportionment; such matters being presumed under L. O. L. § 799, subd. 15, authorizing the presumption that an official duty has been regularly performed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 11; Dec. Dig. § 7.*]

2. PLEADING (§ 7*)—PRESUMPTIONS.

Facts which are presumed need not be pleaded; but to raise an issue on facts which are presumed the contrary averment must be made, by the opposing party.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 7.*]

3. TAXATION (§ 916*)—ACTION FOR APPORTIONMENT—PRESUMPTION.

The presumption that the state board has taken the proper steps in tax apportionment proceedings is not conclusive, in an action by the state against a county for its apportionment of state taxes; and the county may tender an issue in regard thereto.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1753; Dec. Dig. § 916.*]

4. PLEADING (§ 214*)—DEMURRER—EFFECT.

A demurrer to a complaint admits all facts well pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

5. APPEAL AND ERROR (§ 1175*)—DECISION.

Where an action by the state against a county for a tax apportionment was filed before the Constitution was amended in 1910, but the judgment, sustaining a demurrer to the complaint, was not rendered until after the amendment, the Supreme Court, under Const. art. 7, § 3, as amended November 8, 1910 (L. O. L. p. xxiv), authorizing such court to render such judgment as should have been entered below, could, on reversal, render final judgment, notwithstanding L. O. L. § 101, which provides that after the overruling of a demurrer interposed in good faith the court, in its discretion, may allow a party to plead over.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by the State of Oregon against Clatsop County and another. From a judgment sustaining demurrer to a complaint, plaintiff appeals. Reversed and rendered.

Action by the state of Oregon against Clatsop county to collect a balance of \$4,207.50 state taxes apportioned to that county for the year 1909. The trial court sustained a demurrer to the complaint and dismissed the action. Plaintiff appeals.

The substance of the allegations of the complaint are as follows: That Clatsop county is an organized political division of the state of Oregon, with defendant William A. Sherman as county treasurer; that the Governor, Secretary of State, and State Treasurer, acting as a board, met and organized on February 2, 1909, to ascertain the amount of revenue necessary for state purposes for the ensuing year, and to adjust and equalize the assessments for the several counties of the state; that they met from time to time until the 24th day of February, 1909, when they duly adjusted such assessments and apportioned the amount of revenue among the several counties in the manner authorized by chapter 14, General Laws of Oregon 1909; that they sent due notice thereof to the respective counties of the state; that the proportion of the state reve-

nue so apportioned to Clatsop county was \$31,237.50, one half of which came due May 1, 1909, and the other half November 1, 1909; that on April 26, 1909, defendant William A. Sherman, as county treasurer, paid the sum of \$13,515 on the first half of the state taxes, leaving a balance of \$2,103.75 unpaid; that on October 26th of the same year another payment of \$13,515 was made on the second half of the taxes, leaving a like balance thereon; that no part of these sums has been paid; and that the same is now due, with interest from the time delinquent.

The defendants filed a general demurrer, which was sustained by the court. The plaintiff not desiring to plead further, the court rendered judgment, dismissing the action.

I. H. Van Winkle, Asst. Atty. Gen. (A. M. Crawford, Atty. Gen., and James W. Crawford, Asst. Atty. Gen., on the brief), for the State. E. B. Tongue, Dist. Atty., of Hillsboro, and Howard M. Brownell, of Oregon City, for respondents.

BEAN, J. (after stating the facts as above). [1] No brief has been filed on behalf of defendants. We are informed by the Attorney General that counsel in the lower court contended that it was necessary for each step, in the proceedings taken by the state board to ascertain the amount of revenue to be raised, to be pleaded, in order to show the authority of the board in making the apportionment. It is maintained on behalf of the state that such matters are facts which the law presumes to exist, and therefore need not be pleaded; that, if the prima facie existence of such facts is questioned, it is incumbent upon the defendants to allege and prove the contrary. No motion was directed to the pleading, for the reason that the same was too general.

Section 798, L. O. L., enumerates the presumptions that are conclusive. It is enacted by section 799, L. O. L., that all other presumptions are satisfactory, unless overcome. These are denominated "disputable presumptions," and may be controverted by other evidence, among which is that contained in subdivision 15 (section 799, L. O. L.), "that official duty has been regularly performed."

[2] It is an ancient and well-established rule that, where the law presumes a fact to exist, it need not be stated in the pleading; but if it is to be put in issue the contrary averment must come from the other side. 1 Chitty on Pleading (16th Ed.) *243; Bliss on Code Pleading (3d Ed.) § 175; Phillips on Code Pleading, § 348; Baylies' Code Pleading and Practice (2d Ed.) p. 48; Thomas v. Bowen, 29 Or. 258, 267, 45 Pac. 768; Cooper v. Phipps, 24 Or. 357, 33 Pac. 985, 22 L. R. A. 836.

The act referred to (Laws of 1909, p. 57) makes it the official duty of the state board to prepare a tabulated statement of expenses and deficiencies to which the state will be

subject during the fiscal year, for which the levy of taxes is computed, and, after deducting any available surplus, to apportion among the several counties the amount of revenue necessary to be raised for the ensuing year for state purposes.

[3] The complaint alleges that the state officers ascertained the amount of revenue to be allotted to the several counties. It was unnecessary to allege any facts showing the method by which the board arrived at the amount apportioned to the defendant county. While these facts need not be averred in the complaint, by reason of the presumption, yet such presumption is not conclusive, and the defendants could have tendered an issue in regard thereto. But the officers of the county cannot rely upon their own conclusions in the matter, as against those of the proper state officials. School District No. Two v. Lambert, 28 Or. 209, 42 Pac. 221; National Bank of D. O. Mills and Co. v. Herold, 74 Cal. 603, 16 Pac. 507, 5 Am. St. Rep. 476; Dubuc v. Voss, 19 La. Ann. 210, 92 Am. Dec. 526.

In the case of School District No. Two v. Lambert, supra, Mr. Justice Moore, at page 220 of 28 Or., at page 224 of 42 Pac., of the opinion, said: "It is another rule equally well settled that it is unnecessary to allege in a pleading any facts the existence of which the law will presume; * * * and, since the law presumes that official duty has been regularly performed, * * * it was unnecessary to allege any facts showing the method by which the county superintendent arrived at the conclusion that there were 150 persons of school age in district No. 2."

[4] The demurrer admits all the facts well pleaded in the complaint. That the board performed its duties, and the manner in which it performed them, in ascertaining the amount of state revenue to be raised by apportionment to the several counties, is presumed. No other defect in the complaint being pointed out, we hold that the complaint states a cause of action, and that the demurrer should be overruled. The judgment of the lower court will therefore be reversed.

[5] Section 101, L. O. L., provides that after the decision upon a demurrer, if it be overruled, and it appears that such demurrer was interposed in good faith, the court may, in its discretion, allow the party to plead over upon such terms as may be proper. The complaint in this case was filed on May 28, 1910. Judgment was rendered in the circuit court November 1, 1911. No request has been made that the court exercise its discretion and allow the defendants to plead over. Therefore, under section 8, art. 7, of the Constitution of Oregon, as amended November 8, 1910 (L. O. L. p. xxiv), which changes the mode of procedure, a judgment is directed to be entered as prayed for in the plaintiff's complaint.

(3 Or. 604)

KENWORTHY v. SLOOMAN et al.

(Supreme Court of Oregon. July 16, 1912.

On Rehearing, Aug. 15, 1912.)

1. EVIDENCE (§ 183*)—SECONDARY EVIDENCE—PROOF OF LOSS—SUFFICIENCY.

A witness' testimony that he drew the lost mortgage, and thought it was left at a certain bank, and that he went to the bank, and had a certain person search for it, was hearsay, and insufficient to show such search as was necessary to authorize proof of the contents of the mortgage by parol; it being essential that the search be made and testified to by the person, in whose custody the lost instrument is known to be.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

2. EVIDENCE (§ 183*)—SECONDARY EVIDENCE.

The proof to establish a lost writing must show its existence, loss, and contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

3. EVIDENCE (§ 183*)—SECONDARY EVIDENCE.

It was error to admit parol evidence on the contents of a mortgage being foreclosed without its loss having been first established by competent proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

On Rehearing.

4. APPEAL AND ERROR (§ 1175*)—DECISION—EQUITY.

Where, on appeal in a suit in equity, there is no doubt as to the issues below and that the respondent had full opportunity to present his case, the Supreme Court, on reversal, will not remand the case, but will enter a final decree upon the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4477, 4478; Dec. Dig. § 1175.*]

Appeal from Circuit Court, Washington County; J. U. Campbell, Judge.

Action by J. D. Kenworthy against William Slooman and others. From a decree for plaintiff, defendant Adler appeals. Reversed and rendered.

Manche I. Langley, of Forest Grove, and L. L. Langley, of Portland (Langley & Son, on the brief), for appellant. W. G. Hare, of Hillsboro (Bagley & Hare, of Hillsboro, on the brief), for respondent.

EAKIN, C. J. This is a suit to foreclose a mortgage upon real estate. It is alleged in the complaint that on January 16, 1904, Harry Slooman borrowed from J. D. Kenworthy \$100, executed his note to him therefor, and gave a mortgage upon certain real estate as security for its payment. Slooman died on October 15, 1904, and before his death he made a contract in writing with Fred L. Brown for the sale of his property, including the land above mentioned, in consideration for which, among other debts, Brown agreed to pay the note and mortgage. After the death of Slooman his heirs, William and Mattie Slooman, for the purpose of carrying out the Slooman-Brown contract, made a deed to the property in which it was specified that Brown assumed and agreed to

pay the mortgage debt. Thereafter Brown died, and the defendant Emelle T. Adler acquired such real estate by inheritance from him. By her answer she denied the debt of Harry Slooman to plaintiff, denied the execution of the mortgage, and denied that Brown agreed and undertook to pay the mortgage as part of the consideration for the transfer of the land to him, or that he had knowledge of the existence of the mortgage. She admits, however, the conveyance of the land to Brown by the Slooman heirs and her title therein as the heir of Brown.

[1] At the trial plaintiff was unable to produce the mortgage and endeavored to prove its loss, and to prove its execution and contents by parol. Plaintiff's agent, George Naylor, who drew the mortgage and made the loan, testified that the mortgage was executed in the E. W. Haines' Bank at Forest Grove. He thought he left it at the bank to be sent to Hillsboro for record, and, for the purpose of proving the loss of the mortgage, Naylor testified that he had searched for it, but could not find it; that he inquired at the bank and had Miss Cronen search in the bank for it, and that he searched the records of the county for it; that he had forgotten what official had taken the acknowledgment or who were the witnesses to its execution, and then proceeded to give evidence as to its contents, to all of which the defendant objected. The proof of the loss of the mortgage tendered was insufficient for that purpose.

[2] There are three elements of proof required in establishing a lost writing: Its existence or execution, its loss and its contents, and the fact of loss may be proved by any witness that has knowledge of the facts but the search necessary to be made for the writing must be by the person in whose custody it was known to be, and he should be called as to the result of the search. His declarations in regard to it are hearsay. 8 Ency. of Evid. 343, 353; 25 Cyc. 1624, 1625; Bounds v. Little, 75 Tex. 310, 321, 12 S. W. 1109; Wiseman v. N. P. R. R. Co., 20 Or. 425, 28 Pac. 272, 23 Am. St. Rep. 135; Harmon v. Decker, 41 Or. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748. The evidence offered by plaintiff on this point relates only to inquiries made by witness. The proof must be by those who made the search or the person to whom the possession is traced.

[3] The evidence is not sufficient to establish the loss of the mortgage, and, until the loss is proved, the plaintiff is not entitled to give evidence of its contents. By the terms of the deed to Brown, he assumed to pay the mortgage referred to therein which is a mortgage to Edith L. Kenworthy and not to the plaintiff, and, having retained part of the purchase price for that purpose, he became personally liable therefor, but the note and mortgage sued upon are not the debt and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

mortgage assumed in the deed. If plaintiff sought to recover upon the liability of Brown, created by the deed, or to offer the deed as evidence of the existence of the mortgage, or of its contents, and if there is a mistake in the description of the mortgage contained in the deed, it cannot be shown by parol, when the deed is offered in evidence.

The circuit court erred in admitting evidence of the contents of the mortgage, the loss of it not having been first established by competent proof, and without such proof the plaintiff was not entitled to a decree.

The decree is reversed, and, under the authority of section 557, L. O. L., *Fowle v. House*, 30 Or. 305, 47 Pac. 787, and *State v. Richardson*, 48 Or. 309, 314, 85 Pac. 225, 8 L. R. A. (N. S.) 362, the cause will be remanded for such further proceedings as to the circuit court may seem proper, not inconsistent with this opinion.

On Rehearing.

[4] The petition for rehearing only questions the order of the court remanding the case to the circuit court for further proceedings, contending that in equity the case is tried anew on the record, and final decree entered here.

The court is of the opinion that there was no doubt as to the issues tendered in the lower court, and that plaintiff had full opportunity to present his case, and therefore the case does not come within any of the exceptions to the rule, as stated in *Smith v. Wilkins*, 31 Or. 421, 422, 51 Pac. 438, *Robson v. Hamilton*, 41 Or. 239, 69 Pac. 651, *Branson v. Oregonian Ry. Co.*, 10 Or. 278, and *Brown v. Lewis*, 50 Or. 358, 92 Pac. 1058, that in equity cases a final decree upon the record before the court shall be entered here, and one will be entered here dismissing the suit, with costs to defendants.

MANN & BEACH v. FLYNN.

(Supreme Court of Oregon. Aug. 6, 1912.)

1. SALES (§ 883*)—ACTIONS BY SELLER—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an action by a seller against a buyer for failure to perform a contract of sale, evidence held to make a prima facie showing that the buyer concealed himself so as to prevent delivery and tender of a bill of sale, and hence a nonsuit was improperly granted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. § 383.*]

2. SALES (§ 79*)—DELIVERY—PLACE FOR DELIVERY.

Where a contract of sale does not fix the place of delivery, the seller is not bound to send or deliver the property to the buyer at any other place than that where it was kept when the contract was made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 214-216; Dec. Dig. § 79.*]

3. SALES (§ 156*)—DELIVERY—OBLIGATION TO DELIVER.

Where the conditions of a contract of sale were mutual and dependent and the contract did not specify any place for delivery, the seller performed its obligation by placing the property at the buyer's disposal, and it could not be placed in default without a tender of payment and demand of possession by the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 367-371; Dec. Dig. § 156.*]

4. SALES (§ 176*)—PAYMENT OF PRICE—WAIVER OF DEFAULT.

Where a contract for the sale of a magazine provided that the seller should have the open accounts on the books of the magazine on a specified date, the acceptance by the seller of a subscription on that date was not a waiver of performance by the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Mann & Beach, a corporation, against L. J. Flynn. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This is an action to recover money. It is alleged in the complaint, in effect: That plaintiff is a corporation, and that it consummated with the defendant a contract of which the following is a copy: "This agreement, made and entered into this 18th day of February, 1911, by and between Mann & Beach, party of the first part, and L. J. Flynn, party of the second part. Whereas, in consideration of a check for five hundred (\$500) dollars being deposited by the party of the second part with C. T. W. Hollister as first payment on the purchase price of a magazine known as 'The Northwest Architect,' the party of the first part does hereby agree to turn over to the party of the second part on the 1st day of March, 1911, said magazine, subscription lists, contracts from advertisers, etc., free and clear from all liabilities. In consideration of the above, the party of the second part does hereby agree to pay to the party of the first part the sum of one thousand (\$1,000) dollars, as follows: Five hundred (\$500) dollars in cash and the second five hundred (\$500) dollars either in cash or note acceptable to the party of the first part. It is further understood that the party of the first part is entitled to, and shall have, the open book accounts as shown on the 28th day of February, 1911, on the books of 'The Northwest Architect' account of Mann & Beach. It is further understood that the party of the first part shall have the printing of said magazine for the period of two (2) years, from March 1, 1911, provided the party of the first part's cost and quality of work is on basis of present standard of said magazine, and such price to be mutually agreed upon by said parties. It is further understood that the party of the first part shall be entitled to one-quarter page R. O. P. for advertising purposes in said magazine for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

life of the printing contract. It is further understood that C. T. W. Hollister shall pay to the party of the first part the said deposit of five hundred (\$500) dollars upon being informed that said contracts are signed and bill of sale delivered to the party of the second part. The party of the first part will have drawn up and submitted to the party of the second part a contract and bill of sale for said magazine. In witness whereof said parties have hereunto set their hands this 18th day of February, 1911, at Portland, Oregon. [Signed] Mann & Beach, C. E. Thomas, Secy., Party of the First Part. [Signed] L. J. Flynn, Party of the Second Part. Witnesses: C. T. W. Hollister, F. O. Thompson." That, in order to carry out the terms of that contract, the plaintiff's agent on March 1, 1911, made diligent search and inquiry for the defendant but was unable to find him. That in order to avoid a delivery of the property specified the defendant concealed himself on March 1, 1911, and for several days prior thereto, and the plaintiff's agent being unable to ascertain where he was, notified him in writing March 6th of that year, that it was ready to comply with the stipulations of their agreement, a strict performance of which was waived by his conduct. That at all times since March 1, 1911, the plaintiff has been, and is ready, able and willing to fulfill and perform the conditions agreed upon, but the defendant has refused to comply therewith or to pay any part of the stipulated sum of \$1,000, for which judgment was demanded. The answer admitted the making of the agreement, but averred that plaintiff had failed to comply with its terms, in consequence of which defendant on March 7, 1911, rescinded the contract and notified plaintiff thereof. For a further defense it was alleged that about March 1, 1911, the plaintiff, exercising control over the property, specified, solicited and secured a year's subscription to the Northwest Architect, thereby waiving the right to insist upon a specific performance of the agreement. The reply put in issue the allegations of new matter in the answer, whereupon the cause came on for trial without a jury, and, the plaintiff having introduced its evidence and rested, a judgment of nonsuit was given, and it appeals.

Barton Cole, of Portland (Jay Bowerman and Cole & Cole, all of Portland, on the brief), for appellant. Edward J. Brazell, of Portland (Giltner & Sewall, of Portland, on the brief), for respondent.

MOORE, J. (after stating the facts as above). [1] The question to be considered is whether or not the evidence received was sufficient to authorize a judgment in plaintiff's favor when no evidence was offered by the defendant. E. C. Thomas, the plaintiff's secretary, as its witness, testified to the

effect that prior to March 1, 1911, he tried to complete a contract with F. O. Thompson, the defendant's agent, so as to authorize the plaintiff to print the magazine, but, objection having been made to the language employed in the writing submitted for that purpose, no agreement therefor was ever reached; that, though the plaintiff desired to print that publication, the failure to obtain a contract therefor would not have prevented a sale of the property; that the Northwest Architect was not published after March 1, 1911, at which time and thereafter the plaintiff held for the defendant at its office in Portland all the property mentioned; that on the day last named the defendant did not have an office in Portland nor did he then or ever demand the possession of any of the property, which at that time was unincumbered, and the plaintiff then and thereafter was the owner thereof and willing to deliver it to the defendant; that no bill of sale of the property was made or tendered to the defendant until March 6, 1911; and that on February 28th of that year the plaintiff received from George W. Foreman \$3 for a year's renewal of his subscription to the magazine from December 1, 1910. The sworn statements of this witness were corroborated by the testimony of S. C. Beach, the president and manager of the plaintiff corporation, who stated that several times prior to March 1, 1911, he called at a room on the eighth floor of the Lewis Building, in Portland, which apartment the defendant claimed as his place of business, for the purpose of submitting to him a bill of sale and of turning over to him the property, but that he was unable to find him.

The foregoing is believed to be a fair statement of the material testimony relating to the plaintiff's ability and willingness to comply with and perform the terms of the written agreement hereinbefore set forth. Though no bill of sale was prepared until March 6, 1911, it is thought a sufficient showing was made to impose upon the defendant the duty of refuting the testimony offered, and of showing that he did not absent himself so as to prevent a delivery of the specified property within the time stipulated or to thwart a tender of a bill of sale evidencing a transfer of the title.

[2] It will be remembered that the contract did not fix the place of delivery of the magazine, subscription lists, contracts from advertisers, etc. In such case the seller is usually under no obligation to send or deliver the property to the buyer at any other place than where it was kept when a contract for its sale was effected. 24 Am. & Eng. Ency. Law (2d Ed.) 1068. A text-writer, discussing this subject, says: "Ordinarily, in sales, the buyer must come for the goods before the seller is bound to deliver." Benjamin, Sales (6th Ed.) 676.

[3] The plaintiff's obligation was fully performed, if its agents placed the property at the disposal of the defendant, whose duty it was to tender payment therefor and to demand possession thereof. From a consideration of the language of the contract, it appears that these conditions were mutual and dependent, in which case neither party could put the other in default without an offer to perform. *Catlin v. Jones*, 48 Or. 158, 165, 85 Pac. 515; *Longfellow v. Huffman*, 49 Or. 486, 490, 90 Pac. 907.

[4] The plaintiff on February 28, 1911, received \$3 for the renewal of a subscription to the Northwest Architect, which sum, if payable in advance, had been due since December 1, 1911. It will be kept in mind that the contract stipulated that the corporation was entitled to the open book accounts of the magazine on February 28, 1911. It would appear, therefore, that by receiving the money on that day plaintiff had not waived a sale of the property.

Believing that the testimony received was sufficient to have required the defendant to introduce evidence to refute the prima facie showing made by the plaintiff, the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

SCOTT-McCLURE LAND CO. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. Aug. 6, 1912.)
MUNICIPAL CORPORATIONS (§ 583*)—ASSESSMENT LIENS—PRIORITY.

Portland City Charter, § 407, provides that from the date of the entry therein of an assessment the sum as entered shall be a lien on the tract assessed, with priority over all other liens and incumbrances whatsoever thereon, etc. Section 408 declares that, when an assessment becomes delinquent, a person having a lien on the lot by judgment, decree, or mortgage, or having purchased the same for any delinquent tax or assessment, may, at any time before the sale of the lot or part thereof, pay the same, and such payment discharges the property from the effect of the assessment, and the amount and costs and charges shall thereafter become a part of the lien creditor's claim and shall bear interest, and may be enforced and collected as a part thereof. *Held*, that a sale of city property under a junior assessment lien did not extinguish a prior lien of the same character.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 583.*]

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Suit by Scott-McClure Land Company against City of Portland and another. From an order sustaining a demurrer to plaintiff's complaint, it appeals. Affirmed.

This is a suit to restrain the defendant city from selling lot 16 in block 7 in North Irvington, in the city of Portland, for a delinquent street assessment. Plaintiff alleges that on June 14, 1906, there was duly enter-

ed and docketed in the city lien docket of Portland a lien and assessment against the property above mentioned for the improvement of East Eleventh street. On November 26, 1906, the owner of the property having failed to pay such assessment, it was duly offered for sale, and bid in by plaintiff for \$139.82. A certificate of sale was issued to him, and on March 28, 1910, no redemption having been made, the city treasurer executed to plaintiff a deed to the property. On August 10, 1905, prior to the levying of the assessment, there was entered in the city lien docket a lien and assessment against such property for the improvement of another street, abutting upon the same, which remained unpaid, and in March, 1910, a writ was issued out of the office of the city auditor directing the city treasurer to enforce the payment of such lien, and he is advertising the property for sale under such writ. Plaintiff prays for an injunction pendente lite and for permanent relief.

Sections 407 and 408 of the charter are as follows:

"The docket of city liens is a public writing, and from the date of the entry therein of an assessment the sum as entered is hereby declared to be a tax levied and a lien upon such lot, part thereof, or tract of land, which lien shall have priority over all other liens and incumbrances whatsoever thereon, and the sum or sums of money assessed for any local improvement, entered upon such lien docket, shall be due and payable from the date of such entry, and if not paid, or bonded as provided by law, within ten days from the date of such entry, thereafter the same shall be deemed to be delinquent and shall bear interest at the legal rate."

"When an assessment upon any lot or part thereof becomes delinquent, any person having a lien thereon by judgment, decree or mortgage, or having purchased the same for any delinquent tax or assessment, may at any time before the sale of such lot or part thereof, pay the same, and such payment discharges the property from the effect of the assessment, and the amount of such delinquent taxes and all accruing costs and charges, if any, when so paid, is thereafter to be deemed a part of such lien, creditor's judgment, decree, mortgage or tax lien, as the case may be, and shall bear interest and may be enforced and collected as a part thereof. If the holder of any tax lien or claim pays off such assessment, he may thereafter present the receipt to the officer who shall have charge of the tax roll or docket containing the record of the tax sale at which he purchased such property, and thereupon such officer shall make a note of the amount of such assessment so paid by such purchaser and shall exact repayment thereof, together with interest as above prescribed, from any person making redemption

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from such sale, and no redemption shall discharge the property from the effect of such which shall not include the amount of such assessment paid by the purchaser after the purchaser shall have presented the receipt as above prescribed."

A general demurrer to plaintiff's complaint was sustained, and plaintiff appeals.

Frank Schlegel, of Portland, for appellant. Frank S. Grant, City Atty. (L. E. Latour-ette, of Portland, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). A single question of law is presented on this appeal: Whether or not the lien docketed on June 14, 1906, and under which plaintiff derives its title, is superior to the lien docketed on August 10, 1905, under which defendant is attempting to sell the property. In other words, did the sale under the junior lien extinguish the prior lien? Both liens are identical in character, being for street improvements.

The question presented is new in this state; but, after carefully considering it, we are of the opinion that it was not the intent of the provisions of the charter that a sale upon a junior lien should extinguish a former lien of a kindred character. Such a construction would work great inconvenience in many instances, while a purchaser under a junior lien always has it in his power to pay off the prior lien, which presumptively has increased the value of his property to an extent at least equal to its amount. The following cases sustain this view: *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *Philadelphia v. Meager*, 67 Pa. 345; *Bell v. City of New York*, 68 App. Div. 578, 73 N. Y. Supp. 298; *Des Moines Brick Mfg. Co. v. Smith*, 108 Iowa, 307, 79 N. W. 77. The contrary seems to be held in *Burke v. Lukens*, 12 Ind. App. 648, 40 N. E. 641, 54 Am. St. Rep. 539, but we cannot agree with the reasoning of that case.

The order of the circuit court is affirmed.

(32 Or. 308)

DOSE v. BEATIE, Sheriff.

(Supreme Court of Oregon. July 30, 1912.)

1. FRAUDULENT CONVEYANCES (§ 281*) — BURDEN OF PROOF.

Where property levied on under an execution was in the possession of the execution debtor, the burden is on a person claiming to have purchased it from the debtor, under the express provisions of L. O. L. § 798, subd. 40, to prove that the sale was in good faith, for a sufficient consideration, and without intent to defraud creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 800, 816; Dec. Dig. § 281.*]

2. ESTOPPEL (§ 68*)—CLAIMS TO PROPERTY LEVIED ON—CHANGING GROUNDS OF CLAIM.

Where a person, claiming to have purchased from the execution debtor onion sets levied

on under the execution, made no claim to the sheriff that the onion sets were raised by her, or that she had a claim thereto under a mortgage for advancements, or as rental of the land on which they were raised, but based her claim on a pretended purchase from the execution debtor, she could not, when it was too late for the execution creditor to take advantage of the true conditions, change the grounds of her claim.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

Barnett and Bean, JJ., dissenting.

On rehearing. Former decision affirmed. For former opinion, see 123 Pac. 383.

EAKIN, C. J. The defendant, as sheriff, held an execution against Oscar Mahlor, and, at the time of the levy on the goods, found them in Mahlor's possession in a building situated on the Koshmeder place, which he occupied under a lease. The property attached was onion sets raised and owned by him at the time of the levy, unless he had parted with the title by the pretended sale relied upon here. The sheriff was justified, therefore, in levying upon them as the property of Mahlor. Plaintiff had previously taken a chattel mortgage on the growing crop for \$1,200, as security for \$300, previously advanced, and for further advances thereafter to be made to enable him to cultivate and harvest his crop.

[1] It is contended by plaintiff that about the middle of August she made an arrangement with Mahlor, whereby she purchased the onion sets from him for \$300; and that she was to pay an additional \$100 to enable him to complete the harvesting of the crop, which had been commenced then, although at that time he was not in default, and the advances made by her did not exceed \$966.

There was no delivery or change of control or possession of the crop. Subdivision 40, § 798, L. O. L., provides: "Every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same is accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers. * * *" In discussing this subdivision, Mr. Justice Bean, in *Pierce v. Kelly*, 25 Or. 95, 99, 34 Pac. 963, 965, says: "The change of possession necessary to overcome and rebut this presumption (of fraud) must be actual, and not merely constructive

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or legal; it must be effected in a way calculated to give notice to the public that there has been a change in the ownership or control of the property; and a mere constructive possession, or one taken by words and inspection, will not satisfy the statute." No such change took place; therefore the sheriff's levy and possession was rightful in the first instance, and the burden was upon the plaintiff to make it appear that the sale was in good faith, for a sufficient consideration, and without intent to defraud the creditors of Mahlor.

[2] If plaintiff had based her right upon the mortgage when the attachment was made, or when she brought this action, her interests would have been well protected; but she led the creditor to consider the onions as belonging to Mahlor, and, after he had acted upon the conditions as he had found them, she asserted absolute ownership of the crop and sought to defeat the creditor, when, in fact, according to her admission, there was due to Mahlor \$300, as the value of his interest in the crop; and, lest the creditor should learn that fact and secure that sum, she paid it to him after the attachment and before it was due, thus showing a purpose to aid Mahlor to avoid payment of the debt. An attaching creditor is deemed a purchaser in good faith, and for a valuable consideration, of the property attached; and the presumption of law is that the pretended sale of the goods by Mahlor to plaintiff was fraudulent, and the burden is upon plaintiff to prove that it was made in good faith.

There are several circumstances, aside from the presumption above mentioned, which tend to show that the sale was intended to aid Mahlor to defraud the creditor. These are mentioned in the opinion and fully justify the finding of the circuit court. It may be that plaintiff had, in good faith, a valuable interest in the goods for advances made; but that is not the ground upon which she seeks to recover. She stakes her claim upon the pretended sale, and not upon the mortgage; and she cannot now take a new or different ground of recovery, after it is too late for the creditor to take advantage of the true conditions.

The contention that Mrs. Dose was at least entitled to two-thirds of the crop raised on the Kunze place, as her share thereof, is not an issue suggested here. If she had sought to claim a portion of the onions by reason of having raised them herself, or as rental, she should have made a specific demand of the sheriff therefor, setting forth the nature and extent of her interest, in the absence of which she has permitted that interest to stand or fall with the validity of the sale. Mahlor raised both crops, and was in possession of them, and both are included in the mortgage. There is nothing in the record upon which a court can recognize

plaintiff's rights in the crop on the Kunze place, either as the owner of the whole crop, or of the rental therefor from Mahlor, without a specific demand upon the sheriff, disclosing her interest. Such a claim was not at any time contemplated in this proceeding, and the creditor at no time had an opportunity to meet such an issue or take advantage of it; and the same is true of plaintiff's rights under the mortgage.

We adhere to our former opinion.

BARNETT and BEAN, JJ., dissent.

(39 Or. 459)

BROWNE v. COLEMAN et al.

(Supreme Court of Oregon. Aug. 6, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 362*)
—SALE OF LAND TO PAY DEBTS—VALIDITY.

Where an administrator's sale of land to pay debts was void at law for jurisdiction of the court to order it and want of power in the administrator to make it on account of defects in the service of the citation, it was equally void in equity; since, although equity may relieve against the defective execution of a power created by the parties, it cannot relieve against the defective execution of a power created by statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1484-1487; Dec. Dig. § 362.*]

2. EXECUTORS AND ADMINISTRATORS (§ 376*)
—SALE OF LAND TO PAY DEBTS—ESTOPPEL TO ATTACK.

While the parties to a proceeding by an administrator to sell land to pay debts may by their conduct be estopped to attack the validity of the sale for defects in the service of the citation, they are not so estopped merely by failure to appear and contest the proceeding.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1539-1542; Dec. Dig. § 376.*]

3. EXECUTORS AND ADMINISTRATORS (§ 380*)
—SALE OF LAND TO PAY DEBTS—INVALIDITY—REIMBURSEMENT OF PURCHASER.

The heirs of a decedent cannot recover land sold by the administrator to pay debts on account of defects in the proceedings to sell without reimbursing the purchaser for so much of the proceeds of the sale as were applied to the payment of debts which were a charge on the land.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1545-1553, 1555-1564, 1567; Dec. Dig. § 380.*]

4. EXECUTORS AND ADMINISTRATORS (§ 376*)
—SALE OF LAND TO PAY DEBTS—ESTOPPEL TO ATTACK.

Heirs of a decedent who, with knowledge of defects in the service of the citation in a proceeding by the administrator to sell land to pay debts, accepted their distributive share of the proceeds of the sale, were estopped to question its validity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1539-1542; Dec. Dig. § 376.*]

5. DOWER (§ 74*)—ACTIONS FOR DOWER—JURISDICTION.

A circuit court has jurisdiction to admeasure dower.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 256-259; Dec. Dig. § 74.*]

6. EXECUTORS AND ADMINISTRATORS (§ 378*)
—SALE OF LAND TO PAY DEBTS—INVALIDITY—CURATIVE STATUTE.

L. O. L. § 7156, validating executors' and administrators' deeds, notwithstanding "irregularities, defects or informalities" in the proceedings prior to the sale, does not render valid an administrator's deed which was absolutely void because of defects in the service of the citation in the proceeding to sell.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1544; Dec. Dig. § 378.*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by Le Roy Browne against Elizabeth Coleman and others. Judgment for defendants, and plaintiff appeals. Modified.

This is an application under sections 7179 to 7285, L. O. L., to register title to certain lands situated in Marion county. The question as to the title to this identical property was litigated in the case of *Smith v. Whiting*, 55 Or. 393, 106 Pac. 791, which was an action of ejectment. A full statement of the controversy appears in that opinion, and it is unnecessary to repeat it here.

Upon the termination of the case above referred to, Browne, who is the grantee of Whiting, brought this suit, setting up certain alleged equities which his grantor was unable to urge in the law action. The equities urged by applicant may be briefly stated as follows: (1) That at the time of Jacob Smith's death, April 27, 1897, he was the owner of the real property described in the application, and left no personal property or money, and that there were outstanding claims against the estate to the amount of \$300. (2) That the administrator regularly petitioned the court for leave to sell the real estate to pay these claims. (3) That on June 29, 1900, citation was issued to the widow and heirs of the deceased to appear on August 4, 1900, and show cause why the order of sale should not be made. (4) That a copy of such citation was duly and regularly served upon each of the parties, but by neglect and oversight of the sheriff the return of such service was never made nor filed. (5) That service by publication was also made in a newspaper for five consecutive weeks. (6) That, on March 24, 1903, the sale was made and Leroy Browne, plaintiff, and Elizabeth Whiting became the purchasers. (7) That on August 25, 1904, Browne conveyed his interest to Elizabeth Whiting, and in 1908 Mrs. Whiting reconveyed the whole of the land to plaintiff. Then follows a recital of the action proceedings and judgment in the case of *Smith v. Whiting*, supra. (8) That on such trial defendant Whiting offered in evidence the proceedings of the probate court, in relation to the petition for sale, order for sale, and confirmation of sale of the land, but they were excluded by the court for the reason that the record did not show that

the widow and heirs had been personally served with citations as provided by law.

(9) That the court refused to allow defendant in that action to show by parol that such service had actually been made. (10) That defendants J. L. Smith and May Smith (now Hunter) appeared in the county court at the time mentioned in the citation, and were informed by the county judge of their right to file objections to such sale, and the cause was continued from 10 a. m. until 2 p. m. o'clock of that day, to allow them to do so. That they did not appear again, but stated to the administrator that they did not intend to proceed further with such objection. (11) That the widow and each and all of the children of deceased had full notice and knowledge of the pendency of such proceeding, knew that the petition was to be heard on August 4, 1900, and knew that it was necessary to sell the land in order to satisfy the debts of deceased, and the expense of administration. That they failed to file any objection thereto. That they had full knowledge of the sale of the land to Browne and Whiting, and neither of them objected thereto or called the same in question until the filing of the ejectment suit of *Smith v. Whiting*. (12) That the \$400 received from such sale was applied to the indebtedness of the estate, and the surplus was divided in equal shares. (13) That W. J. Smith, one of the heirs, died before administration of the estate was complete, and his widow, Daisy G. Smith (now Shepherd), became entitled to his distributive share of the surplus, arising from the proceeds of the sale, and that the following heirs, defendants herein, made and filed with the administrators their receipts for \$6.24, the distributive share of each, to wit, Nancy Helvey, Elizabeth Coleman, Julia Hall, J. M. Smith, Agnes Jones, Daisy G. Shepherd, and Mrs. T. A. Lamm. (14) That on September 30, 1903, the administrator filed his final account which contained a full statement of the proceedings to sell the land aforesaid, together with a description of the same. That notice of the hearing, of objections to the final account was given for a certain date and hour, as provided by law. That neither the heirs nor the widow appeared, and it was allowed by the court. (15) That at the time of the purchase of the land plaintiff and Mrs. Whiting had reason to believe from representations made by the attorney for the administrator that all the steps necessary to affect a lawful sale of the land had been taken. That all the proceedings leading up to the sale had been regular and according to law, and that they relied upon such belief and representations, and relied upon the fact that neither the heirs nor the widow made any objection to the sale of the premises, but, in fact, remained silent with respect thereto. (16) That none of the heirs, receiving such dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tributive share of the purchase price, has offered to return the same or any part thereof. (17) That applicant and Mrs. Whiting have paid the taxes on the property since the execution of the administrator's deed. That they were never apprised that any of the defendants claimed any interest in the land until they were served with summons in the case of *Smith v. Whiting*. That the defendants never attempted to assert any claim to the land until the same had enhanced greatly in value. That plaintiff, relying upon the silence and acquiescence of defendants, and believing his title to be good, entered into a contract on or about January 1, 1908, for the sale of the property. That, unless his title is quieted, he will suffer great loss and damage. That relying upon the matters aforesaid, petitioner on January 28, 1908, purchased from Mrs. Whiting her interest in the land, paying her therefor the sum of \$3,200. (18) That the widow and heirs remained silent and failed to assert their claim for the purpose of misleading petitioner and Mrs. Whiting, and, except for such silence and acquiescence and apparent assent, they would not have purchased the land, paid the taxes or entered into possession, nor would petitioner have purchased her interest from Mrs. Whiting, or paid her any consideration therefor. (19) The same matters are pleaded as an estoppel. (20) It is alleged that \$253.44 of the claims against the Smith estate were for necessities furnished the family of deceased for which the widow's claim in the estate is liable. A decree was rendered in favor of defendants, and plaintiff appeals.

B. S. Huntington, of Portland (Huntington & Wilson, of Portland, on the brief), for appellant. Thomas Brown, of Salem (Carson & Brown, of Salem, on the brief), for respondents.

MERRIDE, J. (after stating the facts as above). [1] When this matter was before the court in ejectment (*Smith v. Whiting*, 55 Or. 393, 106 Pac. 791), we held that the service of citation and notice was jurisdictional, and that, unless proved by the proper return on file in the county court, that court had no jurisdiction to order the sale. No such return appearing on file and the published notice of sale required defendants to appear on the last day of publication, we held that the proceeding was wholly void, and affirmed the judgment for plaintiff in that action. While equity may relieve against the defective execution of a power created by the parties, it is incapable of relieving against the defective execution of a power created by statute. *Freeman*, Vold Jud. Sales, § 55; *Bright v. Boyd*, 1 Story, 486, Fed. Cas. No. 1,875; *Young v. Dowling*, 15 Ill. 481, 485. Therefore, if the sale was void at law, by reason of want of jurisdiction in the county court to order it, and want of power in the admin-

istrator to make it, it is equally void both at law and in equity. Any other rule would make a court of equity a legislative body with power to amend the statute in each particular case to meet supposed hardships which might ensue from enforcement of the statute.

[2] It does not follow, however, that a sale absolutely void in law may be ineffective for every purpose. If the conduct of the parties was such as to lead purchasers to believe that they recognized it as a genuine sale, and to induce them to purchase where otherwise they would not have purchased, or if, after the sale has been made, they, with knowledge of the facts, accept their proportion of the money obtained by the purchase, an estoppel may arise which may be as effective in equity to bar their right as if a regular valid sale had taken place in the first instance. We do not think such an estoppel arises from mere failure to appear and contest the proceeding in the county court in the first instance. The law provides the method by which a party may be brought into court, and, if this method is not followed, he is under no legal or moral obligation to voluntarily submit himself to the jurisdiction. He may stay out of court and allow the moving party and purchasers under the sale to proceed at their peril. The record is always available to a purchaser, and, in the absence of any affirmative act by the heir tending to mislead the purchaser, he is not chargeable with constructive fraud merely because he does not seek out such purchaser and warn him of defects in the proceedings. The heirs and widow in this case did nothing to mislead the plaintiff and his copurchaser. They simply declined to appear, and the purchasers, without examining the record, bought the property. It is true that they paid full price for it, and, no doubt, thought the sale valid, but this fact can make no difference as to the validity of the sale.

[3] A large part of the money received from the sale was used to pay the debts of the estate, which were a charge upon the land, and in equity and good conscience the defendants should not recover the land freed from these charges, but, as a condition precedent, they should be required to repay this amount, together with the lawful interest from the date of the administrator's sale. Certain of the heirs accepted their distributive share of the estate which arose wholly from the proceeds of this sale and their receipts are on file here.

[4] We are satisfied from the testimony in the case, particularly that of E. L. Smith, who was administrator of the estate and a brother of the other heirs, that those who accepted the distributive share paid them were at the time fully aware of the proceedings in the county court and of the sale, and were fully acquainted with their rights in the matter, and they are thereby estopped to

question the validity of the sale. *Pursley v. Hays*, 17 Iowa, 310; *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460; *Mote v. Kleen*, 83 Neb. 585, 119 N. W. 1125, 131 Am. St. Rep. 654. As to these heirs the decree should be reversed, and as to the remaining parties it should be affirmed, subject to the repayment of their proportion of the purchase money and taxes with lawful interest thereon.

[5] It is claimed that the circuit court is without jurisdiction to admeasure dower, but it is held otherwise in *Baer v. Ballingall*, 37 Or. 416, 61 Pac. 852.

[6] It is claimed that the curative statute (section 7156, L. O. L.) bars the right of defendants in this case, but such statute is limited in its operation to "irregularities, defects or informalities," and it is evidently not intended to extend to sales which are absolutely void, and such has been the holding of this court (*Mitchell v. Campbell*, 19 Or. 198, 24 Pac. 455; *McCulloch v. Estes*, 20 Or. 349, 25 Pac. 724; *Fuller v. Hager*, 47 Or. 242, 83 Pac. 782, 114 Am. St. Rep. 916).

The decree of the circuit court will be modified in the respects indicated in this opinion, and neither party will recover costs in this court. The costs of the circuit court will stand as there decreed.

KOPACIN v. CROWN-COLUMBIA PULP & PAPER CO.

(Supreme Court of Oregon. July 30, 1912.)

1. MASTER AND SERVANT (§§ 101, 102*)—DUTIES OF MASTER.

The master should provide his servant with reasonably safe tools, appliances, and place in which to work, and should exercise reasonable care to keep them in a reasonably safe condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

2. MASTER AND SERVANT (§ 286*)—ACTION FOR INJURIES—QUESTION FOR JURY.

Where, in an employe's action for injuries from being thrown against a paper mill machine through the tilting of a defective walking plank, the evidence was conflicting on the circumstances under which the accident occurred, the question of defendant's negligence was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

3. TRIAL (§ 139*)—EVIDENCE—QUESTION FOR JURY.

What a foreigner, testifying with the aid of an interpreter, meant by his broken language, as well as the weight thereof, was for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

4. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

Where an employe either does not know the circumstances, or, knowing them, does not appreciate the risks, and his ignorance or non-

appreciation is not due to negligence or want of due care by him, there is no assumption of risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where, in an employe's action for injuries from being thrown against a paper mill machine through the tilting of a defective walking board, it did not appear that the defect was so obvious that he could not have failed to appreciate the danger of walking upon the board, the question of his contributory negligence was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

In an employe's action for injuries from a paper mill machine, against which he was thrown by the tilting of a defective walking board, an instruction that he could not recover if the accident arose from his improper use of the machine, was properly refused, where the only evidence to support it was the mere conjecture of a doctor as to what plaintiff, who was unable to speak English, meant by certain motions made with his uninjured hand while he was being treated.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

A requested instruction, substantially given in different language in the main charge, is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by John Kopacin against the Crown-Columbia Pulp & Paper Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

At the time of the injury complained of, plaintiff was engaged in operating a "wet machine" for defendant in its paper mill at Oregon City. This machine consists, in part, of two large revolving cylinders or rollers, between which the pulp passes and is compressed. The pulp is carried between these rollers by means of a felt, upon which it rests, which extends the full width of the cylinders. Frequently this felt wrinkles or kinks, and sometimes works over to one side of the rollers, making it necessary for the operator to straighten the same out. A wheel is attached to the machine, to be used in regulating the felt. By turning this, the operator can make the felt run true. The wheel is located approximately 3 feet back from the rollers, 6 feet 8 $\frac{1}{4}$ inches from the front of the machine where the operator usually stands, and about 6 feet from the floor, upon which the "wet machine" rests. When the machine is in motion, water is constantly dripping from it upon the floor. In order to enable the operator to reach the regulating wheel and other parts of the machine, the defendant, at the time of the accident, maintained a plank about 9 feet in

length, 1¼ inches in thickness, 10 inches in width at one end and 9 inches at the other, which extended along the side of the machine. The plank formerly rested upon cleats, 2x4x10 inches, which were nailed near the end of the plank, raising the top of the same about 5 inches above the floor. About 10 days before the accident, a weight fell upon the board and broke off a piece, 5 inches wide at the narrow end, tapering to a point 14 inches in length, from one corner, and tore the cleat off at the same end. Herman Shercenger, an employé who operated the machine during the night shift, turned the board with the broken end back from where the operator usually stood, and placed the cleat flatways and lengthwise under the remaining part of the end of the board, thus giving that end a bearing on one side 4 inches wide. The board remained in this condition until after the accident, when it was repaired by order of the superintendent of the company, and another board placed at the side, both nailed to longer cleats.

Plaintiff avers that on May 5, 1910, the board was elevated a short distance above the floor, lying loosely on certain supports; that defendant negligently allowed the same to become broken and split, so that when plaintiff stepped thereon the board sprang, throwing him in such a position as to place his left hand in connection with the wet machine, thereby lacerating the hand, entirely cutting off the third and fourth fingers, and a part of the second; that the board was placed where it could not be seen plainly, and that plaintiff knew nothing about the dangerous condition of the same; that defendant knew, or with reasonable diligence might have known, of the unsafe condition of the board; that the plaintiff is permanently injured by the lacerations and the loss of the above-mentioned fingers.

Defendant answered, denying the main allegations of the complaint, and asserting that the machine and the appliances around the same were kept in a reasonably safe condition; and that the accident happened on account of the carelessness and negligence of plaintiff. Issue was joined by the reply. The cause was tried before a jury, and a verdict returned in favor of plaintiff for \$1,999.

S. C. Spencer, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellant. Livy Stipp and Wm. M. Stone, both of Oregon City (Geo. C. Brownell, of Oregon City, on the brief), for respondent.

BEAN, J. (after stating the facts as above). At the conclusion of plaintiff's evidence, counsel for defendant asked for a nonsuit, which was denied, and also requested a directed verdict for defendant. The rulings of the court upon these points are assigned as error. It was the duty of plaintiff, as operator of the machine, to cut off the pulp

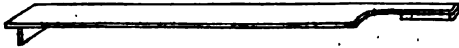
or sulphite, and to regulate the felt when necessary. At the time of the accident, plaintiff had been working for defendant about a month, operating the machine. He claimed that he stepped upon the board in the usual manner, about two feet toward the middle, for the purpose of reaching the wheel to regulate the felt. The board "raised up slightly," "swung around slightly," and "slipped slightly over," causing him to be thrown suddenly forward. At the same time he grabbed for the wheel, and tried to catch himself with his left hand; but it caught in the rollers, and the third and fourth fingers were completely severed, part of the second finger was taken off, and his hand was badly mangled. Plaintiff states that he stepped toward the middle of the board; but how far he does not know. It appears that the room was so dark that the photographer had to turn on the electric lights, in order to take the picture of the machine. Other witnesses testified that they used the board, while in the same condition, before and after the accident, and that it did not tip with them. Plaintiff, who is a foreigner, states that at one time the broken end of the plank would be at one end of the machine, and at another time at the other end; that he does not recollect how it was situated when the accident occurred.

[1] It is the duty of the master to provide his servant with a reasonably safe place to work in, reasonably safe tools and appliances to work with, and to exercise reasonable care and diligence to keep them in that condition. *Duntley v. Inman*, 42 Or. 334, 340, 70 Pac. 529, 59 L. R. A. 785.

[2] There is no controversy as to the condition of the plank which defendant furnished plaintiff for use while working around the machine. It is contended by defendant's counsel that there is no evidence showing negligence on the part of defendant; and that the broken board had nothing whatever to do with the accident. From the evidence, we think that this was a question for the determination of the jury. The board was offered in evidence, and is an exhibit in the case. From an inspection thereof, and applying natural laws, the jury could have reasonably believed that Kopacín stepped on the side of the board opposite the cleat, and that, the plank and floor being wet and slippery, the former tipped, owing to the defect, and served as a trap, and threw him forward against the machine. There is evidence tending to show this. To be plain, it is difficult to understand how one could step on the side of the board, which is unsupported at one end and near the middle, without its tipping. Kopacín, in his evidence, says that the board raised up, swung around, and slightly slipped. The circumstances, as detailed by the evidence, tend to indicate the manner in which the plank moved, and the proximate cause of the accident.

[3] It was necessary for the testimony of

Kopacin to be interpreted; and it was peculiarly for the jury to decide what plaintiff meant by his somewhat broken language, as well as the weight and value of the same after it was translated. The jury evidently understood from Kopacin and the witnesses that, on account of the corner of the board being split off, the cleat broken off and placed lengthwise, so that it tipped easily, like a long table with only three legs—something like this:



—the board was in a dangerous condition, and was the proximate cause of plaintiff's fall and injury. The evidence on the part of defendant tends to show a different state of facts. This conflict, however, is settled by the verdict of the jury.

Where there is no proof of any fact by which the defendant's conduct may be ascertained, there is nothing for the jury. The mere proof of an accident, therefore, ordinarily raises no presumption of negligence; but, where it is accompanied by proof of facts and circumstances from which an inference of negligence may or may not be drawn, the case cannot be determined by the court as a matter of law, but must be submitted to the jury. *Galvin v. Brown & McCabe*, 53 Or. 598, 608, 101 Pac. 671; *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330.

[4] The defendant contends that the condition of the board was known to plaintiff, and that the latter assumed the risk, and that he was guilty of contributory negligence. The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care should know, the risks to which he is exposed, he will, as a rule, be held to have assumed them; but, where he either does not know, or knowing, does not appreciate such risks, and his ignorance or nonappreciation is not due to negligence or want of due care on his part, there is no assumption of risk. *Millen v. Pacific Bridge Co.*, 51 Or. 538, 549, 95 Pac. 196, and other authorities there cited. There is a difference between knowledge of the surrounding circumstances and appreciation of risk. *Roth v. Northern Pac. Lbr. Co.*, 18 Or. 205, 22 Pac. 842. A servant knowing the facts may be utterly ignorant of the risk. *Clarke v. Holmes*, 7 Hurl. & N. Rep. 937.

[5] It cannot be said, as a matter of law, that the circumstances of this case show conclusively that the danger and risk of the plank tilting, with a man's weight thereon, was so obvious to an ordinary person that it would, in the performance of duties required in operating the machine, appeal to his senses, so that he would appreciate such danger. *Millen v. Pacific Bridge Co.*, supra;

Johnston v. O. S. L. Ry. Co., 23 Or. 94, 81 Pac. 283.

At the time of the accident, the plaintiff was engaged in adjusting the felt, which had worked out of place. This naturally required haste and attention. He is not conclusively presumed to have had constantly in mind the particular danger incident to this act. The care and attention required by an employé, while working about dangerous machinery, may depend upon the facts of the particular case. Whether the circumstances were such as to excuse him from that degree of care and thoughtfulness which a prudent man will ordinarily exercise under usual conditions, and whether, in such a case, the injured party was guilty of contributory negligence, are questions of fact for the jury. *Magone v. Portland Mfg. Co.*, 51 Or. 21, 28, 93 Pac. 450; *Carroll v. Grande Ronde Elec. Co.*, 47 Or. 424, 436, 84 Pac. 389, 6 L. R. A. (N. S.) 290.

The language of this court, in *Viohl v. North Pac. Lumber Co.*, 46 Or. 297, at page 301, 80 Pac. 112, at page 114, is as follows: "Mere knowledge of the danger is not conclusive of negligence in failing to avoid it. A servant's knowledge and his voluntary exposure to the danger are probative facts from which the ultimate fact of negligence must be determined; but they are not conclusive. That the servant exposed himself to dangers which could have been avoided imports negligence only when they were of such a character that a man of ordinary prudence and caution would have refused to have incurred them in the performance of his duties; and these are ordinarily questions of fact, and not of law." See *Hill v. Saugested*, 53 Or. 178, 184, 98 Pac. 524, 22 L. R. A. (N. S.) 634.

The main questions in the case are: Did the company provide plaintiff with a reasonably safe place in which to work? And was the board in a reasonably safe condition to be used for the purpose designed by defendant? It appears that the board had been in use for three years; that it had been broken and one cleat disarranged for 10 days prior to the accident. The jury might fairly have believed that the managers of the company knew, or with reasonable diligence could have known, of the dangerous condition of the same, and, in the exercise of such diligence and care, would have repaired the plank; that the board, in its broken condition, was not reasonably safe for Kopacin to walk upon in regulating and operating the machine.

[6] Defendant assigns as error the refusal of the circuit court to give the following instructions, requested by defendant's counsel: "If you find from the evidence that the plaintiff, while attempting to adjust the felt on defendant's wet machine, failed to use the wheel or attachment on defendant's machine for use in regulating the felt, and instead thereof he was attempting to adjust the felt

by taking hold of the same, or some part thereof, with his hand, and while the rollers of the machine were in motion, and that in so doing, and in failing to use the wheel provided for that purpose, he failed to exercise reasonable and ordinary care for his own safety, and that such failure on his part contributed to the accident, your verdict should be for the defendant." This instruction was requested upon the basis of the testimony of the company's physician, which was to the effect that, after the plaintiff's hand was injured, while he was being treated, he made motions with his other hand, which the doctor construed to mean that he was adjusting the felt with his hands, without using the regulating wheel. This amounts to a mere conjecture. There is no substantial evidence upon which to base such an instruction, and we think the same is not applicable.

[7] Counsel for defendant also assigns as error the refusal of the court to instruct the jury as requested, to the effect that if they found from the evidence that the condition of the board did not cause the same to slip at the time of the accident, and was not the proximate cause of such accident, their verdict should be for defendant. The court in its instructions plainly called the attention of the jury to the negligence alleged in the complaint, to wit, that the defendant negligently allowed a certain board, used by plaintiff in his work, to become broken and split, so that when plaintiff stepped upon the same it tilted and sprung and caused the accident. The court directed the jury to confine their deliberations to the particular negligence alleged with reference to the board, and instructed them that they could not find in favor of plaintiff, unless they found that the defendant was negligent in the particular respect charged; and that this negligence caused the accident. We think the requested instruction was substantially given in different language in the charge of the court, and that the cause was properly submitted to the jury.

Finding no error in the record, the judgment of the lower court is affirmed.

HAHN v. ASTORIA NAT. BANK et al.
(Supreme Court of Oregon. July 23, 1912.)
APPEAL AND ERROR (§ 346*)—TIME FOR APPEAL—DECREE IN EQUITY.

Under L. O. L. § 549, authorizing appeal by any party to a judgment or decree, and section 550, prescribing the manner of taking and perfecting the appeal, without distinction as between judgments and decrees, appeal from a decree as from a judgment must be within six months of entry thereof, notwithstanding motion to vacate it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1891, 1894; Dec. Dig. § 346.*]

Appeal from Circuit Court, Clatsop County; James U. Campbell, Judge.

Suit by John Hahn against the Astoria National Bank and another. From a decree for defendants, plaintiff appeals. Dismissed.

William C. Bristol, of Portland, for appellant. G. C. Fulton, of Astoria, for respondents.

BEAN, J. This is a motion to dismiss an appeal for the reason that the same was not taken within six months from the entry of the decree appealed from. L. O. L. § 550, subd. 5. For a full statement of the case, see *Hahn v. Astoria National Bank*, 114 Pac. 1134.

Counsel for plaintiff contends that the time for taking the appeal began to run from the date of the denial of the motion to set aside the decree. This motion was filed seven days after the entry of the decree, but was not acted upon until more than ten months thereafter. Counsel for defendants, in support of their motion, cite and rely upon *Macartney v. Shipherd*, 117 Pac. 814, and *Gearin v. Portland Ry. L. & P. Co.*, 124 Pac. 256, decided June 11, 1912. In both of these cases it was held that the six months time for taking an appeal began to run from the date of the entry of the judgment. All questions involved in the case at bar are fully discussed by Mr. Justice Burnett in the opinions in the above cases. The reasoning therein applies with even greater force to this suit, and the question is a settled one. It is, however, now contended that a different rule should be applied upon an appeal from a decree in an equity suit from that upon an appeal in an action at law.

Section 549, L. O. L., provides that "any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom." Section 550, L. O. L., prescribes the manner of taking and perfecting the appeal. The application thereof is the same, whether appealing from a decree, or from a judgment in an action at law.

The motion to dismiss this appeal is therefore allowed.

DIAMOND ROLLER MILLS v. MOODY.
(Supreme Court of Oregon. July 23, 1912.)

WAREHOUSEMEN (§ 25*)—DELIVERY BY WAREHOUSEMAN—WRONGFUL DELIVERY—DAMAGES.

Where a warehouseman, receiving wheat under an agreement to keep it until called for by a miller who had purchased the same for his mill, made a delivery without demand from the miller and at a time the mill was being repaired, the warehouseman was liable for the damages occasioned by his failure to keep the wheat until called for, but he was not responsible for expenses incurred by the miller in unloading the cars, in the absence of any-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

thing to show that the warehouseman was required to unload.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 38-47; Dec. Dig. § 25.*]

Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Action by the Diamond Roller Mills against M. A. Moody. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action to recover money. The complaint charges, in effect, that the Diamond Roller Mills is a corporation; that the defendant M. A. Moody, at all the times stated, was operating on the line of the Great Southern Railway at Boyd and at Rice's Station public warehouses; that between September 7, 1908, and October 3d of that year, the plaintiff had on storage in these warehouses a quantity of wheat which it had purchased from persons who had deposited the grain "subject to be shipped at the order of the owner thereof, but not otherwise"; that between such dates the defendant without any order therefor, in the absence of the return of any warehouse receipt, and against plaintiff's protest wrongfully loaded on cars of such railway wheat and unlawfully shipped it to the plaintiff at The Dalles, Or., whereby the grain arrived at a time when plaintiff was unable to unload it, and was compelled to leave it on the cars until the demurrage amounted to \$111, which sum plaintiff was obliged to pay the railway company in order to obtain the wheat; "that, in addition thereto, the plaintiff was compelled to employ extra men to unload said cars at the time when the same was received, but which the plaintiff would not have been required to have employed but for said wrongful act of the defendant in shipping the same against the wish and without the order of said plaintiff, as aforesaid," and that plaintiff was also obliged to expend \$19.20 for electric power used in unloading and storing the wheat which sum it would not have been compelled to incur but for the wrongful shipment at a time when plaintiff did not have its elevators in use or its mill in operation. Judgment was demanded for the sum of \$184.20.

The answer admitted that plaintiff was a corporation; that at the times and places stated in the complaint the defendant operated public warehouses; that plaintiff had on deposit therein wheat purchased from persons who had stored it to be delivered pursuant to their orders; that defendant shipped the wheat to plaintiff, but denied that such shipment was wrongful or unlawful. All other allegations of the complaint were denied. For a further defense and by way of counterclaim it was averred that defendant had the right at any time to terminate the bailment and redeliver the wheat;

that, acting upon such authority, he shipped the grain to plaintiff, which accepted and received it and that the loading and shipping thereof was reasonably worth 50 cents per ton, aggregating \$340.73, no part of which had been paid and for which sum judgment was demanded. The reply put in issue the allegations of new matter in the answer, and, the cause having been tried, a verdict was returned for plaintiff in the sum of \$166.20, and, judgment having been rendered thereon, the defendant appeals.

John M. Pipes, of Portland (W. H. Wilson of Portland, on the brief), for appellant. F. W. Wilson, of Portland (Bennett & Sinnott, on the brief), for respondent.

MOORE, J. (after stating the facts as above). [1] The bill of exceptions shows that the plaintiff owns flour mills, located at The Dalles, and, in order to keep them in operation, it purchased from various persons quantities of wheat which they had stored in the defendant's warehouses at Boyd and at Rice's Station on the line of the Great Southern Railway. To each of such depositors the defendant issued a warehouse receipt, of which the following is a copy, in blank, to wit: "No. _____. Original. _____ Station, Oregon _____ 191-. Received for storage from _____ sacks of wheat, oats, barley, gross weight _____ lbs., which amount, kind and grade of grain will be delivered to his order on return of this receipt any (and) payment of storage and hauling charges, and repayment of advance with interest. Loss or damage from fire or unavoidable casualties at owner's risk. Grade _____. Condition _____. Without the return of any of these receipts and against plaintiff's consent the defendant loaded and shipped 13 cars of wheat which arrived at The Dalles September 7, 1908, when plaintiff's mills were being repaired, and in consequence of the work of restoration the grain could not then be stored in its elevators, but was allowed to remain on the cars until a demurrage of \$111 was due the railway company and had to be paid before the wheat would be delivered. Thereafter the defendant loaded and shipped to plaintiff in the same manner 12 other car loads of wheat, but, the mills having been repaired in the meantime, no delay was experienced in unloading the grain. James Snipes, the plaintiff's general manager, was interrogated by its counsel respecting the charge for extra labor, as set forth in the complaint. An objection to the inquiry on the ground that it was not within the pleadings and was incompetent, irrelevant, and immaterial having been overruled and an exception allowed, the witness stated in substance that in order to repair the mills and put them in operation as soon as possible, so as to unload the wheat

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

without further delay, all the regular employees were put at work in making the necessary restoration, and he was compelled to engage three extra men at \$2.25 per day to whom was paid \$54 for unloading and storing the wheat in plaintiff's elevators and mills.

Assuming without deciding that the defendant had no authority to terminate the bailment at pleasure as is alleged in the answer, and for that reason if he shipped and delivered, to the person lawfully entitled thereto, wheat without his order evidenced by a return of the warehouse receipt, a liability would arise for all damages that would necessarily result from a breach of the agreement to keep the grain until called for, we do not see how the defendant would be responsible for any expense incurred in unloading the cars. The warehouse receipt does not contain any provision to that effect, nor does the complaint state any fact from which such a charge could legitimately result. Keeping all the regular employees at work in making the necessary repairs to the mill, in order to put it in proper condition for operation as soon as possible, and employing extra men to unload the cars, may have diminished the demurrage which could have been collected. Such decrease of outlay is not a sufficient justification for imposing upon the defendant the expense incurred in discharging the wheat, in the absence of a contract requiring a performance of that service by him. It was incumbent upon plaintiff to minimize as much as possible the damages which it might sustain by reason of the alleged wrongful shipment of the grain. Wheat is a commodity which at the time of year specified herein could have been procured in any amount in the open market in Oregon, and, if the mills were not then in a proper condition to receive the grain when it arrived, it would seem that plaintiff could have sold the wheat for the then current price, thereby possibly avoiding all demurrage, and could thereafter have purchased other wheat of the same quality and of equal quantity at a time when the grain could have been received and stored in its elevators, and thereupon charged and recovered from the defendant the damages thus sustained. But, however this may be, it is impossible to see how the defendant was liable for the employment of extra laborers engaged to unload the wheat when that duty devolved upon the plaintiff. The same may be said also with respect to the outlay for electric power used to unload and store the grain.

Believing that an error was committed in admitting the testimony so objected to, the judgment must be reversed, and, as the bill of exceptions does not purport to contain all the evidence given in the lower court, the cause is remanded for a new trial.

(32 Or. 530)

McALLISTER v. AMERICAN HOSPITAL ASS'N et al.

(Supreme Court of Oregon. July 23, 1912.)

1. CORPORATIONS (§ 99*) — STOCKHOLDERS — PROMOTERS' SHARES — RIGHTS AS TO CREDITORS.

The voting of shares of stock to the promoter of a corporation as a gratuity is beyond the power of its directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.*]

2. CORPORATIONS (§ 232*) — SUBSCRIPTION TO STOCK — PROMOTERS' SUBSCRIPTION — LIABILITY OF SUBSEQUENT HOLDER.

Where the promoter of a corporation subscribed for a certain number of its shares, but did not pay anything therefor, he was liable to pay the entire par value to the corporation, and successive owners of such stock were also liable for its unpaid par value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.*]

3. CORPORATIONS (§ 244*) — STOCKHOLDERS' LIABILITY FOR UNPAID SUBSCRIPTIONS — LEGAL HOLDERS.

Only the legal holder of stock is liable for an unpaid portion of the subscription price, so that a person who took the equitable title of shares as indemnity for liability upon the corporation's note to a bank did not thereby become liable on the stock either to the corporation or to its creditors as owner.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960-977; Dec. Dig. § 244.*]

4. CORPORATIONS (§ 232*) — SUBSCRIPTIONS TO STOCK — REQUISITES OF CONTRACT — "SUBSCRIBER."

Though persons securing shares of stock in a corporation at a price less than par expressly contract that their liability shall be limited to the price paid, and do not formally subscribe to the stock, a subscription is presumed from any agreement or act by which the stock is acquired from the corporation, and such persons are subscribers within Const. art. 11, § 3, providing that stockholders of all corporations shall be liable for an indebtedness of said corporation to the amount of their stock subscribed and unpaid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884; Dec. Dig. § 232.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6732-6733.]

5. CORPORATIONS (§ 240*) — LIABILITY OF STOCKHOLDERS — KNOWLEDGE OF CREDITOR.

A creditor who dealt with a corporation with knowledge that part of its shares were issued for less than par value could not complain that the transaction was a fraud upon him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 934-942, 1099-1100½; Dec. Dig. § 240.*]

6. CORPORATIONS (§ 268*) — LIABILITY OF STOCKHOLDERS — ACTIONS BY CREDITORS — EVIDENCE — ISSUES, PROOF, AND VARIANCE.

In an action by a creditor of an alleged insolvent corporation against certain stockholders to collect unpaid balances due on stock subscriptions, evidence that the plaintiff dealt with the corporation with knowledge that the stock of defendant was by contract nonassessable was properly refused, where the answer was a denial of the transfer of certain shares to a certain defendant, or that he was the holder and owner thereof, and a denial that

the other defendants subscribed for stock, but admitting their ownership thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1129, 1131, 1133-1147, 2276; Dec. Dig. § 268.*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by E. S. J. McAllister against the American Hospital Association and others. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

Plaintiff obtained judgment against the American Hospital Association, a corporation, in the sum of \$629.55, and brings this suit against certain stockholders of the corporation, alleging its insolvency, for the purpose of collecting from them the amount of the judgment to the extent of their unpaid stock subscriptions.

The Hospital Association was incorporated on August 8, 1905, with a capital stock of \$25,000, consisting of that many shares of the value of \$1 each, but it ceased doing business in the year 1907. R. H. Jewell, D. H. Smith, and J. V. Creighton executed the articles of incorporation, and on the same day signed the following statement, which is entered in the book in which are recorded the articles, by-laws, and minutes of the stockholders' and directors' meetings:

"We, the undersigned, do hereby subscribe for shares of the capital stock of the American Hospital Association in the amount and value set opposite our respective names.

Date.	Name of Subscriber.	Number of Shares.	Value.
Aug. 8, 1905.	D. H. Smith.	10	80¢
Aug. 8, 1905.	J. V. Creighton.	10	80¢
Aug. 8, 1905.	R. H. Jewell.	12,510	80¢."

On the same day, after the election of the directors, the board was organized, and, among other things, it was ordered "that R. H. Jewell be voted 15,000 shares of the capital stock as a bonus for promoting, organizing, and installing the system for handling the business"; also at that time there was issued to Jewell certificate No. 1 for 15,000 shares of capital stock and a certificate for 1,500 shares to D. H. Smith and a like one to J. V. Creighton, as transferred from Jewell, and certificate No. 1 was canceled and certificate No. 4 was issued to Jewell for 12,000 shares as the remainder of the shares as evidenced by certificate No. 1. Certificates No. 5 and No. 6 were issued to Creighton and Smith for the amount of their subscriptions, 10 shares each, which appear in the record canceled on their face without transfer, and upon which evidently no payments were made. The corporation was organized and the business conducted without any payments made on the capital stock until November 16, 1905, when defendant Peters purchased from the corporation 1,000 shares for the agreed price of \$400. Soon thereafter Geo. A. Carney purchased 1,000 shares, Dr. F. S. Smith 1,000 shares, Geo. A.

Carney and his son 500 shares each, and Marshall 1,000 shares at the agreed price of 40 cents a share. Some of these certificates were not issued until March 16, 1906, at which time the board of directors ratified the sales and ordered the issuance of the certificates, and, in effect, authorized the sale of stock at 40 cents a share.

It is admitted in the pleadings and oral proof that defendant Peters is the owner of 2,000 shares, having succeeded to the 1,000 shares of Geo. A. Carney, though it does not appear from the record that they were re-issued to him. Of these 12,000 shares issued to Jewell, 5,000 shares by various transfers came into the hands of Dole on March 19, 1906, by certificates No. 24, No. 25, and No. 27, which were ratified by the stockholders at a regular meeting. On March 27, 1906, Dole, as vice president and manager of the corporation, it being in need of money and evidently without credit, induced Cohen to sign a note with the corporation to the bank for \$2,000, which the latter loaned to the former on the credit of Cohen, and as a part of the arrangement Dole transferred to Cohen the certificates of stock numbered 24, 25, and 27, representing 5,000 shares, to indemnify him against his liability on the note. Cohen afterwards paid about \$1,600 on the note, but made no effort to enforce his lien upon the stock except that on May 21, 1906, he surrendered to the company certificate No. 25, which was for 1,000 shares and had certificate No. 30 issued to him therefor. Upon the trial the court rendered a decree dismissing the suit, and plaintiff appeals.

R. F. Peters, of Portland (A. E. Clark and M. H. Clark, both of Portland, on the brief), for appellant. J. T. McKee, of Portland (Cake & Cake, of Portland, on the brief), for respondents.

EAKIN, C. J. (after stating the facts as above). [1] The voting of this 15,000 shares of stock to Jewell, although referred to as a bonus, was, in fact, a gift, and exceeded the amount of the unsubscribed stock. This act was beyond the power of either the stockholders or directors, at least as against the creditors of the corporation. The promoters of a corporation cannot issue to themselves capital stock of the corporation as a gratuity. The capital stock represents the capital in the business, stands as the guaranty to the public of its ability to meet its obligations, and is not subject to disposal at the whim of the promoters or directors. It is said in *Macbeth v. Banfield*, 45 Or. 553, 564, 78 Pac. 693, 106 Am. St. Rep. 670, in discussing the liability of the stockholder: "His liability is to the full amount of the capital stock subscribed. * * * The obligation is to pay in money. * * * It must be the equivalent of the par value of his stock, * * *

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and it is a natural sequence that, if stock liability is to be discharged in property, the property should measure up to a money value. Such is no doubt the plain intentment of the laws; otherwise, it might easily be so managed that stock subscribers would be virtually exonerated from their statutory liability by pretended and simulated agreements with the directors, and the corporation left without assets of material moment from the beginning, which would atrociously belittle the representations made by the articles of incorporation touching the capital stock. * * * The common declaration (of the law) being that the stock must be paid in money or money's worth."

[2] However, it is not necessary to determine the status of the bonus stock as Jewell subscribed for 12,510 shares—a majority of the stock—for which, as between him and the corporation, he was liable and undertook to pay the par value; and, as the corporation could not be organized until half the stock was subscribed, 12,510 shares of the 15,000 issued to Jewell was the amount of stock subscribed by him, and the successive owners of it were also liable for its unpaid par value.

[3] Cohen only became the owner of the 1,000 shares transferred to him by certificate No. 30, and it is only the holder of the legal title to the stock who is liable for the unpaid subscription. *Branson v. Oregonian Ry. Co.*, 10 Or. 278; 4 *Thomp. Corp.* § 4902. Cohen, as the equitable owner of the other 4,000 shares held by him as indemnity for liability upon the corporation's note to the bank, did not become liable thereon to the corporation or the creditors as owner. This is expressly decided in *Branson v. Oregonian Ry. Co.*, and affirmed in the same case in 11 Or. 163, 2 *Pac.* 86. See, also, *Powell v. W. V. R. R. Co.*, 15 Or. 401, 15 *Pac.* 663. As to the 1,000 shares represented by certificate No. 30, Cohen is liable thereon for the unpaid par value thereof.

[4] Defendants Peters, Smith, Marshall, and Carney, from whom Peters acquired 1,000 shares, did not subscribe for the stock in the ordinary way, but purchased at an agreed price. There is a great diversity of opinion in the decided cases as to whether upon the purchase from a corporation of original stock at less than par the purchaser is liable for the amount unpaid to creditors of the corporation in case of its insolvency; many authorities holding that he is. It is said in *Jackson v. Traer*, 64 Iowa, 469, 476, 20 N. W. 764, 52 *Am. Rep.* 449: "If the rule shall be adopted that directors may issue stock upon the receipt of any sum, no matter how small, and provide that the stock shall be treated as fully paid, or, what is the same thing, that the remainder of the par value shall never be called for, no person could safely subscribe for stock in an incorporated company. However well conceived the enterprise might be, and however ju-

diculously the company might be organized, it would involve nothing but peril, if the directors at their pleasure can be allowed to fritter away the authorized capital of the company and curtail its resources in the mode in question." *Vaughn et al. v. Alabama Nat. Bank*, 143 Ala. 572, 42 *South.* 64, and note to this case in 5 *Ann. Cas.* 667, 4 *Thompson, Corp.* § 3436, and *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551.

There are cases, however, holding that the liability of the shareholder to pay for the stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and, in the absence of either of these grounds of liability, it is not perceived how a person to whom shares have been issued as a gratuity has by accepting them committed a wrong upon creditors, or made himself liable to pay the nominal face value of the shares as upon a subscription or contract, except to creditors who have relied upon the representation that the capital stock is as stated; in other words, that it was paid in full. *Christensen v. Eno*, 106 N. Y. 97, 12 N. E. 648, 60 *Am. Rep.* 429; *Hospes v. Northwestern M. & C. Co.*, 48 *Minn.* 174, 50 N. W. 1117, 15 L. R. A. 470, 31 *Am. St. Rep.* 637; *Great West., etc., Co. v. Harris*, 198 U. S. 561, 25 *Sup. Ct.* 770, 49 L. Ed. 1163; *Clark v. Bever*, 139 U. S. 96, 11 *Sup. Ct.* 468, 35 L. Ed. 88; *McDowell v. Lindsay*, 213 Pa. 591, 63 *Atl.* 130; 1 *Cook on Corp.* § 42.

As we have seen, the disposition of the stock by the corporation to defendants was not by formal subscription to the stock, but by a contract of sale for a specific price less than par, but the capital stock of a corporation is presumed to represent the capital in the business, a trust fund in that amount for the benefit of the creditors, and, as to them, the corporation has no authority to make any contract in the disposal of the stock that will reduce its capital, and persons subscribing for stock or otherwise acquiring it from the corporation are bound to take notice of the power of the corporation. This is what is intended by section 3 of article 11 of the Constitution, which provides that "the stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid." This is well stated in *Macbeth v. Banfield*, *supra*, where Mr. Justice Wolverton quotes with approval from *Hospes v. Northwestern M. & C. Co.*, 48 *Minn.* 174, 50 N. W. 1117, 15 L. R. A. 470, 31 *Am. St. Rep.* 637: "The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a

fraud upon them." Therefore the holders of the stock issued as a bonus or gift to promoters, or otherwise disposed of by the corporation for less than par value, are liable accordingly for the par value of the stock to creditors who have acted upon the faith of the capital as represented by the stock.

The principal contention of defendants is that they are not subscribers to the stock and therefore not liable as such for its par value, that they acquired their stock by contract and not by subscription, and that it is nonassessable. It becomes important to determine whether the holder of stock, acquired in such a manner, is liable to creditors for the par value of the stock without a formal subscription to the stock. We have seen that the corporation can make no disposition of the stock or agreement with the holders of it, so far as creditors are concerned, that will relieve the stock from liability. Subscription to the stock is presumed from any agreement or act by which the stock is acquired from the company. It is said in *Cook on Corporations*, § 52: "Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation. When one accepts or assumes the position and duties and claims the right and privileges and emoluments of a stockholder, and the corporation accepts or acquiesces therein, such person is estopped to deny that he is a subscriber, even though there may have been something irregular or defective in the form or manner of his subscription, or there may have been no formal subscription at all." And in *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, Sanborn, J., says: "The Constitution, the statutes under which the corporation is organized, and the established rules of law in force when he becomes a stockholder are read into and become a part of this contract. By his subscription for the stock, or by his receipt and acceptance of it, he solemnly agrees, in consideration of the benefits derived from its ownership, that he will faithfully perform the obligations and discharge the duties imposed upon a stockholder by the Constitution, the statutes, and the law." See, to the same effect, *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587, and the authorities there cited; *Planters', etc., Co. v. Webb*, 144 Ala. 666, 39 South. 562; *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572; 42 South. 64, 5 Ann. Cas. 665; *Flinn v. Bagley* (D. C.) 7 Fed. 785. Within these authorities defendants or their assignors were subscribers for the stock and liable to the creditors accordingly.

[5, 6] Defendants Peters, Smith, and Marshall at the trial offered evidence tending to show that they purchased stock from the corporation at 40 cents on the dollar, and that the stock of Cohen was issued as a gift

to Jewell, and therefore contend that as between them and the corporation the stock was nonassessable, and that as plaintiff extended the credit to the corporation for which he seeks to recover here, with knowledge of these facts, he is without remedy as against defendants. A creditor cannot complain unless the transaction was a fraud upon him; that is, unless he dealt in the corporation without knowledge that the stock was issued for less than par value. The evidence to this effect was objected to by plaintiff for the reason that it goes to a matter not in issue, and this objection, we think, was well taken. There are authorities holding to the effect that creditors cannot complain of the sale of stock by the corporation for less than par value, unless they have been defrauded thereby. See cases above cited on this point. But there is no issue tendered as to the stock being issued as paid in full or as being nonassessable, or that plaintiff extended the credit of the company with knowledge that the stock was issued as nonassessable. The issue raised by the answer is a denial that 5,000 shares of Jewell's stock was transferred to Cohen, or that he is the owner and holder thereof, and a denial that Carney, defendants Peters, Smith, or Marshall subscribed for stock as alleged, but admits their ownership of stock as alleged, and the evidence upon that question was immaterial.

The conclusion is unavoidable that the defendants are liable pro rata to plaintiff for the amount of his judgment against the corporation to the extent of the unpaid par value of stock owned by them or so much thereof as is required for that purpose; that the amount unpaid upon the stock of Peters is \$935, upon the stock of Marshall, \$475, upon the stock of F. S. Smith, \$475, and upon the stock of Max Cohen, \$1,000.

The decree is reversed, and one will be entered here as indicated.

REHFIELD v. WINTERS.

(Supreme Court of Oregon. July 30, 1912.)

1. APPEAL AND ERROR (§ 1008*)—WEIGHT OF EVIDENCE.

The weight and value of the evidence was for the trial court, in an action at law tried without a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

2. EVIDENCE (§ 148*)—COMPETENCY.

Evidence is not incompetent merely because it is weak.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 438; Dec. Dig. § 148.*]

3. FRAUD (§ 58*)—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

In an action for damages from being induced by fraud to part with property in exchange for worthless bonds, evidence that interest coupons had been detached from the bonds, to corroborate defendant's false state-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

ment that the interest was always promptly paid, sustained a finding that defendant knew the bonds to be of no value.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

4. ELECTION OF REMEDIES (§ 10*)—FINALITY OF ELECTION.

Where, in attempting to make an election, one commences an action in ignorance of substantial facts which proffer an alternate remedy, his action is not binding, but, when informed, he may adopt the other remedy, provided he acts with reasonable dispatch.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 18; Dec. Dig. § 10.*]

5. JUDGMENT (§ 570*)—RES ADJUDICATA.

Where plaintiff's action in equity to rescind a sale contract for fraud was objected to by defendant as not being the proper remedy, and a nonsuit taken, defendant could not set up such action in bar of plaintiff's subsequent action for damages from such sale.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1028-1045; Dec. Dig. § 570.*]

6. ESTOPPEL (§ 68*)—POSITION IN JUDICIAL PROCEEDINGS.

Counsel cannot induce the court to adopt an erroneous rule when it operates in his favor, and be heard to object to the application of the same rule when it militates against him.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

7. APPEAL AND ERROR (§ 1170*)—DECISION.

Under Const. art. 7, § 3, as amended (Laws 1911, p. 7), the Supreme Court will affirm a judgment which it deems correct, notwithstanding any error committed during the trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by E. T. Rehfield against L. S. Winters. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint alleges, in substance, that on the 17th day of January, 1910, plaintiff, who owned a stock of groceries, stores fixtures, and furniture, agreed with defendant to sell the same for \$1,050; that, for the purpose of cheating and defrauding plaintiff, defendant represented that he was the owner of a second mortgage, 6 per cent. gold bond, issued by the Churubusco Water & Light Company of Churubusco, Ind., for the sum of \$200, being No. 11, dated May 1, 1890, upon which the interest had been paid to November 1, 1909, and a first mortgage, 5 per cent. bond of the North Jersey Gas Company of Paterson, N. J., for \$500, being No. 329, dated February 1, 1901, upon which the interest had been paid to August, 1909; that the bonds were each secured by a mortgage covering all of the property of the respective companies, and each worth its full face value; that defendant had collected the interest thereon for the last semiannual payments; that defendant well knew such representations to be false and fraudulent; that the bonds were of no value, and that they were not liens upon any property; that,

relying on defendant's representations, plaintiff sold his stock of groceries and furniture, and received the bonds on account thereof at a valuation of \$700; that he was thereby damaged in said sum.

Defendant answered, denying the allegations of the complaint, and further set forth that in February, 1910, plaintiff commenced a suit against defendant to rescind the contract of sale, and to be restored to the possession of the property, based upon the same facts as are alleged in the complaint. The gist of the answer is as follows: "That said plaintiff, in and by the commencement of said suit, by the filing of said complaint hereinbefore set forth, chose and elected to proceed against this defendant by rescinding said contract for the sale of said personal property and securing the possession of said personal property. * * * It is further alleged that defendant, Winters, appeared in the suit and filed his answer; that on the 1st of June, 1910, upon the trial thereof, plaintiff offered evidence in support of his complaint, which was objected to by the defendant's attorneys; that the objection was sustained by the court, and a judgment rendered in favor of the defendant, dismissing the plaintiff's complaint; that plaintiff, having elected to so proceed, cannot now require defendant to respond in damages. The complaint in the equity suit was set out in *hac verba* in defendant's answer.

Plaintiff filed a general demurrer to the defendant's further and separate answer, which was sustained. The cause was tried by the court, without the intervention of a jury. At the close of plaintiff's testimony, defendant moved the court for a nonsuit, which motion was denied. This ruling the defendant assigns as error. The circuit court made findings of fact in favor of plaintiff, substantially as alleged in the complaint, and rendered judgment thereon against defendant for the sum of \$739.29.

Charles E. Lenon, of Portland (Jeffrey & Lenon, of Portland, on the brief), for appellant. W. X. Masters, of Portland, for respondent.

BEAN, J. (after stating the facts as above). [1] Upon an appeal from a judgment in an action at law, where the cause was tried by the court, without a jury, we can only examine the record to see whether or not there is any competent evidence to support the findings of the trial court. The weight and value of the evidence were for that court. *Salem Traction Co. v. Anson*, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675; *Salem v. Anson*, 40 Or. 339, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485; *Astoria Railroad Co. v. Kern*, 44 Or. 538, 76 Pac. 14; *Courtney v. Bridal Veil Box Factory*, 55

Or. 210, 105 Pac. 896; *Sun Dial Ranch v. May Land Co.*, 119 Pac. 758.

Considering the evidence from this point of view, E. T. Rehfeld, plaintiff, testified, in substance: That at the time of the transaction Winters offered to give the bonds in payment of \$700 of the purchase price. That Winters stated that he had had the bonds for some time, and that the town in which one of the bonds was issued had grown, and was getting along fine; also that the interest was always paid promptly, and that the bonds were just as good as gold. That Winters said: "Why, I know that they are good; if they are not good, I am here to make them good. I am responsible." Plaintiff states that at the time of the sale he did not make any effort to find out whether the bonds were good, but took defendant's word for it; that when he was informed of their worthlessness, and of the fact that no interest had ever been paid thereon, he consulted with his attorney and proceeded to take possession of the store; that he afterwards learned that Mr. Winters owned considerable property. Mrs. E. T. Rehfeld testified, substantiating her husband's evidence as to part of the statement made at the time of the negotiation.

The deposition of Elmer E. Gandy, a banker, who had resided in Churubusco, Whitney county, Ind., for 33 years, was read in plaintiff's behalf. It showed that he was acquainted with the business of the Churubusco Water & Light Company, which was organized under the laws of Indiana, for the purpose of taking over the water and light plant of the town of Churubusco; that the company continued business for only one or two years; that he was familiar with the property owned by the corporation, but that they did not own any now that he knew of; that he identified the \$200 bond; that the interest coupons had been dishonored at the bank at different times; that the bond is worthless, and never had any market value.

The deposition of Charles C. Scott, an attorney at law, of Paterson, N. J., and witness for plaintiff, is to the effect that he had always resided in the above city; that he was one of the incorporators of the North Jersey Gas Company, a corporation organized under the laws of the state of New Jersey; that he had offices in the same suite with the company's attorney; that he identified the \$500 bond; that he had no recollection of any interest having been paid, and that the bond had no market value at that time; that the company was organized to do business in the city of Paterson, N. J., but that it had never supplied the city with any gas, or, to the best of his knowledge, any other place.

Defendant Winters testified in part that he purchased the bonds for value, and that he told plaintiff that he did not know their value, but that he could inquire in regard thereto; that he carried them just as he did

money; that he gave plaintiff the name of the man from whom he got the bonds.

[2] It is first contended by counsel for defendant that there was no legal evidence showing that the representations of defendant were false. The last two witnesses resided at the respective places where the bonds were issued. They were business men, acquainted with the corporations, and likely to know of the latter's property. Their evidence is to the purport that neither of these companies had been in existence for a long time before the bonds were sold to plaintiff, and tends to show that the bonds were worthless. One of these witnesses was a banker, who appeared to know the value of bonds in financial circles. Their testimony was uncontradicted. While corporations are a legal entity, their property is usually visible, like that of a natural person. The circuit judge, as trier of the facts, might well have believed that neither of the corporations had any property, as none could be found; that the interest had not been paid as represented; and that the bonds were worthless. The real objection to this evidence goes to the weight, and not to the competency, of the same. *Van De Wiele v. Garbade*, 120 Pac. 752.

[3] It is further contended that the evidence does not show that the defendant knew that the bonds were valueless. If a piece of clay, veneered with gold, should be sold by one person to another, for a considerable value, that circumstance alone would show that the person negotiating the sale knew the quality of the article. In this case, while the bonds were not veneered, they were trimmed up for dress parade, by carefully detaching the coupons, in order to corroborate the statement of the defendant that the interest was always paid promptly, when, in fact, it had not been paid at all. This circumstance was, we think, some evidence that defendant knew the bonds to be of no value, and to find otherwise would be impeaching the intelligence of defendant. There is other indicia of fraud in the transaction, which need not be specified. The trial judge heard the testimony of the witnesses and made the findings of fact. There is competent evidence to support those findings, and they should not be disturbed for want of evidence.

[4] It is also ably contended by the learned counsel for defendant that the plaintiff, having previously elected, by the commencement of the equity suit, to stand upon a rescission of the contract of sale, should not now be allowed to affirm the contract and adopt an entirely different and opposite course of procedure. The prosecution by plaintiff of an action at law to judgment, or a suit in equity to decree, with knowledge of his rights and of the facts, is held to be a conclusive election of the tribunal in which the action or suit is prosecuted, which will

bar subsequent proceedings for the same cause in the other tribunal. 15 Cyc. 264.

If, in attempting to make an election, one commences an action in ignorance of substantial facts which proffer an alternate remedy, and the knowledge of which is essential to an intelligent choice of procedure, his action is not binding. He may, when informed, adopt a different remedy. But if he does not do this with reasonable dispatch, he will be deemed to have waived the right, and his original act will ripen into a bar. 7 Enc. of Pleading and Practice, 366; 15 Cyc. 262; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; *Kinney v. Klernan*, 49 N. Y. 164; *Agar v. Winslow*, 123 Cal. 587, 56 Pac. 422, 69 Am. St. Rep. 84; *Mankin v. Mankin*, 91 Iowa, 406, 59 N. W. 292; *Lentz v. Flint, etc., Ry. Co.*, 53 Mich. 444, 19 N. W. 138; *Bach v. Tuch*, 47 Hun (N. Y.) 536; *Id.*, 126 N. Y. 53, 26 N. E. 1019.

[5] The records in the suit commenced by plaintiff are not all before us. From the record in the case at bar, it appears that upon the hearing in the equity suit the defendant made objections thereto, and evidently contended that such remedy was not available to the plaintiff. A nonsuit was taken by the plaintiff. Whether or not the defendant's contention was correct, we need not decide. The circuit court held that such contention was correct, and, in effect, that plaintiff could not obtain relief in equity. The defendant, having obtained such ruling, cannot now well claim that it was erroneous. The plaintiff testifies, and it is not disputed, that at the time of the commencement of the suit in equity he knew nothing about Mr. Winters' ability to make the bonds good; and that when he was informed that the same were valueless he proceeded to take possession of the store. He then commenced suit, and in his complaint prayed that the defendant be restrained from disposing of the property, pending the determination thereof. This appears to be one of the main purposes of the suit.

The case of *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109, was an action brought to recover damages for the violation of a dramatic copyright. Daly first brought a suit in equity, in which he prayed for an injunction, and asked for an accounting of money and profits received by defendant. The motion for an injunction was denied. It was claimed that by first proceeding in equity the plaintiff made an election to recover profits, which effectually barred him from a recovery of damages. At page 160 of 175 U. S., at page 67 of 20 Sup. Ct. (44 L. Ed. 109), of the opinion, the court, speaking through Mr. Justice Peckham, said: "The equity action was brought to enjoin the defendant from performing the play of *After Dark*, with the railroad scene in it, taken from the plaintiff's play, *Under the Gas*

Light, and the injunction was asked for on the ground that plaintiff's injuries could not be accurately ascertained or computed, and compensation for such injury could not be made by damages; and as a portion of the relief complainant asked that the defendant be decreed to render a full and true account of all money and profits received by him. The decree in that case, however, did not direct the master to ascertain anything in regard to profits, no evidence was offered upon that subject, no finding was made thereon, and upon the coming in of the master's report no final judgment or decree for profits was ever asked or rendered. In view of these facts, we think there was no election of an inconsistent remedy by the plaintiff in the action which would bar him from the maintenance of this action for the recovery of damages. * * * The relief sought by Rehfield in this action is practically the same as in the first suit. See *Smith v. Bricker*, 86 Iowa, 285, 290, 53 N. W. 250.

[6] All of the testimony in the case under consideration is attached to the bill of exceptions. From a consideration of all the record submitted, we are of the opinion that the judgment of the lower court was such as should have been rendered in the case. If there was error in sustaining the demurrer to the new matter in defendant's answer at the instigation of counsel for defendant, he should not now be permitted to take a position inconsistent with his former contention. *State v. Hassing*, 60 Or. 81, 118 Pac. 195. If plaintiff had no grounds for equitable cognizance, then he is entitled to his remedy at law. We do not think the case should be reversed for the reason assigned. Apparently defendant desired to try the issues in a law action, where he could have the benefit of a jury trial. This was done.

[7] Under the provisions of section 3, art. 7, of the Constitution of this state, as amended (Laws 1911, p. 7), the judgment of the lower court should be affirmed; and it is so ordered.

MURPHY v. PANTER et al.

(Supreme Court of Oregon. July 16, 1912.)

1. BILLS AND NOTES (§ 52*)—ACCOMMODATION PARTY—LIABILITY OF "ACCOMMODATION MAKER"—"PRIMARILY LIABLE."

Under L. O. L. § 5862, defining an "accommodation maker" as one who has signed a negotiable instrument without receiving value, but providing that such person is liable to a holder for value, notwithstanding the holder knew him to be only an accommodation party, and section 6023, defining a person "primarily liable" as one who is absolutely required to pay a negotiable instrument, and sections 5952, 5953, providing for the discharge of a negotiable instrument by payment, and that a person secondarily liable shall be discharged by indulgence of the maker, an accommodation maker is primarily liable, and is not discharg-

ed, notwithstanding an indulgence to parties secondarily liable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 71; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 1, p. 74; vol. 6, p. 5550.]

2. BILLS AND NOTES (§ 499*)—ACTIONS—BURDEN OF PROOF.

When a defendant admits a cause of action and relies upon the defense of payment, he has the burden of proving that fact; and so a maker of a note who pleads payment has the burden of proving it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1682, 1695–1697; Dec. Dig. § 499.*]

3. EVIDENCE (§ 441*)—PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT.

The terms of a written assignment for the benefit of creditors cannot be varied by parol evidence of an understanding by the assignor that he was to be released from all indebtedness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. § 441.*]

4. EVIDENCE (§ 591*)—CONCLUSIVENESS ON PARTY INTRODUCING.

A party is bound by the testimony of his own witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440–2443; Dec. Dig. § 591.*]

5. APPEAL AND ERROR (§ 1175*)—REVIEW—VERDICT.

Under Const. art. 7, § 3, as amended (Laws 1911, p. 7), providing that no fact tried by a jury shall be otherwise re-examined, unless the court can fairly say there is no evidence to support the verdict, a verdict in favor of the accommodation maker of a note, based on the plea of payment, cannot be remanded, where there is no evidence showing payment or discharge of the note.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573–4587; Dec. Dig. § 1175.*]

6. APPEAL AND ERROR (§ 1175*)—REVIEW—DETERMINATION.

Under the direct provisions of Const. art. 7, § 3, as amended (Laws 1911, p. 7), the appellate court will, where all the testimony is in the record, enter the judgment which should have been entered below.

[Ed. Note.—For other cases see Appeal and Error, Cent. Dig. §§ 4373–4387; Dec. Dig. § 1175.*]

Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by W. H. Murphy against William R. Panter and others. From a judgment for the defendant named, the plaintiff appeals. Reversed.

The complaint alleges, in substance, that on May 1, 1908, at Bandon, Or., the three defendants, for a valuable consideration, made, executed, and delivered to Tillman & Bendel of San Francisco, Cal., their promissory note for the sum of \$3,079.49, with interest at 8 per cent. per annum, payable in 10 equal installments, the first installment to be paid on or before May 30, 1908, and the remaining installments on each and every month until the whole should be paid. Should default be made in the payment of any one of the installments, the balance should immediately

become due. The note was indorsed to plaintiff by Tillman & Bendel. A payment of \$923.80 was made in June, 1908.

The defendant William R. Panter answered, admitting the execution of the note. He denied that it was executed for a valuable consideration, that anything remained due thereon, or that he had any knowledge of the assignment of the note. For a further and separate answer, he alleged that the same was signed by him, without consideration, as an accommodation maker, with the understanding and upon the express condition with Tillman & Bendel that they would advise him of the nonpayment of any installment; that he was not so informed; that the time for the payment of the note was extended by Tillman & Bendel without his knowledge or consent. For a second separate defense, this defendant alleged that about the 24th day of September, 1908, defendants Thomas W. Panter and William A. Panter, as Panter Bros., made an assignment of all their stock of merchandise, fixtures, books of account, and cash on hand to E. H. Fahrbach, trustee, representing the San Francisco Board of Trade, in full discharge of all debts and liabilities of the firm, and for the benefit of Tillman & Bendel; that the latter firm has received payment and settlement in full for all debts against Panter Bros., including the note sued on; that the plaintiff was not a bona fide holder of the note, for value, in the usual course of business. This defendant alleged a third and separate defense as to the nonnegotiability of the note. Counsel for plaintiff first moved to strike out, as irrelevant, the substance of the separate defenses. The court denied the motion to strike, as to the first and second separate defenses, and allowed the same as to the third. Thereupon plaintiff filed a reply, putting in issue the remaining new matter of the answer. The cause was tried before a jury, and considerable testimony admitted as to the defendant William R. Panter being an accommodation maker of the note, as alleged in the first separate defense. Afterwards the court instructed the jury, in substance, that such alleged facts did not constitute a defense to the note by this defendant.

Geo. P. Topping, of Bandon, and A. J. Sherwood and L. A. Liljeqvist, both of Coquille, for appellant. C. R. Wade and F. J. Feeney, both of Bandon, for respondent.

BEAN, J. (after stating the facts as above). At the time of the execution of the note, Panter Bros., had been doing business at Bandon, Or., for about three years. Their account with Tillman & Bendel had become somewhat large and overdue. William R. Panter signed the note in question as a joint maker, for the purpose of obtaining an extension of time and credit for his sons.

[1] The negotiable instruments law defines what constitutes an accommodation

*For other cases see same topic and section NUMBER, in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

maker, and specifies how negotiable instruments may be discharged. Section 5862, L. O. L., is as follows: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

It is settled that, under the negotiable instruments law, the accommodation maker is primarily liable as a principal debtor, notwithstanding an indulgence given to the indorser or drawer for whose benefit he became a party to the instrument. Sections 5952, 5953, 6023, L. O. L.; *Lumbermen's Nat. Bank of Portland v. Campbell*, 121 Pac. 427; *Oellers v. Meachem*, 49 Or. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997, and cases there cited.

The first separate defense could well have been stricken out, and may therefore be disregarded in the consideration of this case. The defendants requested several instructions to the jury, which were refused by the court.

[2] The tenth assignment of error is the giving of the following instruction, over the objection of counsel for plaintiff: "The burden of proof is upon the party having the affirmative of the issue to make out the better case. As to the making of the note and the transfer of the same to the plaintiff here, and as to the payments thereon, if any payments were made, except as alleged in the complaint, the burden would rest upon the plaintiff; and, as to these affirmative allegations of the answer which I have stated to you, the burden would rest upon the defendant Wm. R. Panter to establish these by a preponderance of the evidence."

Counsel for plaintiff saved an exception to this instruction, and requested the court to instruct the jury to the effect that the note itself makes a prima facie case, and entitles the plaintiff to recover the amount due thereon; that to overcome this, or to make out a defense, the burden of proof is upon the defendant. This the court refused. The giving of the instruction, and the refusal of the court to instruct as requested, are assigned as errors. We think that the instruction as to the burden of proof upon the matter of payment was erroneous; and that the substance of the requested instruction should have been given. It is a well-settled rule that when a defendant admits a cause of action set out in the complaint, and relies upon the defense of payment, the burden of proof is upon him to establish that fact, though his adversary may negative it. 2 *Greenleaf on Evid.* (16th Ed.) § 516; *Curtis v. Perry*, 33 Neb. 519, 50 N. W. 426; *Wolfe v. Nall*, 62 Ala. 24; *Conselyea v. Swift*, 103 N. Y. 604, 9 N. E. 489; *Bradley, Wheeler &*

Co. v. Harwl, 43 Kan. 314, 23 Pac. 566; *Willis v. Holmes*, 28 Or. 265, 269, 42 Pac. 989.

[3] Passing the other assignments of error, counsel for plaintiff moved for a new trial, for the reason, among others, that there was insufficient evidence to justify the verdict returned in the case by the jury, and assigns the denial of such motion as error. The second separate defense contains several details leading up to Panter Bros.' assignment which did not aid the pleading, and need not be noted. But it contains an allegation that the transfer was made in full payment of the note.

Referring to the testimony in support thereof, defendant Thomas W. Panter, one of the firm of Panter Bros., who appears to have had knowledge in regard to the negotiations relating to the execution of the note in suit, testified upon the trial that Panter Bros. made a bill of sale of their goods, wares, and merchandise to E. H. Fahrbach; that they delivered the same to Mr. Harmon, for the San Francisco Board of Trade, to secure all creditors in San Francisco and Coos county; that the same was turned over to Fahrbach for that purpose; and that he conducted a trustee's sale. He further testified as follows: "I also had inserted in it that they were all secured by this bill of sale, my creditors in San Francisco and here also."

Mr. W. A. Panter, the other partner, testified that it was understood between R. B. Harmon, his brother, and himself that if they turned over all stock, fixtures, and book accounts they would be released of all indebtedness, and that if any money were left it should be returned to them after the bills were all paid; that those were the conditions of the assignment.

Panter Bros. estimated the value of their stock of merchandise, according to their last inventory, to be from \$9,000 to \$10,000, which, with the accounts and money on hand, they approximated at \$15,000. They estimated their indebtedness at \$8,000. The inventory made by the representative of the San Francisco Board of Trade was: Merchandise, \$5,334.34; fixtures, \$763; total, \$6,097.34.

It appears that \$308 was paid on the note in question May 30, 1908; that \$638.15 was credited in July, by merchandise returned; and that a payment of \$508 was made by the San Francisco Board of Trade, after the commencement of this action, as the share of Tillman & Bendel of the proceeds of the sale of the merchandise. Afterwards Panter Bros. filed a petition in bankruptcy, and most of the accounts were turned over to the trustee in bankruptcy.

[4] The bill of sale is not contained in the record. There was no objection, however, to the evidence of one of the defendants that the bill of sale contained a statement that all of the creditors were secured. The whole

force of the evidence is to the effect that the property was assigned to a trustee as security for the creditors. The understanding of the members of the firm that they were to be released from all their indebtedness must necessarily have been upon the condition that a sufficient amount should be realized from the property, and such an understanding would not change the effect of the transaction. The same should not be permitted to vary the terms of the written bill of sale. The evidence cannot possibly be construed to mean that the firm of Panter Bros. transferred the property in full payment of the note, or that they were thereby released from their indebtedness. This is the testimony of defendant William R. Panter's witnesses and sons, and he is bound thereby. It is unnecessary to consider the evidence of the plaintiff upon this point.

[5] Section 8, art. 7, of the Constitution, as amended (Laws 1911, p. 7), provides in part that "no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." If there is no evidence to support the claim of defendants that the note was paid in full, the cause should not be remanded for a new trial. See *Gollnick v. Marvin*, 60 Or. 312, 118 Pac. 1016.

We will assume, without deciding, that the representatives of the San Francisco Board of Trade, in negotiating for the assignment made by Panter Bros., were the agents of Tillman & Bendel; and also that defendant may make the same defense that he could have made, had Tillman & Bendel been plaintiffs, and give defendant the full benefit of all the testimony in relation to the transaction. None of the testimony indicates that it was the purpose or intent of the parties to the transaction that the assignment be made with the agreement, or upon the condition, that the debtors should be released from all their indebtedness or from liability upon the note. The bill of sale and the proceedings thereafter show to the contrary. There was no competent evidence tending to show that the plaintiff released either of the Panter Brothers from their obligations upon the note. Therefore there was no evidence to support the verdict, or to form a basis for remanding this cause.

[6] It is admitted by defendant that he signed the note as a joint maker. No defense to the balance of the note, after deducting the payments above mentioned, has been shown by him. It appears that the defendant has no defense thereto. All the testimony in the case is attached to the bill of exceptions contained in the record. After consideration of all the matters thus submitted, we are of the opinion that the judgment of the lower court must be reversed and changed; that a judgment should have been entered in the court below for the amount

of the note, less such payments, which judgment is now directed to be entered in conformity with the further provisions contained in the above section of the Constitution.

(62 Or. 259)

PERRY v. HUNT et al.

(Supreme Court of Oregon. July 2, 1912.)

1. APPEAL AND ERROR (§ 237*)—OBJECTION BELOW — SUFFICIENCY — EVIDENCE — MOTION TO STRIKE OUT.

Where a question asked a witness is answered before any objection is made, a motion must be made to strike out the answer, or the admission of the evidence is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237.*]

2. TRIAL (§ 29*) — INSTRUCTIONS — REMARKS OF COURT ON RULINGS ON EVIDENCE.

Where, in an action for damages for breach of a railroad construction contract, plaintiff claimed that he was compelled to quit work because defendant overcharged him for supplies, remarks of the court in ruling on evidence on the issue that it did not remember that the contract made any provision requiring defendant to furnish supplies, but that, if the act of defendant terminated the relations, plaintiff could go to the jury, must be treated as instructions, and their correctness must be determined by the contract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84, 508; Dec. Dig. § 29.*]

3. CONTRACTS (§ 231*)—BUILDING CONTRACTS — CONSTRUCTION.

A written subcontract for the construction of a railroad roadbed, which fixed the compensation for the removal of specified material at so much a yard, governs a subsequent oral agreement to pay a specified amount over the contract price for the use by plaintiff, one of the subcontractors, of equipment, owned by him individually, and affords the means of computing the sum to be paid for grading the roadbed by the use of his machinery, but, where the plaintiff and his associates were wrongfully prevented from performing the written subcontract by the contractor terminating it and seizing plaintiff's equipment, plaintiff was deprived of the compensation he might have earned by the use of his equipment, and compensation plaintiff might have earned must be considered in estimating the damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1051, 1052; Dec. Dig. § 231.*]

4. CONTRACTS (§ 346*)—ACTION FOR BREACH — VARIANCE.

Where the complaint in an action for breach of an oral agreement for the construction of a railroad roadbed alleged that plaintiff, the contractor, fully performed the agreement until a specified time, when the adverse party unlawfully terminated the contract and seized the contractor's equipment, and thereby prevented the contractor from completing the work, the failure to complete the work could not be excused on the ground that the adverse party had failed to furnish supplies to the contractor pursuant to the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1718-1753; Dec. Dig. § 346.*]

5. CONTRACTS (§ 289*)—BUILDING CONTRACTS — ESTIMATES BY ENGINEERS.

Where an engineer in charge of railroad construction work refused to make an estimate,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the contractor could sue for the work done and establish the amount due him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1310, 1311; Dec. Dig. § 289.*]

Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Action by George Perry against W. B. Hunt and another, copartners, doing business under the firm name of W. B. Hunt & Son. From a judgment for plaintiff, defendants appeal. Conditionally reversed.

This is an action by George Perry against W. B. Hunt and W. Hunt, copartners as Hunt & Son, to recover compensation for the use of machinery, tools, etc., and damages for an alleged breach of an agreement. The facts are that the defendants, having engaged to construct a part of a line of railway, entered into a written contract November 1, 1909, whereby the plaintiff and his associates stipulated to grade the roadbed between engineer's stations 1425 and 1437 in Lane county, Or., at various prices for different classes of work. Thereafter the defendants made an oral agreement with plaintiff, pursuant to which the latter brought from California to the stations mentioned a power drill, track, tools, etc. The complaint states the facts in substance as hereinbefore detailed, and alleges that, for moving the equipment to Oregon and using it in breaking and removing solid rock between the points designated, plaintiff was to have been paid five cents per cubic yard in excess of the contract price for such work; that by the use of plaintiff's machinery and tools there had been broken down and removed, on August 20, 1910, 27,000 cubic yards of such material for which the defendants became indebted to plaintiff in the sum of \$1,350; no part of which had been liquidated. For a second cause of action the complaint states the preliminary facts necessary to the maintenance of the first cause, and also avers that plaintiff fully performed the terms of the oral agreement until August 20, 1910, when the defendants unlawfully terminated the contract, seized the equipment, and thus prevented him from breaking down and removing 15,000 cubic yards of rock then remaining, to plaintiff's damage in the sum of \$750; no part of which had been paid.

The answer admits that defendants are copartners and engaged in railroad construction, but denies every other allegation of the first cause of action. For a separate defense thereto, the answer sets forth the substance of the written contract and avers that soon after November 1, 1909, the defendants agreed to give plaintiff, for the use of his equipment, one cent per cubic yard in addition to the price stipulated for the grading, which payment was to have been made when the work was completed and the quantity of material removed had been

determined by the engineer's estimate thereof; that plaintiff failed to supply sufficient tools, whereupon defendants, in order to complete the grading within the time required, were compelled to and did secure a large quantity of other appliances; that the grading had not been completed, nor had an estimate of any part of the work done by plaintiff been made by the engineer who was to perform that duty; that on August 20, 1910, plaintiff, in violation of his agreement and against defendants' wish, abandoned the grading and refused to do any more work; and that defendants have performed their part of the written contract and of the oral agreement, and by reason of plaintiff's refusal to keep his engagements they are not indebted to him in any sum. For answer to the second cause of action it is admitted that defendants are copartners, but every other allegation of that part of the complaint is denied.

The averments of new matter in the answer are denied by the reply, which pleading further alleges that defendants, for the purpose of defrauding plaintiff and his associates and of avoiding the terms of the contracts, unlawfully took possession by force of their commissary supplies and outfit and terminated the agreements, thereby making it impossible for plaintiff and his associates to continue the grading.

Based on these issues, a trial was had resulting in a verdict for the sums demanded in the complaint, and, judgment having been rendered thereon, the defendants appeal.

L. Blyeu and John M. Williams, both of Eugene (Williams & Bean and Skipworth & Pipes, all of Eugene, on the brief), for appellants. C. A. Hardy, of Eugene (Thompson & Hardy, of Eugene, on the brief), for respondent.

MOORE, J. (after stating the facts as above). The defendants' counsel introduced in evidence the original contract which provides that, after plaintiff and his associates had finished the grading and the work had been received by the engineer in charge thereof, the defendants were to have paid them for the removal, inter alia, of trap rock, basalt, or lava rock, 55 cents per cubic yard. Clauses of the contract deemed material are as follows: "Any person or persons abandoning * * * the work, shall hold no claim against the first party [the defendants]. * * * After all proper deduction for wages, material, and supplies are paid by the second party [the plaintiff and his associates] the first party upon receipt of estimate and work agrees to pay prices as aforementioned in this agreement to the second party."

The plaintiff testified that the estimate of 27,000 cubic yards of solid rock, broken and removed in the construction work as stated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the complaint, was correct. This witness, in referring to the engineer in charge of the grading at the stations indicated, stated upon oath: "I asked Ellis if he could give me figures on that work. I would like to get his figures of as many yards as there was on the work. He said they never figured that out. It was left to the engineer at Natron, Randall, I understood. * * * Q. Did you ever ask the engineer at Natron to figure it? A. No."

Oscar Ellis, the engineer mentioned, testified that he had not been requested by plaintiff nor by any person for him to ascertain the amount of grading that had been done by Perry and his associates under the contract.

Testimony was admitted tending to show that on August 21, 1910, the defendants seized the plaintiff's equipment, and at the same time took possession of the commissary supplies belonging to him and his associates. This testimony was denied by the defendants. It appears, however, that, at the time last stated, the defendants placed on the part of the grading then remaining to be finished between the stations referred to other employes who used some of plaintiff's tools.

Dominick Crosta, one of plaintiff's associates, was asked: "Where were you on the 20th day of August?" and he answered: "In Eugene. * * * Q. What did you come to Eugene for? A. I came down to inform myself about the work. Q. What was the trouble? A. The trouble was Mr. Hunt (one of the defendants) was charging too much for expenses, and we can't afford to pay that. Q. To what extent was he overcharging you? A. Well, he overcharged over \$1,000. Q. And you objected to that? A. Yes." Defendants' counsel thereupon said: "We object to that. It has nothing to do with the case." The court replied: "Their contention (referring to plaintiff's controversy) is that Hunt compelled them to quit. Your contention is that they abandoned it (meaning the grading). Now that makes an issue. If this is an explanation why he compelled him to quit, it is competent to go to the jury." To this observation an exception was taken, defendants' counsel further saying: "There is nothing in the evidence, your honor, to show that there was any obligation on the part of Hunt & Son to furnish them these things, or on the part of these men to buy from Hunt & Son. The Court: I don't remember that the contract makes any provision for that. But if that is one of the things that brought about the severance of their relations, I think they have a right to go to the jury with it." To this observation also an exception was taken.

The foregoing are the only exceptions reserved, and it is maintained by defendants' counsel that whether or not Hunt & Son

were overcharging plaintiff and his associates for commissary supplies was not an issue in the case, and hence an error was committed in permitting Crosta to testify respecting a collateral matter that had no connection with the question involved. An examination of the testimony inveighed against will show that the only complaint interposed by defendants' counsel was that to Crosta's objection to overcharges for expenses made by Hunt & Son. It is quite probable, from the dialogue between the court and defendants' counsel, that the objection was intended to have been made to the preceding question, "To what extent was he overcharging you?"

[1] The inquiry having been answered, however, before any complaint was made to the question, a motion should have been made to strike out the answer given.

[2] But, however this may be, the remarks of the court will be treated as instructions to the jury, and, based thereon, the question to be considered is whether or not the language complained of was erroneous.

[3] The written contract governed the oral agreement and afforded the means of computing the sum of money to be paid plaintiff for grading the roadbed by using his machinery, tools, etc., in breaking and removing solid rock. For each cubic yard of trap rock, basalt, or lava rock removed from the line of the road and deposited in the proper place, the defendants engaged to pay 60 cents, of which sum the plaintiff and his associates were to have received 55 cents and Perry the remainder. If, therefore, the plaintiff and his associates were prevented by the defendants from performing the terms of the written contract respecting the handling of that kind of material, the plaintiff in like manner would be deprived of the compensation he might have earned by the use of his equipment, and hence any change in the written contract modified to that extent the terms of the oral agreement.

[4] In the second cause of action the complaint, referring to the oral agreement, charges "that said defendants violated the terms of said contract in this: That on the 20th day of August, 1910, said defendants wrongfully and unlawfully, and to terminate said contract, and in breach thereof, seized said equipment and outfit and took possession of the same by force and prevented plaintiff from working the same, and while there remained 15,000 cubic yards of rockwork to be done on said construction work above described and for which said plaintiff was entitled to receive from defendants five cents per cubic yard under the terms of said contract, and amounting in the aggregate to the sum of \$750, and by reason of said breach of said contract, said plaintiff was and is damaged in the sum of \$750."

It will thus be seen that the only ground

assigned in the complaint for plaintiff's failure to complete the grading was defendants' seizure of his equipment. It will be remembered that the court, in referring to the question as to whether or not Hunt & Son were under any obligation to furnish supplies to plaintiff and his associates pursuant to the written contract, said in the presence of the jury: "I don't remember that the contract makes any provision for that. But if that is one of the things that brought about the severance of their relations, I think they have a right to go to the jury with it." This was permitting a recovery as to the second cause of action on a different ground from that stated in the complaint, and the observation of the court in this respect was erroneous.

[6] There is nothing in the transcript before us tending to show that the oral agreement provided for the engineer's estimate of the solid rock broken down and removed by plaintiff's equipment as a condition precedent for the payment of the sum due therefor. Perry testified that Ellis, who is described in defendants' abstract as the engineer in charge, stated to him that he did not have to compute the amount of work performed by the witness, saying: "It was left to the engineer at Natron." If Perry's testimony was to be believed, and that was a question for the jury to determine, that Ellis practically refused to make an estimate of the work performed, plaintiff was not thereby defeated of a remedy, but he had a right to maintain this action and to establish the amount due him as best he could.

The testimony does not show that the clause of the written contract, providing for a forfeiture of payment in case of the abandonment of the work, applied to the oral agreement. The jury made special findings as to each cause of action, and, as the remarks of the court could apply only to the second cause, the award therefor can be segregated from the general judgment.

If, therefore, within 10 days plaintiff remit the sum of \$750 and pay the costs and disbursements in this court, the judgment will be affirmed, otherwise it will be reversed and a new trial ordered.

PIPPY et al. v. WINSLOW.

(Supreme Court of Oregon. July 9, 1912.)

1. CONTRACTS (§ 295*)—BUILDING CONTRACT —"SUBSTANTIAL PERFORMANCE."

A "substantial performance" of a building contract admits of only such deviations as are inadvertent and unintentional, and not due to bad faith, and such as do not impair the structure as a whole, and can be conveniently remedied, and without injustice be paid for by deductions from the contract price.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1353, 1356, 1362; Dec. Dig. § 295.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6739.]

2. MECHANICS' LIENS (§ 93*)—RIGHT TO ENFORCE—BUILDING CONTRACTOR.

Where a building contractor fails in any considerable and material respect, or willfully fails in an unimportant respect, to carry out his contract, he cannot enforce a lien for the work done.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 124; Dec. Dig. § 93.*]

3. MECHANICS' LIENS (§ 279*)—BURDEN OF PROOF—BUILDING CONTRACTOR.

In a building contractor's action to enforce a mechanic's lien for work done under a contract which has been changed, the burden is upon him to show a substantial compliance with the contract as changed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 555, 556; Dec. Dig. § 279.*]

4. MECHANICS' LIENS (§ 93*)—DECREE.

While, in a suit to enforce a mechanic's lien for work done under a building contract which has been changed by agreement of the parties, the court may adjust the differences between them as justice demands, and may allow something for what is deemed insufficient work, it cannot disregard the legal rights of the parties but must follow the law.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 124; Dec. Dig. § 93.*]

5. CONTRACTS (§ 290*)—BUILDING CONTRACT —PERFORMANCE—DEFECTS—WAIVER.

Where part of a building being constructed under a contract was approved by the owner, who was himself an experienced contractor, and by the architect, either expressly or impliedly by failure to promptly object, and no fraud was pleaded or proved, objections could not be made thereafter and the contractors were entitled to recover for such part.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1317; Dec. Dig. § 290.*]

6. CONTRACTS (§ 290*)—BUILDING CONTRACT —CONSTRUCTION—ARCHITECT—IMPLIED APPROVAL.

Where an architect is by a building contract made the sole arbiter between the parties of matters concerning the work, and has knowledge of them and does not object at the time, his failure to object amounts to an approval which cannot be withdrawn to the injury of the contractors.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1317; Dec. Dig. § 290.*]

7. CONTRACTS (§ 232*)—BUILDING CONTRACTS —CHANGE BY AGREEMENT.

Where the owner of a building orders changes, and the contractor makes them, recovery may be had therefor as on an independent contract, although the original contract provides that no extra work shall be allowed except on a written order.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1071-1097; Dec. Dig. § 232.*]

8. CONTRACTS (§ 238*) — ALTERATION BY AGREEMENT.

A written contract may be changed verbally at the pleasure of the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1123; Dec. Dig. § 238.*]

9. MECHANICS' LIENS (§ 281*)—SUFFICIENCY OF EVIDENCE.

Evidence in an action to enforce a mechanic's lien claimed by a building contractor held not to show any material or unauthorized deviation from the contract so as to bar the contractor's right to enforce his lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

10. CONTRACTS (§ 300*)—BUILDING CONTRACTS—DAMAGES FOR DELAY.

Where the delays in the performance of a building contract were not unreasonable and were caused by various changes made by the owner who stated that he did not intend to enforce the penalty prescribed for noncompletion within a specified time, the owner was not entitled to damages for delays so caused.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372-1381; Dec. Dig. § 300.*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action to foreclose a mechanic's lien by T. A. Pippy and another against J. S. Winslow. From a decree for plaintiffs, defendant appeals. Affirmed.

On July 1, 1909, plaintiffs, as partners, entered into a written contract with defendant for the construction of a four-flat building on the northwest corner of Washington and East Nineteenth streets, Portland, Or. The contractors were to furnish all the materials and perform all the work necessary for a full completion of the building, both the work and material to be the best of their respective kinds. The work was to be done under the direction of the architect, W. F. Tobey. By the contract it was understood that such additional drawings and explanations as might be necessary to detail and illustrate the work, were to be furnished by the architect, so far as they might be consistent with the purpose and intent of the original drawings and specifications. In case the owner and contractors should not agree as to the amount to be paid or allowed for any alterations that might be made, the work should go on and the matter be referred to arbitration. Should the contractors fall in the performance of the agreement, the same having been certified to by the architect, the owner should be at liberty to provide such labor or materials as the contract called for, deducting the cost thereof from any money due the contractors. Upon a certificate from the architect, 80 per cent. of the labor performed, and material on the ground, should be paid for from time to time as the work progressed, final payment to be made within thirty days after the completion. A payment of \$3,000 on the contract was made by Mr. Winslow.

J. O. Stearns, of Portland, for appellant. Lewis & Lewis, of Portland, for respondents.

BEAN, J. (after stating the facts as above). The contract contains 12 articles and refers to 151 specifications which are made a part thereof. These specifications were prepared in the city of San Francisco by J. E. Kafft, architect. As the material manufactured in Portland differed in style and size from that in the former city where the plans were drawn, changes therein were necessitated. Therefore 27 alterations were agreed upon and attached as addenda to the specifica-

tions. Afterwards numerous other alterations in the building were agreed to. Some were made by the contractors and approved by the owner and his architect. In regard to others there is contention. In fact, the plans were changed to such an extent that they became of little value as a guide in the performance of the work. To begin with, they were something like a ready-made suit of clothes which does not fit. The owner of the building was an old, experienced contractor and carpenter and understood that part of the construction. No doubt he could express orally what he desired, better than in writing. In discussing the changes, as the work progressed, there were sometimes misunderstandings as to what the owner directed. The record contains 860 pages of typewritten testimony and 43 exhibits. Apparently the circuit court heard the testimony with very careful attention. Experts were called, who examined the building and enlightened the court with their knowledge and experience. After a hearing of some length, the court allowed \$252.90 of the \$412.40 claimed, for extra labor and materials, deducted the sum of \$189.20 for defective work and materials, and rendered a decree in favor of plaintiffs for \$5,406.70 with interest, \$250 attorney's fees, and \$1.60 for recording the lien. The defendant claims that he was damaged in the sum of \$3,919.15 on account of the defects and failure to construct the building according to the contract, and furthermore that plaintiffs are not entitled to a lien.

The voluminous record and the many items in dispute render it impracticable to refer in detail to each matter. The controversy reminds us of a case involving domestic difficulties. About the last of August, when the building was advanced as far as the plastering, the contractors and the owner quarreled in regard to the construction of the front porch columns. Since that time the difficulties and differences have apparently increased. We approach the solution of this difficult question having in mind the following general rules.

[1] The substantial performance of a contract like the one in question permits only such omissions and deviations as are inadvertent and unintentional, are not due to bad faith, do not impair the structure as a whole, can be conveniently remedied, and may, without injustice, be paid for by deductions from the contract price.

[2] Where the contractor fails to perform a considerable part of the work required by the contract, his failure, irrespective of whether his intentions were good or bad, constitutes a bar to his enforcement of a lien for the work performed. If the defects show that the contractor performed the work in a slovenly and improper manner, not conforming substantially with the plans and

specifications and thereby defeating the intentions of the parties to have the work done in a particular manner, the contractor, unless there has been a waiver, cannot enforce a lien. The willful omission, though in an unimportant respect, will preclude the assertion of a lien by him. The spirit of the contract should be faithfully observed, though the letter thereof fail. 20 Amer. & Eng. Enc. of Law (2d Ed.) 367; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Anderson v. Peterelt*, 86 Hun, 600, 33 N. Y. Supp. 741; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740.

[3] In a suit by a contractor to enforce a mechanic's lien, the burden of proof is upon him to show a substantial compliance with the contract, as modified and changed from time to time. *Adams v. MacKenzie*, 59 Or. 89, 114 Pac. 460.

[4] A court of equity, in adjusting such differences, should be governed mainly by considerations of right and justice between the parties. It cannot disregard legal rights but must follow the law. It may, however, allow something for what is deemed insufficient work, while granting a decree for the amount found equitably due. *Heberlein v. Wendt*, 99 Ill. App. 506; *Burn v. Whittlesey*, 2 MacArthur (D. C.) 189.

[5] Under the circumstances of this case, that part of the building which passed under the inspection of Mr. Winslow, the owner, and Mr. Tobey, the architect, and was approved by them in good faith, expressly or by implication, was not open to objection by them afterwards, and plaintiffs may recover therefor. *Vanderhoof v. Shell*, 42 Or. 578, 587, 72 Pac. 126; *Willey v. Fractional School District Number 1 of Paw Paw and Antwerp*, 25 Mich. 419. Mr. Winslow, being a contractor of many years' experience, practically superintended the construction for some time, and, under such circumstances, the right of objection should have been exercised promptly. *Ashland Lime, Salt & Cement Company v. Shores*, 105 Wis. 122, 81 N. W. 136.

[6] When the architect is, by the building contract, made the sole arbiter between the parties of matters concerning the material and character of the work, has knowledge of such, and does not object at the time, it will be an approval of the same, which cannot be renounced to the injury of the contractors. The exercise of his judgment on such matters will be binding on both parties in the absence of fraud being pleaded and proved. *Wright v. Meyer* (Tex.) 25 S. W. 1122.

[7] Where the owner orders changes made in the construction of a building, although the contract provides that no extra work shall be allowed except on a written order, if such work be done at the instance of the owner, for which a benefit is derived, it must be regarded as an independent contract for which a recovery may be had. *Escott &*

Son v. White, 10 Bush (Ky.) 169; *Baum v. Covert*, 62 Miss. 113.

[8] A written contract may be changed verbally at the pleasure of the parties to the agreement. *Cooke v. Murphy*, 70 Ill. 96; *Munroe v. Perkins*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475.

[9] It is asserted by plaintiffs that Mr. Winslow, in the early part of the work, stated that there would be some changes in the plans and specifications which would be met with a "give and take" on both sides, and that it was under this arrangement that several of the changes were made for which there was no additional charge by the contractors and no allowance made to the owner. They also assert that defendant was a nervous wreck and hard to please. It appears that he had retired from business.

Referring to some of the testimony in regard to the substantial completion of the building, Mr. W. F. Tobey, architect, testified in relation to each paragraph of the specifications, stating in part that the general class of the work was what he would call fair; that little details were not complied with; that the building was substantially completed; that he tried to carry out the work in touch with Mr. Winslow, and to help him to the best of his ability; that Mr. Winslow assumed the control of the superintendency of the building at first; that he was restrained from issuing a certificate of completion by the owner's notice, and on account of the changes and orders made by the owner without the architect's knowledge.

J. V. Bennis, an architect of 22 years' experience, testified, in substance, that he examined the Winslow building; that the general construction, finishing, and painting of the whole house he considered a little above the average; that the framing was most excellently done; that the finishing, for that class of building, was very good; that there might have been slight defects in a few things, but that he would not consider them objectionable; that the material was class A so far as he could see; that the outside finishing was excellently done and the doors were above the standard.

John G. Wilson, who had been an architect for 24 years, actively engaged in the business, testified that he examined the building from basement to top with Mr. Bennis; that he did not see anything wrong with the construction, but that he could not see all of it; that he thought the workmanship very good for that class of building, and that the material and finishing were good; also that the front porch and posts were all right.

E. J. Burkhardt, who was in the planing mill business, and who furnished the material for the house, swore in substance, that he furnished the interior finish; that the doors and windows were all No. 1 goods, and that the material was thoroughly kiln dried;

that the doors were five cross panel doors; that a few were changed from cross panel to one panel; that a change was made afterwards to one panel veneered door, which had to be manufactured, causing a delay of three weeks.

C. Moore testified that he had been a carpenter for 15 years; that he was a finisher, and worked on the Winslow building on the inside for four or five weeks, receiving \$4 per day instead of \$3.50, the going wages; that the general character of the work was first class all the way through, and the material good; and that he thought it was as good as any he had ever seen in town on that class of building.

[10] It appears that delays in the performance of the contract were caused by various changes made by the owner, who stated that he did not intend to enforce the penalty for noncompletion within the specified time. *Vanderhoof v. Shell*, supra. Under all the circumstances of this case, we do not think that the time within which the contractors erected the structure was unreasonably long, and the owner is not entitled to damages for delays so necessitated.

We will not incur the record with a discussion of the evidence, which, viewed from an equitable standpoint and under the rules of law alluded to above, we think supports the main conclusions of the trial court. The court had an opportunity to observe whether or not the experts and other witnesses were prejudiced or fair in the matter. From the record, it is impossible to figure the several items to an exact amount. An estimate, such as that made by the witnesses and the circuit court, is the nearest approach to justice in the premises.

Therefore, after careful examination of the record, we can come to no other determination than that the decree of the lower court should be affirmed, and it is so ordered.

WOLF et al. v. HOUGHAM et al.

(Supreme Court of Oregon. July 16, 1912.)

1. PLEADING (§ 396*)—DEFENSES—NECESSITY OF PLEADING.

A defense, not pleaded, cannot be urged.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1336; Dec. Dig. § 396.*]

2. SALES (§ 172*)—ACTIONS FOR BREACH—REMEDY OF BUYER.

A seller of hops cannot excuse his non-performance by proof that the hops raised were of a quality inferior to that stipulated for in the contract; the buyer having his option to accept such hops in satisfaction of the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 425-430; Dec. Dig. § 172.*]

3. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

A contract for the sale of hops from a specified farm stipulated that a previous contract was to be satisfied first. The seller failed to perform, and, on suit by the buyer,

set up in avoidance the buyer's failure to comply with his agreement to make advances. *Held* that, the seller having failed to plead as an excuse for nondelivery the delivery of the hops on the first contract, an instruction authorizing a verdict for the buyer, unless he failed to make the stipulated advances, was correct.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

4. APPEAL AND ERROR (§ 1171*)—REVIEW—HARMLESS ERROR.

Where a verdict was for \$2,200, an error involving about \$20 is so insignificant that it will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by Adolf Wolf and Julius C. Wolf, copartners, doing business under the firm name of A. Wolf & Son, against C. R. Hougham and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an action to recover money. It is alleged in the complaint, in effect, that at all the times stated therein Adolf Wolf and Julius C. Wolf were and are partners as Wolf & Son; that during such time the defendants, C. R. Hougham and Joseph J. Keber, were engaged, *inter alia*, in buying and selling hops; that defendants represented to plaintiffs that they had purchased from J. R. White and others a crop of hops, and thereupon the parties hereto entered into a written contract, the material parts of which follow, to wit:

"Agreement, dated 23d day of July, 1909, between C. R. Hougham and Joseph J. Keber, of Marion county, state of Oregon, called herein the seller, and A. Wolf & Son, called herein the buyer, concerning the hop crop of the seller for the year 1909 and the sale of hops, not the product of the first year's planting, bright, even color, fully matured, free from mold or vermin damage, cleanly picked, properly dried and cured and put up in merchantable order and condition, in bales weighing from 185 to 210 pounds each (tare 5 pounds per bale to be deducted), herein called 'contract hops,' to be grown, harvested and prepared for market by the seller on that certain hopyard, herein called the 'hopyard,' situated on that certain farm in Marion county, state of Oregon, about three miles northeast of Mount Angel, Oregon, on which land there are about 56 acres planted in hops and owned by J. R., V. J., M. J., and G. H. White.

"First. The seller * * * does hereby bargain and sell, and he does agree to deliver to the buyer in one lot f. o. b. cars at Mount Angel, in the state of Oregon, between October 1st and November 1st of the year 1909 twenty thousand (20,000) pounds, net weight, of contract hops from the hopyard and to give 20 days' notice in writing to the buyer after the entire crop is ready for de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

livery and to make full delivery to the buyer before making any other delivery from the hopyard. * * * This contract is taken subject to a contract made about a week before this for 20,000 lbs., which contract must be filled first.

"Second. The buyer agrees to purchase twenty thousand (20,000) pounds of contract hops of the crop of hops raised by the seller upon the hopyard in the year 1909 and to accept and receive the same when delivered in pursuance of this agreement, and to pay therefor the sum of sixteen (16) cents per pound, that is to say: To pay eight hundred (\$800.00) dollars at the time of signing hereof; * * * and (\$1,000.00) dollars during the picking season as the same shall be actually required and the balance at the time of the acceptance and receipt of said hops; * * * all payments to be made by check of money at the Bank of Mt. Angel, in the county of Marion, state of Oregon, upon ten (10) days' written request therefor by the seller. * * *

"Third. Should the seller neglect or fail to do anything which as a careful husbandman he should do in order to produce contract hops, and if by reason thereof, or for any cause the hops raised shall be inferior to contract hops, the buyer shall have the right and privilege of receiving and accepting so many thereof as are contract hops at the contract price and the balance of the quantity contracted at a reduction in price equal to the differences in value between the hops tendered and contract hops, * * * but should the seller and the buyer fail to agree upon a price at which the inferior hops shall be accepted in fulfillment of this contract, then in that event the seller agrees to return all advances heretofore made * * * to the buyer upon demand.

"Fourth. * * * It is therefore further agreed by and between the parties hereto, that should the seller make default in this agreement and by reason of such default, the buyer not being in default 20,000 pounds of contract hops be not delivered in pursuance of this agreement, the buyer may recover of the seller damages for the seller's breach of this agreement, and in such event it is hereby agreed that the difference between the contract price and the market value at the time of delivery of 20,000 pounds of contract hops, together with all advances, * * * are hereby fixed as the liquidated damages which the buyer shall recover from the seller for such breach. * * *

"In witness whereof, the parties constituting the seller have hereunto set their hands and the buyer has hereunto subscribed their names this, the day and year first above written.

C. R. Hougham. [Seal.]

"Jos. J. Keber. [Seal.]

"Adolf Wolf & Son. [Seal.]

"Witnessed by: Tom Shortell, Joseph Bruch."

That on July 23, 1909, pursuant to the

terms of such contract, plaintiffs advanced to defendants \$800; that on the 13th, 20th, and 24th of September of that year plaintiffs offered to make such further advances of money as were necessary, but the defendants refused to accept the offers, and plaintiffs were then, and prior and subsequent thereto, ready, willing, and able to make such payments and fully to perform their part of the agreement; that the market price of contract hops on November 1, 1909, at the place of delivery was 24 cents per pound; that the defendants failed and refused to deliver to plaintiffs any of the hops grown on such farm, or to return the money advanced, whereby they lost \$800 so paid and the further sum of \$1,600, the latter sum being the difference between the contract price of 16 cents and the market price of 24 cents on 20,000 pounds of hops, no part of which sums has ever been paid. Judgment was demanded for \$2,400.

The answer admitted the relation and pursuits of the respective parties; and that they executed the contract referred to, but denied all the other averments of the complaint. For a further defense, it is alleged that plaintiffs failed and refused to keep or perform their part of the agreement, or to make the advances required. The reply put in issue the allegations of new matter in the answer, and the cause being tried resulted in a verdict and judgment for plaintiffs in the sum of \$2,208.87 and the defendants appeal.

M. W. Seltz and L. Rauch, both of Portland (Seltz & Seltz and Rauch & Senn, all of Portland, on the brief), for appellants. J. A. Carson and George G. Bingham, both of Salem, for respondents.

MOORE, J. (after stating the facts as above). [1, 2] It is contended by defendants' counsel that an alleged failure to deliver "contract hops" did not constitute such a breach of the contract as to authorize a recovery of the sum of money advanced, or of any damages asserted to have been sustained; for the parties had stipulated that, if the farm referred to produced hops of an inferior quality, they were to have been accepted at a reduced rate. It is difficult to understand how this question is involved. The breach of the agreement assigned in the complaint is the declared failure of the defendants to deliver any hops. The excuse for the nonperformance set forth in the answer is the alleged neglect and refusal of the plaintiffs to advance the sums of money specified for in the contract. In order to invoke the legal principle insisted upon, the answer should have stated that in the year 1909 the farm referred to produced hops of an inferior quality; that defendants offered to deliver, at the then market price of — cents per pound, the hops so grown to the plaintiffs, who thereupon refused to accept any part thereof. Besides this, if the plaintiffs were willing to accept hops produced as of the

quality and the condition specified in the contract, the defendants cannot be heard to object thereto. *Livesley v. Johnston*, 45 Or. 30, 53, 76 Pac. 13, 946, 85 L. R. A. 783, 106 Am. St. Rep. 647.

[3] It will be remembered that the written agreement excluded from its provisions the first 20,000 pounds of hops produced on the farm in the year 1909. Over objection and exception, the plaintiffs were permitted to offer testimony tending to show that no part of the quantity last referred to had been delivered to the party entitled thereto, with whom the defendants settled by paying the damages sustained by a breach of the agreement in the particulars mentioned. Based on this evidence, the jury were instructed as follows: "In considering the meaning of the contract which is admitted to have been entered into, it becomes the duty of the court to construe such contract; and it is the construction of this court that the contract, for the purposes of this case, is a contract for the sale of a certain quantity of hops, subject to the fulfillment of a certain other contract therein mentioned, which was entered into about a week before this contract was entered into. It must be shown that the rights under the contract, adverted to as being the one first entered into, have been met. If, under the evidence, the subject of this contract which is in evidence was exhausted by that former contract, then the plaintiffs cannot recover in this case; for their contract is subject to the terms of the contract first entered into, and subject to the fulfillment of that contract. The rights under the contract entered into between the plaintiffs and the defendants are to be considered by you in this light. It is a contract for the sale of 20,000 pounds of hops at 16 cents per pound; and if the plaintiffs have shown by a preponderance of the evidence that they have fulfilled their part of this contract, and that the defendants have made the breach alleged in the complaint, namely, a failure to fulfill their part of the contract by delivering the hops, as agreed upon in the contract, within the time specified, you should find for the plaintiffs. The defendants, however, in this case hold the affirmative of the allegations contained in their answer, which, briefly stated, consist of the allegations of a breach of this contract upon the part of the plaintiffs. The contract is one which provides that \$1,000 shall be paid, as required, for picking purposes; and if you find from a consideration of all the evidence, gentlemen of the jury, that the plaintiffs have made a breach of that provision of the contract, and have failed to comply with it, you should find for the defendants in the case."

[4] Exceptions having been taken to these parts of the charge by defendants' counsel, it is maintained that errors were committed in using the language thus employed. It ap-

pears from the bill of exceptions that the defendants offered evidence tending to prove that the entire quantity of hops produced in the year 1909 on the farm mentioned was only 37,365 pounds. If from this number there be deducted the first 20,000 pounds of hops, the remainder is 17,365 pounds. It is alleged in the complaint that, by reason of the defendants' failure to deliver 20,000 pounds of hops to the plaintiffs, they sustained damage to the extent of 8 cents per pound, or in the sum of \$1,600. If the answer had averred that there was produced only 37,365 pounds of hops, of which quantity the plaintiffs could be entitled to no more than 17,365 pounds, the greatest sum that could have been allowed them, if a finding had been made according to the assumed allegation, would have been \$1,389.20, to which should have been added the money advanced, or \$800, making \$2,189.20, or \$19.47 less than the sum awarded by the jury. The answer did not contain the averment suggested, and, in the absence thereof, the instructions complained of were applicable to the facts involved, except that in the first instruction, hereinbefore quoted, the sum of \$800 was omitted, to which the plaintiffs would have been entitled, in any event, on the theory assumed. But this omission may have been fully explained in the general charge. However that may be, the defendants cannot complain of any error in this respect. The difference of \$19.47 is so insignificant, when compared with the sum involved, as to be almost trifling, even if the assumed issue had been made.

From a careful examination of the entire evidence, which has been made a part of the transcript, we do not think any substantial error was committed. It follows that the judgment should be affirmed; and it is so ordered.

(32 Or. 277)

STATE ex rel. McNARY, Dist. Atty., v.
OLCOTT, Secretary of State.

(Supreme Court of Oregon. July 23, 1912.)

1. STATUTES (§ 35½*)—ENACTMENT—SUBMISSION TO POPULAR VOTE—PETITION—"LEGALLY SUFFICIENT."

Under L. O. L. § 3474, providing that the court, on a showing that any petition for a referendum is not legally sufficient, may enjoin the Secretary of State and all other officers from certifying or printing the title and number of the measure on the official ballot, the petition, to be "legally sufficient," must be a valid petition, signed by legal voters, and complying substantially with the requirements of the law; and, although a petition appears regular on its face, the court may inquire into its legal sufficiency.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 85½.*]

2. CONSTITUTIONAL LAW (§ 70*)—DISTRIBUTION OF GOVERNMENTAL POWERS—JUDICIAL FUNCTIONS.

The filing of a petition for a referendum is not a legislative act, but merely a matter pre-

liminary to the legislative act; and hence an investigation into its sufficiency is not beyond the jurisdiction of the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

3. STATUTES (§ 35½*)—ENACTMENT—SUBMISSION TO POPULAR VOTE—PETITION.

L. O. L. § 3472, referring to initiative petitions, provides that every sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure; that referendum petitions shall be attached to a full and correct copy of the measure; and that all petitions for the initiative or referendum "and sheets for signatures" shall be printed on pages of a specified size. *Held*, that it is not necessary that each referendum petition have printed thereon the form of petition provided by the act, and a full copy of the title and text of the measure proposed, but that several referendum petitions may be attached to one full and correct copy of the measure.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

4. STATUTES (§ 35½*)—ENACTMENT—SUBMISSION TO POPULAR VOTE—PETITION.

Where referendum petitions contain evidence of forgeries, perpetrated either by the circulators, or with their connivance, the prima facie case in favor of the genuineness of the petitions is overcome; and the burden is on those upholding the validity of the petition to establish the genuineness of each signature.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

5. STATUTES (§ 35½*)—ENACTMENT—SUBMISSION TO POPULAR VOTE—PETITION.

It is the duty of the circulator of a referendum petition to see that the proper address of the signers thereto is placed on the petition.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

Eakin, C. J., dissenting.

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by the State, on the relation of John H. McNary, District Attorney of the Third Judicial District, against Ben W. Olcott, as Secretary of State. From the judgment, defendant appeals. Reversed, and suit dismissed.

W. S. U'Ren, of Oregon City, C. E. S. Wood, of Portland, and A. M. Crawford, of Salem, for appellant. W. T. Slater, of Salem, and M. L. Pipes, of Portland, for respondent.

McBRIDE, J. This is a suit brought by the state of Oregon, on the relation of John H. McNary, against Ben W. Olcott, secretary of state, to enjoin the defendant from placing upon the ballot a referendum upon an appropriation for the benefit of the State University.

The facts set forth in the complaint are substantially the same as alleged in *Friendly v. Olcott*, 123 Pac. 53, and need not be restated here. In that case we held that a private citizen could not bring a suit of this character, and dismissed the suit; and thereafter this suit was instituted upon the relation of the district attorney of the Third

judicial district, having for its object the same relief that was sought in the former proceeding. We regard it as settled by our former opinion that the right to bring a suit to enjoin the secretary from certifying or printing upon the official ballot the title or number of any measure, when it is shown to be not legally sufficient, resides in the district attorney, and we will not further discuss that phase of the case.

[1] Section 3474, L. O. L., provides that, "on a showing that any petition filed is not legally sufficient, the court may enjoin the secretary of state and all other officers from certifying or printing on the official ballot for the ensuing election the ballot title and numbers of such measure." On behalf of defendant it is contended that, by the words "legally sufficient," as here used, it is meant that the petition shall be regular upon its face, and that, if a petition, regular upon its face, shall be presented, the court cannot go behind its apparent regularity to inquire into its genuineness. We cannot assent to this view. It is conceded that there is no power granted to the secretary of state to call witnesses and examine into the facts to determine the validity of any petition. His powers are not judicial, but ministerial; and if this power does not reside in the courts a petition, consisting wholly of forged names, can be presented, and the public put to the expense of printing the measure and submitting it to a vote. This would be giving a forced and unnatural construction of the law in favor of fraud. The Legislature never contemplated such a vicious construction. We are of the opinion that by the term "legally sufficient" the Legislature meant to describe a valid petition, signed by legal voters, and complying substantially, not necessarily technically, with the requirements of the law.

[2] It is also contended that the filing of the petition is a legislative act, and consequently beyond the jurisdiction of the courts to investigate; but this contention is also unsound. The signing and filing of a petition is a matter preliminary to the legislative act. It is that which calls the legislative power into action. It is more a legislative act than the placing of a candidate's name for the state Legislature upon the ballot is a legislative act. If the candidate for legislative honors presents a petition, signed by the required number of legal voters, and in other respects complying with the law, his name is entitled to go upon the ballot. If the partisan of a referendum measure presents a like petition, the measure is entitled to go upon the ballot. Any other construction would place it in the power of one dishonest person, or a number of such, to hold up and delay any measure, no matter how meritorious, by means of a fraudulent petition. By this means the whole machinery of the state government could be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

held up. The courts, the asylums, the penitentiaries, the various state institutions, could be deprived of the means necessary to sustain their existence by the fraudulent act of one or a few persons. Such is not the law.

The question of jurisdiction being settled, we now come to the principal questions that constitute the gist of this controversy:

(1) Are the petitions in such form as to substantially comply with sections 3471, 3472, and 3473, L. O. L.? Such sections, so far as they relate to the matter now under consideration, are as follows:

"Sec. 3471. Form of Initiative Petition. The following shall be substantially the form of petition for any law, amendment to the Constitution of the state of Oregon, city ordinance or amendment to a city charter, proposed by the initiative:

"Warning.

"It is a felony for any one to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a legal voter.

"Initiative Petition.

"To the honorable _____, secretary of state for the state of Oregon (or to the honorable _____, clerk, auditor, or recorder, as the case may be, for the city of _____):

"We, the undersigned citizens and legal voters of the state of Oregon (and of the district of _____, county of _____, or city of _____, as the case may be), respectfully demand that the following proposed law (or amendment to the constitution, ordinance, or amendment to the city charter, as the case may be), shall be submitted to the legal voters of the state of Oregon (district of _____, county of _____, or city of _____, as the case may be), for their approval or rejection at the regular, general election, or (regular or special city election), to be held on the _____ day of _____, A. D. 19____, and each for himself says: I have personally signed this petition; I am a legal voter of the state of Oregon (and of the district of _____, county of _____, city of _____, as the case may be); my residence and post office are correctly written after my name.

"Name _____, Residence _____, Post Office _____. (If in a city, street and number.)

"(Here follow twenty numbered lines for signatures.)

"Sec. 3472. Every such sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition: but such petition may be filed with the secretary of state in numbered sections for convenience in handling, and referendum petitions shall be attached to a full and cor-

rect copy of the measure on which the referendum is demanded and may be filed in numbered sections in like manner. Not more than twenty signatures on one sheet shall be counted. When any such initiative or referendum petition shall be offered for filing, the secretary of state, in the presence of the Governor and the person offering the same for filing, shall detach the sheets containing the signatures and affidavits and cause them all to be attached to one or more printed copies of the measure so proposed by initiative or referendum petitions; provided, all petitions for the initiative and for the referendum and sheets for signatures shall be printed on pages seven inches in width by ten inches in length, with a margin of one and three-fourths inches at the top for binding; if the aforesaid sheets shall be too bulky for convenient binding in one volume, they may be bound in two or more volumes, those in each volume to be attached to a single printed copy of such measure; the detached copies of such measure shall be delivered to the person offering the same for filing. If any such measure shall, at the ensuing election, be approved by the people, then the copies thereof so preserved, with the sheets and signatures and affidavits, and a certified copy of the Governor's proclamation declaring the same to have been approved by the people, shall be bound together in such form that they may be conveniently identified and preserved.

"Sec. 3473. Each and every sheet of every such petition containing signatures shall be verified on the back thereof, in substantially the following form, by the person who circulated said sheet of said petition, by his or her affidavit hereon and as a part thereof:

"State of Oregon, County of _____, ss.:

"I, _____, being first duly sworn, say: (Here shall be legibly written or typewritten the names of the signers of the sheet), signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, post office address and residence correctly, and that each signer is a legal voter of the state of Oregon and county of _____ (or of the city of _____, as the case may be).

"(Signature and post office address of affiant.)

"Subscribed and sworn to before me this _____ day of _____, A. D. 19____.

"(Signature and title of officer before whom oath is made, and his post office address.)

"The forms herein given are not mandatory and if substantially followed in any petition it shall be sufficient, disregarding clerical and merely technical errors."

(2) Does the petition contain a sufficient number of genuine signatures of legal vot-

ers to entitle the petitioners to have the measure placed upon the ballot?

The sections above cited prescribe the form of petition and the method by which a copy of the measure, with its title, shall be attached; but it is especially provided that such forms "are not mandatory and if substantially followed in any petition it shall be sufficient."

[3] Section 3470, L. O. L., prescribes the form of a referendum petition. Section 3472 enacts as follows: "Every such sheet for petitioners' signatures shall be attached to a full and correct copy of the title and text of the measure so proposed by the initiative petition." It would thus appear that each sheet is to be regarded as a separate petition, and that several initiative petitions might be attached to only one full and correct copy of the title and text of the measure so proposed. By the means suggested, "every such sheet" would be fastened to each other, and also to a full and correct copy of the title and text of the initiative bill. If, however, in initiative petitions we should adopt the strict and technical rule that "every such sheet" must have attached a separate copy of the title and text of the measure proposed, so that there must be as many copies thereof as there are of the petition, a ruling to that effect could have no application to a referendum petition.

Section 3472, Id., contains a clause as follows: "Referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded and may be filed in numbered sections" (for convenience in handling). The use of the plural form "petitions" in the language last quoted, and the omission therefrom of the words "every such sheet," as employed in the excerpt first hereinbefore noted as applicable to initiative petitions, conclusively show that two or more referendum petitions may be attached to only one full and correct copy of the measure on which the referendum is demanded.

The law relating to direct legislation elections does not contemplate that each petition shall have printed thereon the language constituting the form recommended, the 20 numbered lines for signatures, and also a full copy of the title and text of the measure proposed. This conclusion results from an examination of the language of the following clause: "All petitions for the initiative and for the referendum *and sheets for signatures* shall be printed on pages seven inches in width by ten inches in length." The use of the phrase "and sheets for signatures" indisputably shows that such sheets, though duly attached, are only auxiliary to the petitions, from which language it is clearly to be implied that a full and correct copy of the proposed measure need not be printed on the petition.

An examination of the sections of the statute referred to induce the conclusion that

subdivision 36 of numbered section 210 and subdivision 64 of the same numbered section of the referendum petitions comply with the requirements of the law applicable thereto; and hence they are valid, and the names of the petitioners thereon, and on other petitions of similar import, should be counted and considered in determining whether or not a sufficient number had subscribed their names to cause the measure to be referred to the people for their action at the coming election.

We come now to consider the question of the genuineness of the signatures to the petitions. The origin of the movement to refer the measure in question is not altogether creditable to its promoters. The State University is located at the city of Eugene, in Lane county. Certain citizens of the southern portion of the county, including the city of Cottage Grove, were desirous of being incorporated into a new county, with Cottage Grove as its county seat. This was strenuously opposed by the citizens of the northern part of the county, and particularly by those of Eugene, and the measure was defeated. As a matter of retaliation, or, perhaps, to convince the citizens of Eugene that their city and its institutions would be better off without Cottage Grove in the same county, this movement was inaugurated. That there was no general and spontaneous desire on the part of the general public to withhold the appropriation from the University soon became apparent, and the promoters were compelled to employ an attorney to secure the necessary signatures. This in itself was not an unusual course, as it is difficult to find citizens who are so devoted to their principles as to be willing to circulate such petitions without compensation. They employed Mr. Parkinson of Portland, who undertook to procure such signatures for 3½ cents a name. He employed a large number of circulators, who went forth into the highways and byways to procure signatures. Seven of these, at least, devised an easy method of earning their money. They would get together and pass their petitions around, each signing a few names in a disguised hand, thus minimizing the chance of detection. These forgeries were clearly proved, mostly by the admissions of the parties upon the trial of the case of *Friendly v. Olcott*, the testimony in which case was, by stipulation, used in the case at bar. In the present case these signatures are admitted by the pleadings to be forgeries, though they were filed in the secretary's office as part of the original petition. Other signatures to the number of 800 were discovered by Mr. Parkinson to be forgeries, and were eliminated from the petitions before filing. The petition as filed contained 13,715 names. Of these it is admitted that 3,778 are forgeries, perpetrated by dishonest circulators.

[4] In addition to these, we find that the petitions circulated by Thurber, Mathews,

Dirk, Wolwein, and Rahles, alias Wallace, contain such evidence of forgeries, perpetrated either by the circulators, or with their connivance, that the prima facie case made by the affidavits of these circulators in favor of the genuineness of these petitions is overcome, putting the burden of proof upon the defendant to establish the genuineness of each signature; and, as this has not been done, we reject all the signatures on these petitions, amounting in the aggregate to 1,183 names, although it is probable that many names on such petitions are genuine.

We have, with much labor, gone over all the other names on the petition as filed, viewing it in the light of the testimony of experts and detectives in regard to the genuineness of the signatures and the residence of the parties. In several instances the testimony of experts as to forged signatures is contradicted by the parties themselves, who appear in court and swear that the alleged forgeries are their genuine signatures. While we do not question the motives of these experts, and believe that their intention was to state the exact truth, these mistakes, which have been proved, cause us to hesitate and be cautious in receiving their testimony. The testimony of the detectives as to the fact that certain persons signing petitions were not found, and were unknown at the place given by them as a residence, is largely hearsay, and for that reason was inadmissible, and in several instances it is shown to be inaccurate, though, no doubt, honestly given. We are convinced, however, that there are spurious and forged names on several of the petitions; but the evidence does not, in our opinion, establish the fact that such names were so placed by the circulators, or with their connivance. It would be almost impossible to circulate a petition containing so great a number of signatures in a city like Portland without some fictitious names being placed upon it. As the circulator of a petition is the agent of the signer, and his oath is the only evidence of the genuineness of the signature, it follows as a matter of course that, where he is shown to have acted fraudulently, the value of his verification is destroyed, and the petition must fall, unless the genuine signatures are affirmatively shown. But, in the absence of evidence of intentional fraud or guilty knowledge on the part of the circulator, it would be an unjust rule to deprive the honest signer of his right to have his signature counted, merely because some disqualified person signed, or because some person, without the knowledge of the circulator, affixed a fictitious name, or gave a fictitious address.

[5] A careful scrutiny of all the testimony by the experts and detectives convinces us that there are, in addition to the signatures already held to be invalid, 936 names which are either fictitious or absolute forgeries, and should therefore be stricken from the petitions, since it is the business of the cir-

culator to see that the proper address is placed upon the petition. This includes those names where false or incorrect addresses have been given. In addition to this, there are 205 names appearing upon the petitions which are not included in the verifications, and for that reason will have to be eliminated. We believe this leaves 7,613 names upon the petitions which have not been successfully attacked.

It is claimed that there is evidence that Mr. Parkinson was aware of these forgeries; and that, as he acted as agent of the promoters of this referendum, and presented for filing a petition containing a large number of fraudulent names, the whole petition should be rejected as a forged document. We do not think the evidence shows that he was in any way cognizant of the fact that forged names were upon the petition when presented, but that, on the contrary, he supposed that all forged names had been eliminated. It probably would have been better if he had refused to become an assistant of people who were initiating a campaign of spite against a rival town, and it is evident that he was not careful in the selection of his circulators, and allowed some of them to impose upon his good nature and credulity, and for this he is censurable; but it appears fairly probable that when he presented the petition he believed that he was filing a paper from which fraudulent signatures had been eliminated.

It requires 6,135 signatures to place this measure upon the ballot, and we therefore hold that it is entitled to be so placed. Many details of the evidence are not discussed in this opinion, not because they have been overlooked, for they have been carefully weighed and examined, but because the time within which this measure must appear in the voters' pamphlet is now drawing near its close, and to consume it by the editorial work of preparing a more extended opinion might prevent friends and opponents of the measure from discussing its merits in that document.

The decree of the circuit court will be reversed and the suit dismissed.

BURNETT, J., concurs only in the result of this opinion.

EAKIN, C. J. (dissenting). I disagree with the opinion on but one question: As to the form of the petition in referendum cases. I am of the opinion that every sheet containing blank lines for signatures must contain the petition.

Section 3470, L. O. L., which gives the form for the petition for referendum, provides:

"Warning. It is a felony for any one to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the same measure, or to sign such petition when he is not a legal voter.

"Petition for Referendum.

"To the honorable _____, secretary of state for the state of Oregon (or to the honorable _____ clerk, auditor, or recorder, as the case may be, of the city of _____):

"We, the undersigned citizens and legal voters of the state of Oregon (and the district of _____, county of _____, or city of _____, as the case may be), respectfully order that the Senate (or House) Bill No. _____, entitled (title of act, and if the petition is against less than the whole act, then set forth here the part or parts on which the referendum is sought), passed by the _____ Legislative Assembly of the state of Oregon, at the regular (special) session of said Legislative Assembly, shall be referred to the people of the state (district of _____, county of _____, or city of _____, as the case may be), for their approval or rejection, at the regular (special) election to be held on the _____ day of _____, A. D. 19____, and each for himself says: I have personally signed this petition; I am a legal voter of the state of Oregon, and (district of _____, county of _____, city of _____, as the case may be); my residence and post office are correctly written after my name.

"Name _____, Residence _____, Post office _____.

"(Here follow twenty numbered lines for signatures.)"

Section 3471, providing for the form of the initiative petition, which is set out in the opinion, does not provide for the designation of the law submitted thereby, other than "the following proposed law." In the referendum form of petition, it contemplates that the number of the bill and its title shall be given; but by section 3472 it is provided that every such sheet for petitioners' signatures shall be attached to a full and correct copy of the measure proposed by the initiative; and that referendum petitions shall be attached to a full and correct copy of the measure on which the referendum is demanded. The vital question is, Must the petition be printed on every sheet presented for petitioners' signatures? and not whether every sheet must have attached thereto a copy of the measure. The language and purpose of the two forms are identical in this regard, and cannot be distinguished, namely, the form of petition is given, and it is stated, "here follow twenty numbered lines for signatures," that is, form for 20 names on every sheet with the petition; and the evident purpose of this requirement in both cases is to prevent the possibility of securing signatures to blank sheets and afterwards attaching them to a petition. It is intended as an assurance that the registered voter will have under his eye, as a part of the sheet on which he places his name, the warning, as well as the measure to which he is subscribing. This whole act is brist-

ling with precautions against fraud in its use, and this is the most important of them—the assurance that the man, who writes his name as one of the 20 on the sheet, signs the petition.

These sheets came to the secretary of state in sections of five or ten separate sheets, to each section of which is attached the petition; and it is not in the power of the secretary to know whether they were in that form when signed. A large majority of these sections has the petition printed on every sheet; but there are 5,000 signatures presented on sheets that were otherwise blank, except the printed heading, "Name," "Residence," "Post office."

The main argument of defendant in favor of this form of petition is the impossibility, in many instances, of printing the title of the act, on account of its length, on a sheet 7x10 inches, leaving room for 20 signatures. But this objection is without merit, as it is stated in section 3474 that these forms are not mandatory, and, if substantially followed, it shall be sufficient. Therefore a short synopsis of the title or the number of the bill alone would be a substantial compliance with the resolution, as the sheets must be attached to the copy of the measure, as in the referendum petitions. But it is not a substantial compliance with the forms given to have the petition on one sheet and the signatures on a separate sheet; and the names on all such sheets should be stricken out.

It was conceded at the argument that if the names, contained on sheets not having the petition upon them, are discarded, the plaintiff must prevail; therefore the decree should be affirmed.

TAFFE v. SMYTH et al.

(Supreme Court of Oregon. July 9, 1912.)

1. APPEAL AND ERROR (§ 237*)—OBJECTION BELOW—FINDINGS—REVIEW.

Findings of fact by the trial court on all disputed questions in issue will not be disturbed on appeal unless the bill of exceptions shows that application was made to it for further or different findings, and that the request was denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1386-1388; Dec. Dig. § 237.*]

2. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The action of the court trying a case without a jury, in admitting over objection and exception evidence which it thereafter determined was incompetent, is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

3. APPEAL AND ERROR (§ 839*)—QUESTIONS REVIEWABLE—POWER OF SUPREME COURT—"TRIAL DE NOVO."

Under Const. art. 7, § 3, as amended November 8, 1910 (L. O. L. p. xxiv), requiring the Supreme Court on appeal, where either

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

party has attached to the bill of exceptions the whole testimony, to direct the proper judgment, provided it can determine what judgment should be entered, the Supreme Court on appeal, where the whole testimony is attached to the bill of exceptions, must examine the evidence and affirm, modify, or reverse the judgment as is required in appeals in suits in equity, except that in an action at law the court will only consider errors properly assigned, but such review is not a trial de novo which implies a re-examination of the original evidence as if no previous hearing had occurred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3279-3300; Dec. Dig. § 839.*]

For other definitions, see Words and Phrases, vol. 8, p. 7108.]

4. APPEAL AND ERROR (§ 80*)—JUDGMENTS REVIEWABLE—FINAL "JUDGMENT."

A judgment which determines the issues involved in six of the seven causes of action is a final judgment and appealable under L. O. L. § 548.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 450, 456, 457, 494-509; Dec. Dig. § 80.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

5. APPEAL AND ERROR (§ 839*)—QUESTIONS REVIEWABLE—JURISDICTION OF SUPREME COURT.

Where an appeal is taken from a judgment determining six of the seven causes of action alleged, rendered on the court making findings of fact on such six issues, but omitting to make any findings on the remaining issue, the Supreme Court, under Const. art. 7, § 3, as amended November 8, 1910 (L. O. L. p. xxiv), must examine the entire testimony given at the trial, segregating the part applicable to the cause of action on which no finding was made, and make a conclusion of fact in relation thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3279-3300; Dec. Dig. § 839.*]

6. EASEMENTS (§ 26*)—COMPENSATION.

Plaintiff permitted defendants, engaged in constructing a canal, to lay on his premises underground pipes to his water tank, and to use water, for which defendants agreed to pay \$1 per day. Defendants subsequently discontinued the use of plaintiff's tank and disconnected their pipes therefrom. Thereafter plaintiff notified defendants that he would demand as rental \$2.50 per day from the date of the notice for the use of the water tank and his land for conveying water through the pipes. Defendants made no response to the notice, and permitted the pipes to remain. *Held*, that plaintiff was not entitled to compensation for the use of his land by defendants after such notice.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 72¼-74, 80-82; Dec. Dig. § 26.*]

7. COSTS (§ 233*)—APPEAL—LIABILITY.

Where the correct conclusion was reached by the trial court, though it failed to make a finding of fact on one issue, the defeated party, though obtaining on appeal a finding of fact as to such issue, was liable for the costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 844-891, 929; Dec. Dig. § 233.*]

Burnett, J., dissenting in part.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by I. H. Taffe against Sidney Smyth and another, partners doing business under the firm name of Smyth & Jones.

From an order granting insufficient relief, plaintiff appeals. Affirmed.

This is an action by I. H. Taffe against Sidney Smyth and W. N. Jones, partners as Smyth & Jones, to recover money. Seven separate causes of action are set forth in the complaint wherein facts are alleged from which it was asserted that there was due from defendants to plaintiff on the several causes sums as follows: First, \$398.08; second, \$141.60; third, \$525; fourth, \$365; fifth, \$715; sixth, \$700; and seventh, \$120—amounting to \$2,964.68, on account of which there was credited \$678.50, thus leaving due \$2,286.18, for which judgment was demanded. The answer denied that either of the sums thus stated was owing, but admitted the validity of parts of the causes of action, and that there was due thereon sums of money, to wit: First, \$205.58; third, \$37.50; fourth, \$30; sixth, \$50; and seventh, \$10—aggregating \$333.08. All liability on the second and fifth causes was denied. For a further defense and by way of counterclaim, the answer alleged facts showing that defendants were entitled to a credit on account of certain items, setting forth a list thereof, amounting to \$1,209.94 instead of \$678.50 as admitted in the complaint. Judgment was demanded by defendants for \$854.36, or for \$22.50 less than appeared from their statement of the account.

The reply having put in issue the allegations of new matter in the answer, the cause was tried without a jury, and, from the testimony taken, findings of fact were made in favor of plaintiff upon the several causes of action as follows: First, \$225.58; second, \$95.60; third, \$300; fourth, \$40; fifth, \$—; sixth, \$150; and seventh, \$40—aggregating \$851.18. The court further found that defendants were entitled to \$1,099.90 as a credit on account of all the causes of action, from which sum was deducted \$851.18 that was found to be owing from them to plaintiff, thereby leaving due from him to them the remainder, or \$248.72, for which judgment was given, and he appeals.

B. S. Huntington, of Portland (Huntington & Wilson, of Portland, on the brief), for appellant. S. B. Huston, of Portland, for respondents.

MOORE, J. (after stating the facts as above). [1] It is maintained by plaintiff's counsel that no evidence was received tending to support several findings of fact as made, and, such being the case, errors were committed in these respects. When an action is tried by stipulation without the intervention of a jury, and from the evidence received findings of fact are made upon all the disputed questions to which the parties in the pleadings have narrowed their respective allegations, such conclusions will not be disturbed on appeal unless it satis-

factorily appears, from an inspection of the bill of exceptions, that application was made to the trial court for further or different findings, and the request therefor denied. *Hicklin v. McClear*, 18 Or. 126, 22 Pac. 1057; *Umatilla Irrigation Co. v. Barnhart*, 22 Or. 389, 30 Pac. 37; *McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13.

In the case at bar no exception was taken to any of the findings, or motion made to set either of them aside, nor was any other finding submitted with a request that it be adopted in lieu of any conclusion of fact that was reached. If any error was committed as alleged, the action of the trial court in that respect is unavailing.

[2] The defendant Jones on direct examination was asked by his counsel if he had ever made any objection to a written statement of account submitted by the plaintiff, and replied: "No, I never did. Q. Why not?" An objection to the inquiry, on the ground that it was incompetent, having been overruled and an exception allowed, the witness answered: "When we first went to Celilo we were told that we would have trouble with Mr. Taffe before we got out of there." Plaintiff's counsel, interrupting, moved to strike out the answer, whereupon defendant's counsel stated: "I want to show that he was warned, which is the reason why he did not object to this bill." The court thereupon remarked: "Well, I will admit the evidence and consider it on the motion to strike." To this ruling an exception was taken. The witness, continuing, said: "It was represented to us that Mr. Taffe loved a lawsuit; and had them all the time, and of course we wanted to avoid a lawsuit as long as possible, and for that reason we did not object to what I considered his preposterous charges until after we had finished work up there."

The testimony thus quoted, the objections interposed, the statements of respective counsel relating to the matter, and the exceptions noted, are practically repeated in respect to the testimony of the defendant Smyth on the same subject. In ruling on objections to questions submitted to Smyth, the court observed: "I do not believe that testimony is competent. * * * I admitted it on the part of the other witness, and I will admit it now, although I have my doubts about it. It would seem to me rather it should be a reason why they should object to it at once"—referring to plaintiff's bill of items which had been tendered to the defendants.

In the trial of an action without a jury, the admission, over objection and exception, of immaterial evidence cannot injure a party unless he is prejudiced thereby. The court having stated that the testimony, the receipt of which is complained of, was not considered competent, such comment rebuts any inference that the sworn declarations of the witnesses tended in any manner to induce

the findings of fact that were made. The plaintiff was evidently not prejudiced in any manner by the admission of such testimony.

It will be remembered that no finding of fact was made on the issue involved in the fifth cause of action. The complaint relating thereto avers in effect that, at the special instance and request of the defendants, the plaintiff permitted them to lay and maintain on his premises water pipes and to use in connection therewith his water tank from November 25, 1907, to September 10, 1908, at \$2.50 per day, amounting to \$715, no part of which had been paid except \$878.50 heretofore referred to as the sum to be credited on the entire account. The answer to this part of the complaint admitted that, during the time specified, defendants had some pipes buried on plaintiff's land, but denied that his tank was used for any part of such time, or that they agreed to give \$2.50 per day or any other sum, or promised to pay \$715 or any other amount for the privilege alleged. For a further defense to such cause of action, the answer stated in substance that the pipes under ground do not interfere with plaintiff's use of the premises, and that such conduits are the pipes referred to in paragraph 2 of the fourth separate cause of action; and denied that no other payments have been made than as alleged, but averred that defendants had fully paid plaintiff for such use prior to the commencement of this action. The paragraph thus adverted to charges a use by the defendants of the same property from November 25, 1906, to November 25, 1907, at the agreed price of \$365; no part of which had been paid except the sum stated as a credit on the entire account. The reply denied the allegations of new matter contained in this part of the answer.

[3] No finding of fact having been made upon the material issue involving the sum of \$715 as set forth in the fifth cause of action, the failure in this respect, under the rule formerly prevailing, would not only have necessitated a reversal of the judgment, but required the cause to be remanded for a new trial. *Henderson v. Reynolds*, 57 Or. 186, 110 Pac. 979; *Darling v. Miles*, 57 Or. 593, 111 Pac. 702, 112 Pac. 1084. Section 8 of article 7 of the Constitution was amended November 8, 1910, and, as far as material herein, reads as follows: "Until otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the Supreme Court shall be of the opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed notwithstanding any error committed during

the trial or, if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of the opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court." 1 L. O. L. p. xxiv.

It has not been "otherwise provided by law" that any change in the practice on appeal should be inaugurated, differing from that prescribed in the amendment quoted. This alteration in the fundamental law was evidently induced by an earnest desire on the part of the electors of Oregon to promote the peace of society by having all controversies in judicial tribunals ultimately determined at only one trial in the circuit court, and one review of a judgment on appeal to the Supreme Court. To effectuate this purpose, it is essential that, when from an examination of the entire testimony given at the trial of an action, of the instructions of the court to the jury and of other material matters, it is possible for the Supreme Court on appeal to determine the issues involved, the amended organic act demands a final conclusion of the matter. Nor is such a review a trial *de novo*, for that term implies a re-examination at which original evidence may be received as if no previous hearing had ever occurred, and such trial applies only to appeals from judgments rendered in the county court and in justices' courts. The statute regulating these matters reads as follows: "Upon an appeal from a judgment, the same shall be reviewed as to questions of law appearing upon the transcript, and shall only be reversed or modified for errors substantially affecting the rights of the appellant; but upon an appeal from the judgment of a county court or justice's court, the action shall be tried anew, upon substantially the issues tried in the court below; and upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it." L. O. L. § 556. It will be remembered that the amended organic act declares that, "if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of the opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court." Decrees in equity, involving the merits of a cause, are affirmed, modified, or reversed on appeal in the Supreme Court after a careful examination of the evidence accompanying the transcript. Construing the provisions of our statute relating to the trial of appeals in the Supreme Court in connection with the amended organic act, the declaration therein as last quoted, demands the same examination on

the trial of an appeal from a judgment in a law action, when either party has caused to be attached to the bill of exceptions the whole testimony, etc., as is required in the trial of appeals from decrees in suits in equity, except that in the law action it is only errors properly assigned that will be considered.

[4] In the case at bar the determination by the trial court of the issues involved in six of the causes of action is, as to them, a final judgment from which an appeal may be taken. L. O. L. § 548.

[5] Jurisdiction of the appeal having been secured by this court, it is authorized, under the amended act in question, to examine the entire testimony given at the trial, segregating the part applicable to the cause of action on which no finding was made, and thereupon to make a conclusion of fact in relation thereto.

Findings having been made on all but one of the material issues, the omission in this respect was evidently inadvertent and not a willful violation of the duty enjoined by law upon the trial court to make and file findings of fact in the trial of an action without a jury. L. O. L. § 158. But, however the failure may have occurred, the amended Constitution imposes upon the Supreme Court, "until otherwise provided by law," the obligation to determine on appeal what judgment should have been entered in the court below, when this can be done from an inspection of the entire proceedings in that tribunal if they are properly brought up for review.

[6] In the case at bar the certificate of the trial judge appended to a transcript of the testimony is to the effect that the written copy sent up contains all the evidence offered by either party at the trial of the cause. Carefully examining, in the light of the amended organic act, all the testimony given at the trial and detailing the part thereof applicable to the fourth and fifth causes of action referred to in the answer, it appears that the plaintiff permitted the defendants, who were engaged in constructing at Celilo, Or., a government canal, to lay on his premises pipes, to connect them with his tank, and to use water thus obtained for which they agreed to pay him \$1 per day. The plaintiff testified that such use was to continue for the term of one year from November 25, 1906, and his fourth cause of action charges the defendants therefor \$365. The plaintiff's testimony in this particular is corroborated by that of his wife. The defendants, however, severally testified that they were to pay him the stipulated sum for the time only that they used his tank; that discovering the supply of water afforded by such means was inadequate to their demands, the defendants, after 30 days' use, disconnected their pipes from the tank and thereafter took no water from such reservoir. The defendants' testimony is corrob-

orated by that of other witnesses in respect to the length of time for which payment was to be made for such use, and that it was not to be for a year, but only for the part thereof the tank was employed as a water supply. For this use the trial court found that \$40 was due from defendants to plaintiff. The conclusion thus reached is supported by some testimony, but whether or not the weight of evidence upholds the finding as made is not subject to review and is referred to here only because the answer alludes to the fourth cause of action wherein the value of such use is involved.

A letter, of which the following is a copy, was duly mailed and received by the persons to whom it was addressed, to wit: "I. H. Taffe, Proprietor of the Celilo Fishery, Celilo, Oregon, Nov. 25, 1907. Messrs. Smyth & Jones, Contractors, Celilo Government Canal, Celilo, Oregon—Gentlemen: On the 25th of November, 1906, the verbal contract which was agreed upon between your firm and myself expired yesterday. This contract, as you know, was for the use of my water tank and use of my land for the purpose of conveying water through pipes where required. From this date on, or while your pipes remain on my land, the rental will be \$2.50, two dollars and fifty cents per day. Yours Respectfully, I H. Taffe." The plaintiff testified that no answer to this notice was ever received, nor was any objection made to him by the defendants in respect to paying the sum so demanded. On cross-examination the plaintiff was asked: "When you wrote them that letter, they then took the pipe out of the ground where it went up by the house around back on your place?" He replied: "It was out before that; before writing that letter. Q. What did you have reference to in this letter when you said: 'From this date on, or while your pipes remain on my land, the rental will be \$2.50.' Now, you say the pipe had been taken out before. A. Yes sir; but there were other pipes—they had pipes laid to their boilers all the time while they were working on that canal. Q. It was not the pipe then going to the tank? A. No, sir. Q. What you were going to charge them the \$2.50 a day for was the pipes leading to the boilers? A. Yes, sir; and trespassing generally over my place. Q. It was not for the use of water? A. No, they were pumping their own water then. Q. And had torn up their pipes? A. Torn up this big pipe. Q. That led to the tank? A. Yes, they moved it to another place."

A. K. Bentley, the defendants' superintendent at Celilo, testified that, when the conduit was disconnected from plaintiff's tank, the pipe thus used, which was laid under ground, was not taken up, except sufficient thereof to complete his employers' pumping system.

A. E. Hammond, a civil engineer in defend-

ants' employ, testified that the use of plaintiff's tank was discontinued because the reservoir was not of sufficient capacity to store the quantity of water needed; that the pipes leading to and from the tank were exposed to freezing weather; and that, in order to prevent delay of their work from ice, the defendants were compelled to build a tank of their own, and, disconnecting from plaintiff's tank their pipes, they shifted a part of them, through which water was pumped to the new reservoir.

The charge in the fifth cause of action was for a use of the tank and an exercise of the right to lay pipes on plaintiff's premises from November 25, 1907, to September 10, 1908. An alleged use of the tank, therefore, formed a part of the plaintiff's claim, but, since such use was discontinued long prior to November 25, 1907, it is evident that his real complaint was predicated, as he testified, on the trespass occasioned by the defendants' failure to remove the buried pipes from his premises. The defendants' previous use of the land having ceased prior to the receipt of the plaintiff's letter, they had no right to or estate in the real property which they thereafter exercised or held pursuant to the notice of the sum demanded. A careful examination of the entire testimony convinces us that no sum of money whatever is due plaintiff from the defendants on account of the fifth cause of action, which finding of fact is now made in lieu of the conclusion which the trial court should have reached on that branch of the case.

Nothing here said, however, is intended to prejudice the plaintiff's right to remove from his premises the pipes complained of, or to recover the reasonable expenses incident thereto, or the damages occasioned thereby.

[7] Though plaintiff by this appeal secured a finding of fact as to one of the issues, the conclusion reached in respect thereto does not modify or reverse the judgment appealed from, and hence defendants will be entitled to their costs and disbursements in this court and in the court below.

It follows from these conclusions that the judgment should be affirmed, and it is so ordered.

BURNETT, J. (dissenting). I agree with the opinion of Mr. Justice MOORE in its treatment of alleged errors in the admission of evidence, and so far as it holds that, in the absence of exceptions to the findings of fact, they must stand as the verdict of a jury and cannot be here assailed. So far, then, as the case depends upon the bill of exceptions, we must decline to re-examine those findings. I am compelled, however, to withhold my assent to the innovation sought to be ingrafted upon the judicial system of the state by the opinion to the effect that, without any examination or decision what-

ever by the circuit court upon a separate and distinct cause of action, this court may, in the first instance, consider the testimony reported with the bill of exceptions and, as a tribunal of original jurisdiction, reach a conclusion and pronounce a judgment at law.

This might be a legitimate deduction if section 3 of article 7 of the state Constitution, as amended by the plebiscite of November, 1910, were all there is to be considered of that expression of the popular will, but it is not. The preceding section 2 reads thus: "The courts, jurisdiction and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law; but the Supreme Court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings." This section declares that, except in the three special proceedings noted, the great body of the law as laid down in the statutes and embodied in the decisions remains undisturbed and unchanged. The former judicial system, which abides even yet, requires that the circuit court shall, in the first instance, make findings of fact and conclusions of law on every material issue, and for its failure to do so its judgment is reversible on its face without a bill of exceptions.

In the case at bar there are seven distinct causes of action stated in the plaintiff's initial pleading. In effect there are seven complaints each requiring complete treatment by the trial court. That tribunal, however, as appears on the face of its record, has entirely ignored the fifth cause of action, although issue was joined upon it. This court decided in the case of *Chung v. Stephenson*, 50 Or. 244, 89 Pac. 386, that, "under our statutes, as the findings in law actions are entered in the journal, the failure of the trial court to find on a counterclaim may be reviewed on appeal, though no exception was taken to such failure to find." If that was a sound rule, then it is so now, for the judicial system remains unchanged in that respect. This court is still only an appellate tribunal except at its own discretion in habeas corpus, quo warranto, and mandamus. The mention of those exceptions excludes all other cases as subjects of original jurisdiction, yet, in effect, the court would assume that power universally if it undertakes the decision of a case of this kind which has not been heard and determined first by the circuit court. All we have before us on the fifth cause of action is a report of the testimony which might as well have been sent up by some referee, if we allow the court below to pass it by without examination.

If the circuit court can abdicate its function as a judicial tribunal and take up the

role of a mere reporter as to one cause of action, it may do so as to all of them or in any case whatever. It is but a step farther to the situation where the trial court will entirely abandon its responsibility and delegate the preparation of its decision to the counsel of the party whom the judge, arbitrarily as a Persian *cadi*, may designate as a winner, complacently leaving it to this court to do tardy justice on appeal.

The revision of article 7 of the Constitution does not obviate the necessity of the trial court passing upon questions of law and fact in the first instance in all cases before it on original jurisdiction. Because it has the witnesses personally present before it, hears them, and sees their manner of testifying, the litigants, as well as this court, are entitled primarily to the judgment of the circuit court on disputed questions of fact. This is eminently proper and ought to be so because of the conditions mentioned giving that court the better facility for reaching a just conclusion in any case.

Whether the omission to make findings of fact and conclusions of law on the fifth cause of action happened designedly or from mere inadvertence does not appear, nor is it necessary to decide. In either case, the litigants have been deprived of the benefit of the decision of a judge who personally heard the witnesses. This is an error we cannot adequately correct on a mere paper hearing, and the judgment ought to be reversed and the cause remanded for trial *de novo*.

BUTTS v. PURDY.

(Supreme Court of Oregon. July 9, 1912.)

1. DEEDS (§ 193*)—VALIDITY—BURDEN OF PROOF.

In a suit to quiet title against a deed to defendant which plaintiff claims defendant forged, and which bears upon its face evidence of mutilation, the burden is on defendant to show a valid conveyance.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 562-573; Dec. Dig. § 193.*]

2. DEEDS (§ 207*)—FORGERY—EVIDENCE—SUFFICIENCY.

In a suit to quiet title, evidence held to show a deed relied upon by defendant is a forgery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 614-624; Dec. Dig. § 207.*]

3. EVIDENCE (§ 273*)—DECLARATIONS BY DECEDENT—ADMISSIBILITY.

On an issue as to whether a deed to defendant from plaintiff's intestate is a forgery, declarations of intestate while in possession of the property as to its ownership were admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

4. EVIDENCE (§ 44*)—NOTARIES (§ 1*)—JUDICIAL NOTICE—"STATE OFFICER."

A notary public is a "state officer," and the Supreme Court will take judicial notice of his accession, his official seal, and his continuance in office, and to inform itself respecting such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

facts will refer to the official records of the state department.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 66; Dec. Dig. § 44;* Notaries, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 7, pp. 6635-6638; vol. 8, p. 7804.]

5. DEEDS (§ 186*)—CANCELLATION—EXECUTION—PLEADING—SUFFICIENCY—"TRICK."

A complaint stating that defendant threatened to bring ejectment against plaintiff claiming to own under a pretended deed land which belonged to plaintiff's decedent, that the deed was a forgery and "trick" on defendant's part to secure title and possession of the property, and thereby cheat and defraud decedent's estate, etc., is sufficient to warrant relief either on the theory that the deed was forged or obtained by some fraudulent device; the word "trick" as a noun meaning an artifice or stratagem; a crafty or deceitful contrivance or procedure, and meaning as a verb to deceive by cunning or artifice; to impose on; to defraud; cheat; to effect by deceit or trickery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 557; Dec. Dig. § 186.*

For other definitions, see Words and Phrases, vol. 8, p. 7108.]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by Agnes Butts, H. D. Winters' administratrix, against Will E. Purdy. Decree for plaintiff, and defendant appeals. Affirmed.

This is a suit brought by Agnes Butts, as administratrix of the estate of H. D. Winters, deceased, against the defendant, Will E. Purdy, to have declared void and canceled an alleged deed from H. D. Winters, plaintiff's intestate, to defendant. The complaint alleges, in substance, that Winters died intestate on June 20, 1911; that plaintiff was appointed administratrix of his estate and took possession of the real and personal property known to have belonged to deceased in his lifetime, the real estate consisting of lots 1, 2, 3, and 4, and the west half of lots 5 and 6, in block 114, East Portland; that on August 8, 1911, defendant served upon her a written notice to vacate the property above described, upon which was situated a large rooming house; that defendant is threatening to bring ejectment against plaintiff, claiming to be himself the owner of such property by reason of a pretended deed, alleged to have been dated, made, executed, acknowledged, and delivered to defendant by H. D. Winters on May 1, 1909. Plaintiff further alleges that the pretended deed of conveyance dated and acknowledged on May 1, 1909, is not, and was not, the deed of deceased; that the same was never signed or executed by him, and was never delivered by him to the defendant; that it is a forgery and trick on the part of the defendant Will E. Purdy to secure the title and possession of the property and thereby cheat and defraud the estate of deceased; that the value of the property is about \$65,000; that defendant never paid Winters anything for the property.

Defendant answered, denying the allegations of forgery and fraud in the execution of the deed, and by way of affirmative defense set up that the deed was made to him by Winters in due course and for a valuable consideration; that defendant thereby became the absolute owner of the property; that at the time the deed was made it was agreed between Winters and defendant that the deed should not be recorded; that the grantor should remain in possession of the property until his death; and that the rental value of the property is about \$400 per month. The answer prayed for a decree quieting the title to the property in defendant, and that plaintiff be required to account to defendant for the rents and profits since June 20, 1911. A reply denied defendant's title to the property, and admitted the value of the rents to be \$400 per month. There was a trial before the court and findings made for plaintiff. Defendant appeals. Other facts appear in the opinion.

Thos. O'Day and M. L. Pipes, both of Portland (J. M. Haddock, on the brief), for appellant. C. M. Idleman and R. Citron, both of Portland, for respondent.

McBRIDE, J. (after stating the facts as above). [1, 2] This is a remarkable case. The defendant claims to be the owner of the property in dispute by reason of a conveyance from H. D. Winters, and, irrespective of the question as to who introduced in evidence the deed under which he claims, the burden of proof is upon him to show, by a fair preponderance of the evidence, that he holds a conveyance to the property made to him by Winters. He produces an instrument purporting to be such a deed, but bearing upon its face evidences of mutilation for which he attempts to account. His own story is in itself improbable in so many particulars that we are unable to convince ourselves of its truth.

Before discussing the evidence, we will briefly review the relations of the principal parties. Winters at the date of the pretended deed was a man 77 or 78 years old. He was a miser, sordid and suspicious in character, and had accumulated, by shrewd business dealing, the property in question upon which was situated a large rooming house and other buildings, from which he derived a rental of about \$400 per month. His eyesight was poor, but his general health is not shown to have been very greatly impaired for a man of his years until shortly before his death. For several years before the 1st day of May, 1909, he had been associated with defendant and one M. B. Evans in a real estate corporation, known as the "Purdy Investment Company," and was one of its officers, and in that capacity or in his individual capacity had frequently signed deeds and other papers which were acknowledged

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in Purdy's office. In June or July, 1909, Evans went to Winters, and informed him that Purdy had forged a deed to all his (Winters') property, that he had signed as a witness upon a promise from Purdy that he should receive \$10,000 for so doing, and that Miss Pratt, a notary and stenographer in the office, had signed as the other witness. Evans then disappeared, but subsequently was heard of in Tacoma, where he gave out statements reflecting upon the business of the corporation and upon Purdy. These statements being published in the Portland papers, a statement written by Purdy and signed by Winters and himself was printed in the Daily Journal, in which they say, among other things, that: "He [Evans] approached Mr. Winters with the story that Mr. Purdy had tried to sell his (Winters') property, claiming to have in his possession a deed covering all of the said property, and that he himself had seen and signed the deed on a promise of \$10,000 cash, claiming also that the young lady in our office, who is a notary public, had acknowledged, also signed the deed as a witness. In this, his last effort, he met with failure; accordingly he left for parts unknown, but stating he was going to Tacoma, and would be gone for three or four days. This proposition of legal documents being forged, or having lost faith in his business associates is the last chapter or act in the drama," etc. Appended to this statement is the following statement by Miss Pratt: "I, M. B. Pratt, notary public and stenographer in the office of the Will E. Purdy Investment Company, assert that I have not acknowledged or signed any such deed as mentioned by M. B. Evans in the published article. M. B. Pratt." The Purdy Investment Company went out of business shortly after this episode, and business relations between Purdy and Winters seem to have substantially terminated about September of the same year.

Purdy's story is substantially that for some time prior to May 1, 1909, Winters had intimated that he would give him this property, and that on the 1st of May he went over to Winters' place, and Winters said to him that he had had a bad spell the night before, and remarked, "I was thinking last night I was done for; and, if I had gone, I suppose the estate would have gotten all the money that belonged to you, because you have no papers. I am coming over to-day and settle the matter up, and I am going to give you a deed to this property;" that he came over to the office at 2 o'clock and asked Purdy if he had a blank deed. Witness got out the deed and proposed to have Miss Pratt typewrite the description, but Winters said, "No, * * * write it yourself;" that witness then wrote the deed which appears to be a deed of general warranty, Winters giving him the description from memory. When it was written, Winters went out to find a witness and brought in Welgle, who

had an office near by, and who had formerly been an associate with witness in business, that, when he returned, Winters signed the deed and Welgle and Miss Pratt signed as witnesses; that witness paid Winters \$1, the nominal consideration, and handed him the deed after Miss Pratt had taken his acknowledgment; that, in addition to the nominal consideration, Winters actually owed him \$11,300, which he had left with him as a sort of deposit.

His account of this \$11,300 fund is substantially as follows: "Besides that there was about \$11,000 and \$300 in property and money that had been loaned to Mr. Winters by myself, and this was a part of the consideration for this deed. I sold him property, and, when I would sell him property, he would give me a receipt for it, and I considered it just like putting it in the bank. I considered Winters good, and I wanted to lay by a certain amount of money so that I would have it when I wanted it, and I was laying by this money and giving it to Mr. Winters and holding his receipt for it. He has got the receipts, I suppose, or did have them. I gave them back to him when this deed was given to me. They represented \$11,300 besides interest money I had let him have and property I had deeded to him. * * * I said it was property and cash (the \$11,300). The property was two lots and a seven-room house in Mansfield addition. * * * This was about seven years ago. The value of the property was \$2,500, but the balance that he owed me was \$1,650, for which I took a written agreement. From time to time I returned his agreements, and took one from him for a larger amount. I returned the first agreement at the time I sold him an interest in eight lots and two houses. I drew the agreement, and he signed it. * * * I kept no copy of the agreement. Six, eight, or ten months after the Mansfield addition transaction I sold him a half interest in two houses and eight lots in Corona Park addition. Property was worth \$3,500. Half interest was mine. That would be \$1,750 coming to me. I returned the first agreement and took one then for \$3,400. * * * I kept no copy of it, have no record at all. I added it to the next sale. I have not got the deeds here, but the next transaction was an equity in 40 acres at Buell, Wash. I deeded Mr. Winters the property, subject to an installment contract. The equity, I think, was somewhere from \$1,200 to \$1,500. * * * I then gave back the previous agreement, and took a large one. I then sold Mr. Winters my equity in Mississippi avenue addition property in Multnomah addition. I think I had \$1,000 coming. I then turned the last agreement back to Mr. Winters. I had a rooming house, and I sold it, and got \$1,000. I then sold that to Mr. Winters, and I took another agreement. * * * I returned the last agreement to Mr. Winters when I gave him \$800 that I

sold some property in Newberg for. Q. How did you give him this \$800? By check? A. No. I gave it to him in cash, I think, although I could not say. Q. Where did you have it when you gave it to him? Did you draw it out of the bank somewhere? A. I would not say at the present time, because I never thought I would ever have to give an account of such things again. Q. Where were you keeping your account at that time? A. All my banking business at that time, and for the last eight years, have been done in the United States National Bank at Newberg. This was five or six years ago. I returned the last agreement to Mr. Winters when I sold a mortgage I had on a farm in the Nehalem country for \$1,000, and I turned it over to Mr. Winters. Cannot say whether I had given him a check or not. I returned the last mortgage to Mr. Winters when I sold a lot on the boulevard, on the St. John car line, for \$500. This was four or five years ago, and I turned this money over to Mr. Winters. Cannot say whether it was cash or check, and took a new agreement. * * * I returned this agreement to Mr. Winters when I sold a house on Ninth street, on the East side; price of it was \$2,500, and I gave Mr. Winters \$1,000 of it. This, I think, was four years ago. I returned that agreement when I sold a lot in Albina, corner of Stanton, for \$800, and I turned that over to Mr. Winters. I think that was the last agreement I had. I returned that to him when he gave me a deed for this property. During this time I borrowed considerable sums of money from time to time from Mr. Winters during the same period of time. * * * He was a man of large wealth and means, and during the same five or six years I was selling property and taking agreements from him he was loaning me money from time to time, and sometimes I gave him my note. I would go to Mr. Winters and say, 'I want \$2,000, and do not want it to interfere with our other transactions at all. I want it for a few days'—and he would give it to me, and he would lay the money down on the table, and he never took a scratch of the pen for it—only my word. Many and many a day he has done this, and many and many a time. * * * I did not consider that I was loaning Mr. Winters any money when I took this agreement from him. I was putting it there for safe-keeping. It was the same as though I was putting it in the bank, I considered. He was loaning me money at the time. * * * I could not tell you now when I borrowed the last money from him, but I know it has been quite a while. I could not tell you how much I borrowed. It was so often that I did that when I was in business. You know, I have not been in business down there for over two years now." The witness also testified that one of the reasons for the conveyance was that he had promised to retain the name "Winters Block" to the property, and that it

was verbally agreed that Winters was to retain the possession and income from the property during his lifetime. Purdy goes on to state that he took the deed out to his place at Butteville, and, after keeping it for five or six weeks, put it in an envelope and placed it in a glass fruit jar, which was covered with a tin lid, and buried it on the bank of the river, about 2½ feet beneath the surface of the ground. Here it remained until August, 1910, when Winters told witness that to satisfy himself as to the statement of Evans, made in July, 1909, as to a forged deed, conveying all his property being in Purdy's possession, he would like to have him bring the deed down and let him see it. Purdy says that he promised to do so, but forgot it, and that finally, some time in the month of August, 1910, Winters came out to Butteville, and witness disinterred the deed and required Winters to give him a receipt for it to prevent his taking it away or destroying it. He states that, after Winters examined the deed, he expressed himself satisfied and went back home, Purdy giving him a check on the local bank to pay his expenses, that Mrs. Purdy was not at home on the day of Winters' visit, and that nobody was present at the disinterment except himself and Winters. He said that he would produce the check he had given Winters later on in the trial, but he failed to do so. The witness states that the deed was dug up the second time on August 4, 1911, six weeks after Winters' death, in the presence of several persons; that it was damp and mouldy, and the names of the witnesses almost obliterated; that he sent for Weigle to come up, and on the 6th day of August Weigle came, and, as his signature appeared very dim, it was finally suggested by the notary that he should retrace it, which was done. Miss Pratt was sent for and came out the same day and identified her signature. The deed was then sent to Multnomah county for record.

Before referring to the testimony of Weigle and Miss Pratt as to the execution of the deed, it seems proper to point out certain improbabilities in the account given of the matter by Purdy. It is improbable in the first instance that Winters, who was an old man past the age of active business, would convey the bulk of his property and apparently all of it that produced any income, without taking some assurance in writing that Purdy would perform his part of the agreement, and to allow him to have the possession and use of it during his lifetime. Winters seems to have been a keen, calculating business man, careful and even miserly and stingy in money matters, and such a course would have been contrary to his usual habits and character. Granting that he had confidence in Purdy's integrity, he could not be sure that Purdy could outlive him, or that in the event of his death Purdy's heirs would carry out his secret verbal agreement. Moreover, the property was incumbered with a

mortgage which in the event of Purdy's death would have to be repaid out of Winters' other property. We do not believe that Winters was foolish enough or unbusiness-like enough to have done an act so inconsistent with his character and habits. It is all but incredible. Outside of Purdy's own testimony no intimate, personal relations are shown to have existed between Winters and defendant. Winters was old and lonely, but it is not shown that he visited with the Purdy family or they with him, or that at any time he was the recipient of any of those kindly attentions from defendant or his family which might tend to awaken his gratitude or generosity. Their intercourse seems to have been of a strictly business character, fairly friendly most of the time, but not such as to awaken in a man of Winters' age and habits a desire to practically make Purdy the recipient of his wealth. That he did not trust Purdy completely is shown by his conduct in the Evans' episode. He was doubtful and proceeded to make inquiries to ascertain whether Purdy had actually concocted a forged deed to his property, and it is a significant fact also that, when he talked with Purdy and Miss Pratt about Evans' charges against Purdy, neither he nor they, according to the testimony of Purdy and Miss Pratt, ever referred to the alleged deed of May 1st, which had been executed only six weeks before. He asked Miss Pratt if she had certified to or witnessed the deed Evans referred to, and she contented herself by replying in the negative. Now what would have been more natural than for her to have said, "No, Mr. Winters; I never saw nor heard of any other deed from you to Mr. Purdy than the one you acknowledged before me a few weeks ago." She contented herself with making practically the technical answer that she knew nothing about a deed conveying all his property. Both Purdy and this witness seem to have been particularly careful not to remind him of the alleged deed of May 1st. This may have happened just the way these witnesses say it did, and this omission to mention the transaction of May 1st has been mere forgetfulness or a mere coincidence, but, to say the least, it seems unnatural under all the circumstances.

The alleged burial of the deed is another peculiar and unnatural circumstance. Purdy himself gives no reason for this, though Miss Pratt and Weigle state that, when it was executed, either Winters or Purdy, or both, requested that the fact of its execution be kept secret. According to Purdy's statement, it was buried in a jar without any rubber to protect it from dampness. He was a business man who had a bank account and transacted business with the bank. The natural thing for him to have done would have been to put it safely away in the bank, but instead of this he would have it believed that he buried it secretly, not even telling his wife its whereabouts, and that he left

the evidence of a fortune lying in the ground in an insecure receptacle where it would have been lost to his wife and family in case of accident to himself.

The story of Winters' coming to Butteville is not supported by any circumstance. The alleged visit was nearly or quite a year after Evans had made the accusation in regard to the forged deed. Winters, if he in fact signed the deed in suit here, presumably knew he had signed it, and the affair was a closed incident. Nobody saw him at Purdy's or at Wilsonville on his way home, and his housekeeper is positive that he never made the visit. Purdy declared that he could produce the check given by him to Winters for the expenses of the trip, and promised to do so before the close of the trial, but it was not produced. Mrs. Purdy was absent, and the children seem to have been away also. The alleged reason for the visit is absurd, considering the circumstances, and we do not believe it ever took place. Purdy's account of the visit also throws a peculiar side light on the relations of the parties when he tells us that he did not permit the friend, who had such confidence in him that he was willing to convey to him the bulk of his income-bearing property, without a line of acknowledgement or guaranty of good faith, to examine the document until he had extorted from him a receipt for the deed. Then he allowed him to handle it. In brief, this confiding and affectionate friend who so loved him that he was willing to trust him with the bulk of his property thought he might be a forger, and defendant thought that this same friend might be treacherous enough to destroy the deed if he got it into his hands. We do not believe the alleged visit was ever made.

The alleged consideration of \$11,300 also seems apocryphal. Purdy was a business man of experience. For his own convenience he would have kept some memorandum of these large transactions and deposits with Winters. Winters was a man of wealth, but old and not likely to assume the burden of acting as a gratuitous custodian of Purdy's earnings, and it is in evidence that Purdy was a frequent borrower from him. He produces not a single writing, check, or receipt indicating that such deposits were ever made. His books of account are strangely absent. In September, 1910, Winters stated in an answer to a complaint filed against him in the state of Washington that in August, 1909, and for a long time prior thereto, Purdy was indebted to him in the sum of \$2,050. The alleged indebtedness of Winters to defendant is supported solely by Purdy's testimony, and seems improbable.

[3] The declarations of Winters, while in possession of the property as to his ownership, are admissible. These declarations, as well as his conduct, in regard to it, tend to show that he had never consciously conveyed away the title. We find from the testi-

mony of disinterested and credible witnesses that in December, 1910, and up to a short time before his death, Winters, an ardent prohibitionist, was in communication with a temperance organization in Portland with a view to the construction of a building on the premises, which should include a hall for the meeting of the society, and which building should eventually become the property of that organization, and that he had even gone so far as to order and receive plans for its structure. It is in evidence that he had entered into preliminary negotiations in writing with Mrs. Rutledge to lease her the rooming house for five years at \$150 per month, with the privilege of renewal, and had told her that he contemplated visiting his daughter and grandchildren in New York.

Mrs. Maxwell testifies that Winters told her at the time of the Evans' trouble that, if Purdy had a deed to the property, it was a forgery. Mrs. Crocker and Thomas Groome testify to the same effect. Outside of the testimony of the subscribing witnesses, there is little testimony as to the genuineness of the deed. F. S. Fields testified that from a comparison of handwriting he was satisfied in his own mind that it bore Winters' genuine signature, but shows no qualifications as an expert in handwriting beyond the fact that he is county clerk. A man may be an excellent clerk, and yet be a poor judge of handwriting. But one specimen of Winters' true handwriting accompanies the transcript, and, while a comparison of that with the signature to the deed discloses a general similarity, there are dissimilarities equally marked, and no expert can say from the specimen submitted that the signature is genuine. Winters' genuine signature is composed of very simple lines which are readily susceptible to imitation.

The date in the deed itself is blurred and obscured by what is either a fading of the figures or by an erasure of the first figure of the date. It appears thus: "This 1th. day of May," etc. Now Purdy had written too many deeds and had too much education to write "1th" for "1st." The conclusion from the appearance of the document is almost irresistible that the date has been "doctored" from some date like 10th, 20th, or 30th, to 1th, and that by some slip the letters "th" have been allowed to stand as they were originally written.

The testimony of the subscribing witnesses is the sheet anchor of defendant's case. One was a stenographer in the office of the Purdy Real Estate Company and the other a former business associate of defendant. Giving each of these witnesses credit for entire honesty, their testimony fails to overcome in our minds the impression made by the testimony before recited. Winters had dealt with so many people and executed so many papers that it would be very easy for a shrewd man like Purdy to mislead them as to a particular

date. We are satisfied that this deed was never executed nor acknowledged by Winters in May, 1909, and one reason for this opinion is conclusive.

[4] A notary public is a state officer, and this court will take judicial notice of his accession, his official seal and his continuance in office, and, for the purpose of informing itself in relation to such facts, will refer to the official records of the state department. *State v. Main*, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; *State v. Morris*, 47 Conn. 179. So informed, we find that Miss Pratt was appointed a notary public for the first time on the 5th day of May, 1909, and that on the 8th day of May, 1909, she filed her bond and oath of office, and thereby became qualified to act. Her bond is dated May 1st, and Winters was her surety. It is not probable that a young woman going into office for the first time would assume to act before she had been appointed and had filed her oath of office. A notary holding over might inadvertently continue to act in the interim between the expiration of his old commission and his reappointment, but it is not likely that a new applicant would begin her duties before any appointment had been made. Of course, the acknowledgment of the deed in itself is of no moment so far as this case is concerned as a deed otherwise valid would still be so between the parties without any acknowledgment whatever, but the circumstance above adverted to is important as it affects the value and accuracy of the witnesses' testimony. If Miss Pratt had been deceived, tricked, or persuaded into antedating the acknowledgment, to what extent has the deception extended? We are willing to credit her statement that at some time Winters executed some instrument in her presence, but that he so consciously executed the deed in question, we doubt.

Weigle's testimony is practically the same as Miss Pratt's, but there are some unusual features in it. He testifies that Winters came and requested him to witness a deed, and that, when he got to the office, they informed him it was a deed to Mr. Winters' Grand avenue property. It is not usual that a person who is called upon for such a purpose is informed of the contents of the instrument he is called upon to witness, but what makes the circumstance more peculiar is that, after the deed was executed and delivered, "they" (Winters or Purdy, or both) asked him to keep the transaction secret. That they should first deviate from the usual course of business and unnecessarily inform him of the contents of the instrument, and then ask him to say nothing about the transaction, is singular to say the least. He is evidently a prejudiced witness and not at all a fair one, as the following extract from his testimony on cross-examination will show. Being interrogated by counsel for plaintiff as to previous statements made to them, the

following colloquy occurred: "Q. Did you say anything to us that day about your name fading? A. How is that? Q. Did you say anything to us that day about your name fading here? A. Yes; I think I did. Q. What did you say about that? A. No, no; I don't think that was talked about at all, about my name having faded that way. I don't think it was, because my name didn't have the appearance of fading on that deed. Q. Well, what did you say on that day about the signature on that deed was not the signature at the time it was executed? A. You asked me why my name was so much dimmer than the others. Q. And didn't you say to Mr. McCarthy and myself on that day that your name, as it appeared on that deed, was as it appeared originally? And it was the only time you put your name there? A. No; I didn't say that. Q. Are you certain about that? A. Well, yes; I hedged myself pretty well. I didn't like to state a falsehood, but I told you I did not retrace my name there. Q. You hedged yourself, you say? A. Yes, I did—I did not want to say I had written my name on that day up there. Q. Why didn't you? A. Well, I wanted to tell the truth. I told you I had not retraced it. I was not under any obligation to tell you all that I knew. Q. Well, it would not have hurt you. It would not have done you any harm. A. No, sir. Q. Then why didn't you tell us the exact facts? A. Because I did not think you had any right to ask me those things. You came to me to learn all that I knew about it that day. Q. But we treated you very nicely? A. Oh, yes, sir. A. And we were frank in our conversation with you? A. Yes, sir; you were. Q. And we asked you very nicely about this matter? A. Yes, sir. Q. And why did you evade us? A. Well, simply because I did not think very material of you. I thought all you were trying to learn was what I knew about this, and I thought you were trying to learn something more than I wanted you to know. Q. Well, why didn't you want us to know that that was your signature, if it had been put regularly upon that deed? A. I told you. Q. Well, just answer that question. Why didn't you tell us that was your signature, and why did you evade the question we were asking you? A. I did not tell you, because I did not want to tell you on that day. Q. And that is the only explanation you can give? A. Yes; and that is enough too." He may have been misled by Purdy into believing that the dim characters on the deed shown him at Wilsonville were the remains of his original signature. He was no doubt ready to do anything he could to assist his old friend and partner and willing to suppress the truth to do so, as the above extract from his testimony indicates. Without further discussing the testimony, which is voluminous, we are of the opinion that the deed in question is not shown to have been the genuine deed of H.

D. Winters, but that it is either a forgery outright or was obtained by some trick or device, whereby he affixed his name to the instrument in ignorance of its real nature.

[5] While the complaint is not ample in its terms, we think it is broad enough to cover a case for relief either under an allegation that the deed was forged or obtained by some fraudulent device. The word "trick" used on the complaint in connection with other allegations is defined as "an artifice or stratagem; a crafty or deceitful contrivance or procedure." As a verb it signifies "to deceive by cunning or artifice; to impose on; to defraud; cheat; to effect by deceit or trickery." No demurrer or motion to make more definite was interposed, and the case was tried as though the allegations of fraudulent conduct were ample. The judge of the court below saw and heard personally the principal witnesses in the case, and in that respect was much better qualified to judge of their credibility than we. There is too much mystery and improbability in defendant's account of this transaction for us to accept it as true.

The decree of the circuit court is affirmed.

SWAIN v. FRITCHMAN, Mayor, et al.
(Supreme Court of Idaho. May 4, 1912.)

(Syllabus by the Court.)

1. ENJOINING ELECTION—INTEREST OF TAX-PAYER.

Question raised but not decided as to whether a taxpayer as such, in his individual and private capacity, can maintain an action against the city authorities to enjoin and restrain them from holding an election under the provisions of a statute which the plaintiff maintains is unconstitutional and void.

2. STATUTES (§ 11*)—ENACTMENT—VALIDITY OF PROCEEDINGS.

Legislative journals examined containing the entries and record of the introduction, amendment, and passage of House Bill No. 233, known as the Black Law or commission government act (Laws 1911, c. 82), and held that the journals show a substantial compliance by the Legislature with the requirements of section 13, art. 3, of the state Constitution in the passage of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 8; Dec. Dig. § 11.*]

3. MUNICIPAL CORPORATIONS (§ 48*)—ORGANIZATION—STATUTORY PROVISIONS.

Under the provisions of section 1 of the act of March 18, 1911, known as the Black Law or commission government act (1911 Sess. Laws, c. 82), it is specifically provided that any city within the state organized under a special charter may adopt the provisions of the new form of government, and section 3 of the same act recognizes that the provisions thereof may be adopted by a special charter city and provides "that no provisions of any special charter or other special act or law which any such city may be operating under at the time of its becoming organized under this act shall thereafter be applicable to such city," etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127-133; Dec. Dig. § 48.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

4. MUNICIPAL CORPORATIONS (§ 48*)—ORGANIZATION—STATUTORY PROVISIONS.

Under the provisions of section 3 of the commission government act (Laws 1911, c. 82), a special charter city which has decided by popular vote in accordance with the provisions of the act to adopt the commission form of government is thereafter subject to and governed by all the general laws of the state governing or pertaining to cities of the second class which are not inconsistent with the provisions of the commission government act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127-133; Dec. Dig. § 48.*]

5. MUNICIPAL CORPORATIONS (§ 48*)—ORGANIZATION—STATUTORY PROVISIONS—"SUCH CITIES."

The words "such cities" as used in section 3 of the act of March 13, 1911 (Laws 1911, c. 82), mean cities of the class to which the one adopting the new form of government belongs, if existing under the general laws, or would legally belong if it were organized and operating under the general laws of the state.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127-133; Dec. Dig. § 48.*]

6. STATUTES (§ 205*)—CONSTRUCTION—GENERAL RULES.

In construing legislative acts, it is not the business of the court to deal in any subtle refinements, but it is rather its duty to ascertain, if possible, from a reading of the whole act the purpose and intent of the Legislature and give force and effect thereto.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 205.*]

7. MUNICIPAL CORPORATIONS (§ 51*)—ORGANIZATION—STATUTORY PROVISIONS.

Under the general incorporation laws of the state, a city of the second class was the highest class of cities which was recognized or provided for by the lawmaking body at the time of the adoption of section 2170 of the Revised Codes, and the fact that the statute provided that cities of a population of from 1,000 to 15,000 should be known as cities of the second class does not signify that the lawmaking body meant or contemplated that a city should become disorganized or disincorporated by reason of its growth to exceed the maximum population of 15,000, and a city so incorporated would continue to exercise the powers and functions of a city of the second class although its population should exceed the maximum of 15,000.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 138-140; Dec. Dig. § 51.*]

8. MUNICIPAL CORPORATIONS (§ 48*)—ORGANIZATION—ADOPTION OF NEW CHARTER—SUBMISSION TO POPULAR VOTE.

Under the provisions of section 1, art. 12, of the Constitution, cities and towns organized prior to the adoption of the Constitution may become organized under the general laws when a "majority of the electors at a general election shall so determine under such provisions therefor as may be made by the Legislature." Under the terms of this constitutional provision, it is not necessary that the Legislature submit to the electors the question as to whether they will surrender a special charter, but they may submit the question as to whether they will adopt some general legislative act and become organized and operate thereunder.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127-133; Dec. Dig. § 48.*]

9. STATUTES (§ 91*)—GENERAL AND SPECIAL LAWS—MUNICIPAL GOVERNMENT.

The Black Law or commission government act (Laws 1911, c. 82) is a general and not a special law, and applies equally to all cities of the state having the required population that see fit to adopt its provisions by a popular vote.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 101, 102; Dec. Dig. § 91.*]

10. MUNICIPAL CORPORATIONS (§ 48*)—CONSTITUTIONAL LAW—MUNICIPAL BONDS—IMPAIRING OBLIGATION OF CONTRACT.

The act of March 13, 1911 (Laws 1911, c. 82), known as the commission government act, does not tend or purport to repeal any of the provisions of any bonding ordinance of Boise City, and does not purport or attempt to impair any bond or other obligation of the city, but on the contrary, specifically provides that the new form of government, if the same shall be adopted by any city, shall still be liable for all the outstanding obligations of the city as they then existed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127-133; Dec. Dig. § 48.*]

11. CONSTITUTIONAL LAW (§ 144*)—IMPAIRMENT OF OBLIGATION OF CONTRACT—MUNICIPAL BONDS.

The remedies given by law for the enforcement of contracts created by bonding ordinances and the sale of bonds thereunder cannot be altered or diminished so as to impair the substantial rights or interests of the holders of such obligations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 349-355; Dec. Dig. § 144.*]

12. MUNICIPAL CORPORATIONS (§ 909*)—TAXATION—REFERENDUM.

Under the provisions of sections 25, 28, and 74, of the act of March 13, 1911, known as the commission government act, it was clearly the intention of the Legislature that "ordinances making the annual tax levy and appropriations" should go into effect immediately upon their passage and that they should not be subject to the referendum provisions of that act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2068-2074; Dec. Dig. § 909.*]

Sullivan, J., dissenting.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by A. J. Swain against Harry K. Fritchman, mayor, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

E. G. Davis and Richards & Haga, all of Boise, for appellant. McCready Sykes, of Boise, amicus curiae. P. E. Cavaney and Charles F. Reddoch, both of Boise, for respondents. Gustave Kroeger, H. S. Kessler, and Frank Martin, all of Boise, amici curiae.

AILSHIE, J. This action was instituted in the district court by the plaintiff as a taxpayer against the mayor and members of the common council of Boise City to enjoin and restrain them from holding a city election under and in pursuance of a proclamation issued by the mayor on March 4, 1912, which proclamation was made in pursuance of the provisions of the act of the Legislature, approved March 13, 1911 (1911 Sess.

Laws, p. 280), known as the Black Law or the commission government act. The trial court denied the application, and the plaintiff has appealed.

In addition to counsel who represent the respective parties to this action, Gustave Kroeger, H. S. Kessler, and Frank Martin as amici curiæ appeared and were allowed to make oral argument and submit a brief in support of the judgment of the lower court, and McCready Sykes appeared and made argument and filed a brief as amicus curiæ in behalf of the appellant.

[1] Amici curiæ have raised the point that the appellant does not show such interest as to enable him to maintain an action to enjoin the holding of an election, that the question involved is a purely political question, and a taxpayer as such has no individual or personal right to maintain an action to restrain or enjoin the exercise of the political power of the municipality. In support of this position, counsel has cited the court to the case of City Council of McAlester v. Milwee (Okla.) 122 Pac. 173; 2 Joyce on Injunctions, pages 2033-2037; 22 Cyc. 885. In view of the public importance of having the questions raised in this case decided and for the further reason that this question was not raised in the trial court, we have concluded to reserve our judgment on the point raised and pass directly to a consideration of the merits of the case.

[2] 1. It is contended that the act of March 13, 1911, known as the Black Law or commission government act, is void for the reason that it was not passed by the Legislature in accordance with the requirements of section 13, art. 3, of the Constitution. The particular defects and failure to comply with the provisions of the Constitution urged by appellant are as follows: After the bill (House Bill No. 233) had been introduced and given the first and second readings and referred to the appropriate committee, we find from the House Journal that on February 25th the "committee of the whole" made the following report to the House: "The committee of the whole has had under consideration the general calendar and recommend that the amendments to the following House and Senate Bills be adopted: Nos. 129, 314, 268, 83, 378, 191, 379, 233, 171, 149, 372, 287, 162, 251, 327, 430, 354, 297, 86, 296, and 342, and Senate Bill No. 150. * * * * * Upon the filing of this report, the Journal shows that "Black moved the adoption of the report. Seconded by Davis. Motion carried." It is contended that the House by this action attempted to adopt amendments in omnibus form by viva voce vote to 22 House Bills and 1 Senate Bill, and that no single amendment is given, and that no separate action was taken on each bill, and that such a procedure is fatal to each and every bill thus attempted to be amended.

The foregoing action, as we view it, was merely the acceptance of the report of the

committee. It was evidently not considered as the final action on each separate bill in reference to the particular amendment proposed to such bill. We find further along in the journal entries of the proceedings of the same day, February 25th (House Journal, p. 437), where Black moved a "suspension of the rules, and that that portion of section 15, art. 3, of the Constitution, requiring a reading of bills on three several days be dispensed with on the ground that an urgency existed, and that amendments to House Bill No. 233 having been printed be read the first and second times and referred to the engrossing committee with the original bill." This motion was adopted by an aye and nay vote. The Journal further recites that "amendments to House Bill No. 233 were then read first and second times and with original bill referred to the engrossing committee and ordered engrossed." This entry shows that the amendments had been printed before being read the first or second time. It was unnecessary to suspend the rules or the provisions of the Constitution for the first reading. The motion to suspend the rules and the provisions of the Constitution with reference to reading on three several days was properly made and carried, and afforded the constitutional authority for giving the amendments a second reading on the same day as the first reading. It is contended that these amendments must not have been printed until after the passage of the bill for the reason that the journal entry of February 28th (House Journal, p. 482) contains a report of the committee on printing wherein they say: "Your committee on printing herewith report that we have had correctly printed and distributed the following: Amendments to House Bills Nos. * * * 233. * * * * * This entry, however, is not contradictory to or in conflict with the entry of February 25th which recites that the amendments had been printed at the time they were given the first and second readings. The committee report does not show when the committee had the amendments printed and distributed, nor does it show when the report of the printing committee was made. It is not dated, but it was presumably filed with the clerk of the House on February 28th and for that reason was entered in the proceedings of that day. Taking the two entries together, the one of February 25th and the one of February 28th, it is reasonably certain that the amendments had been printed and distributed among the members on or prior to the 25th, and that the printing committee's report thereon did not find its way into the Journal until the 28th.

Appellant contends further that the Journal affirmatively shows that the bill was never given a third reading as required by the Constitution. This contention is based upon the fact that the Journal shows, under date of March 1st (House Journal, p. 522),

that "House Bill No. 233 by Black read a third time at length, section by section, for final action. The question being, 'Shall the bill pass,' the roll was called with the following result: * * * and so the bill passed, title was approved, and House Bill No. 233 was ordered transmitted to the Senate." A subsequent entry in the Journal under the same date reads as follows: "We, your committee on engrossed and enrolled bills, report House Bill No. 233 correctly engrossed. Glennon, Chairman: Report received and House Bill No. 233 filed for third reading." Now the fact that this entry appears in the Journal after the entry showing the passage of the bill affords no evidence that the bill had not been previously given a third reading and passed by an aye and nay vote as recited by the previous entry of the same day. It is probable, however, that the report was in fact made and the engrossed bill was filed prior to the third reading and passage of the bill, and that the Journal clerk got the order reversed in making his entries. This bill as shown by the foregoing entry was transmitted to the Senate on March 1st. The Senate Journal of March 2d, among the first entries of the day, contains a message from the chief clerk of the House transmitting House Bill No. 233. It is clear, therefore, that this bill was engrossed on March 1st as shown by the House Journal, and that it was transmitted to the Senate on that day and noted among the Senate proceedings of the following day. It is immaterial for the purposes of our consideration whether the bill was engrossed prior or subsequent to the third reading. We would ordinarily suppose that the bill was engrossed after its final passage preparatory for the signatures of the presiding officers of the House and Senate and the approval of the Governor, but an examination of the Journal with reference to this and other bills passed at the same session indicates to us that it was the practice of the House of Representatives to refer a bill immediately after its second reading to the engrossing committee and order that it be engrossed. House Journal, p. 438. This bill had been transmitted to the Senate as shown by the above quotation from the Journal, and we find that under date of March 3d (House Journal, p. 554) the Journal shows a message from the Assistant Secretary of the Senate in which he says he transmits therewith " * * * House Bills Nos. 94, 233, and 376 which have passed the Senate." According to the wording of this message with reference to other bills, it would appear that House Bill No. 233 had passed the Senate without amendment. The Senate Journal, pp. 320 and 325, shows that the bill was in fact passed in the Senate on March 3d and transmitted to the House.

Now we have the following things appearing clearly from the House Journal entries: First, that amendments to the bill were rec-

ommended by committee of the whole; second, that these amendments were printed before they were given a first reading; third, that the rules and the provisions of the Constitution were suspended with reference to the second reading; fourth, that the bill was read at length and passed by an aye and nay vote and thereupon transmitted to the Senate; fifth, that the Senate passed the bill as it came from the House and returned the same to the House. The House Journal again, under date of March 4th (House Journal, p. 619), contains a report from the committee on engrossed and enrolled bills reporting House Bill No. 233 as having been correctly "enrolled," and immediately following this entry the Journal shows that "the Speaker in the presence of the House signed the following bills * * * 233."

We fail to find wherein the Legislature in the passage of this act has departed in any substantial manner from the method prescribed by the Constitution for the passage and enactment of bills. It seems to us that the journal entries show a substantial compliance with the provisions of section 13, art. 3, of the Constitution. It also complies with the holdings of this court in *Cohn v. Kingsley*, 5 Idaho, 430, 49 Pac. 985, 38 L. R. A. 74, and *Tarr v. Western Savings & Loan Ass'n*, 15 Idaho, 751, 99 Pac. 1049, 21 L. R. A. (N. S.) 707. It is true that the court indulged in considerable dicta in the *Cohn-Kingsley* Case which was in no way essential to the decision of that case and to which we would not feel disposed to give our approval, but we would not be inclined at this time to depart from the general rule there enunciated that the court may look to the Journal. It would certainly be a remarkable and appalling situation if in the rush, hurry, and turmoil of the closing hours of a legislative session a purported bill could be engrossed, certified, and filed with the Secretary of State and become a law which in fact had never passed the Legislature nor been considered by it, and the Journals clearly established that fact, and yet there should be no remedy whereby the fraud or mistake could be reached and the purported act could be prevented from going into force and operation as a law. If courts cannot go behind the enrolled bill, this would be the exact situation, and yet the case supposed has actually occurred in this state. A bill was enrolled, certified, and filed with the Secretary of State as a valid act of the Legislature where the legislative journals showed affirmatively that the bill had been defeated instead of passed.

[3, 4] 2. It is next contended that the Black Law or commission government act is void and inoperative as to a special charter city and cannot be applied to or be put in operation in such a city for the reason that the general laws of the state applying to municipal corporations do not apply to such cities, and that the commission government act is not a complete city government act

and does not purport to be such, and that therefore a special charter city adopting such act will be left without any complete or adequate law or authority for administering city government and discharging municipal duties and obligations. This argument is based chiefly upon the provisions of section 1, art. 12, of the state Constitution, and section 3 of the act here in question. 1911 Sess. Laws, p. 284. Section 1, art. 12, of the Constitution provides as follows: "The Legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns, in proportion to the population, which laws may be altered, amended, or repealed by the general laws. Cities and towns heretofore incorporated, may become organized under such general laws, whenever a majority of the electors at a general election, shall so determine, under such provisions therefor as may be made by the Legislature."

In *Kessler v. Fritchman*, 119 Pac. 699, this court in discussing the same question here involved and considering the foregoing provisions of the Constitution said: "Under the Constitution, the Legislature is clearly authorized to classify towns, cities, and villages of the state according to the population, and, while the Legislature by general laws has made a classification of cities, towns, and villages, this would not preclude or prevent the Legislature in enacting the law now under consideration, and the reclassification of cities, towns, and villages as cities, according to population, as a prerequisite to adopting the form of government provided in the act now under consideration." Without further comment on this constitutional provision, suffice it to say that we are still content with our holding to the effect that the act of March 13, 1911, known as the commission government act, is not in conflict with this section of the Constitution and it was within the power and authority of the Legislature to enact the same. Section 3 of the act in question provides as follows: "All general laws of the state of Idaho governing or pertaining to such cities and not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act; provided, that no provisions of any special charter or other special act or law which any such city may be operating under at the time of its becoming organized under this act, shall thereafter be applicable to such city while it is operating under the provisions of this act."

[5] Now it is contended by counsel for appellant that the word "such" as used in the foregoing statute refers to the particular city adopting the new form of government, and that, since a special charter city is not governed by any general laws or any laws other than the special charter, the act cannot therefore apply to such cities. It should be borne in mind that this act specifically

provides "that no provisions of any special charter or other special act or law which any city may be operating under at the time of its becoming organized under this act shall thereafter be applicable to such city while it is operating under the provisions of this act." This shows clearly that it was intended that the act should apply to special charter cities and renders it reasonably certain that the word "such" in the preceding portion of the section cannot mean what is contended for it by appellant, but on the contrary means a city of like size under the "general law" classification. It should also be remembered that section 1 of the act specifically provides that it shall apply to "any city within the state of Idaho organized under special charter or under a general incorporating act," etc. It is reasonable and fair, therefore, to conclude that the words "such cities" as used in this act mean cities of the class to which the one adopting the new form of government would legally belong under the general laws of the state, because it is referring to the general city incorporation laws of the state. *Kessler v. Fritchman*, 119 Pac. 699.

[6] It is not our business as a court to deal in any subtle refinements in construing legislative acts, but it is rather our duty to ascertain, if possible, from a reading of the whole act the purpose and intent of the Legislature and give force and effect thereto.

[7] The question next arises as to the class to which Boise City would properly belong under the general laws of the state. Section 2222 of the Revised Codes provides, as follows: "Any town or village containing not less than two hundred nor more than one thousand inhabitants, now incorporated as a city, town or village, under the laws of this state, or that shall hereafter become organized pursuant to the provisions of this title, and any city of the second class which shall have adopted village government as provided by law, shall be a village. * * *" This section then provides that at the time of its adoption all towns or villages then incorporated containing not less than 200 nor more than 1,000 population should thereafter be known as villages and be governed by the statutes prescribing the authority, powers, and duties of village governments. It also provided that any town or village containing a population of not less than 200 nor more than 1,000 might at its pleasure become incorporated under the provisions of the village government act. The act, however, contains no provision prohibiting such a village from continuing to exercise the powers and authorities of village government merely by reason of its growth exceeding the maximum population of 1,000, nor did it provide any compulsory process or method whereby such a village should be compelled to take on any new or different form of government upon reaching the maximum population of 1,000. Section 2170 of the Revised Codes provides

as follows: "All cities, towns and villages containing more than one thousand and less than fifteen thousand inhabitants shall be cities of the second class, and be governed by the provisions of this chapter, unless they shall adopt a village government as hereinafter provided." It will be noticed from this section that all cities, towns, and villages containing more than 1,000 and less than 15,000 inhabitants become cities of the second class. Now the Legislature at the time of the adoption of the foregoing statute failed to make any specific provision for the classification, organization, or government of cities with a population in excess of 15,000. This was probably due to at least two reasons: First, that the state did not at that time have any city organized under the general laws with a population of 15,000; and, secondly, the lawmakers probably intended that in the event any city should grow to that size it could and should continue to exercise the powers and functions of a city of the second class. It is certain, at any rate, that they did not provide any other form of government or any other class for a city of greater population, nor did they anticipate that a city should become disorganized or disincorporated by reason of a growth which might cause its population to exceed 15,000. The same laws that were made applicable to govern such a city when it reached a population of 15,000 would be equally applicable when it reached a population of 15,100.

Now, then, we find that Boise City at the time it voted to suspend its charter and adopt the commission form of government was a city with a population in excess of 15,000. The question therefore arises: To what class would Boise City have belonged if it had been organized and operating under the general laws as they then existed? The answer is inevitable that it would have been a city of the second class and would have belonged in that class. That was the highest class city known to the general laws of the state, and the laws applicable to cities of the second class would have been applicable to Boise City had it not been operating under a special charter. It will be no more difficult now for the officers of Boise City, acting under the commission government act, to ascertain what the general laws are governing a city of the second class than it would have been for the officers of Boise City had it been operating under the general laws of the state as a second class city at the time it voted to adopt the commission form of government. Under the provisions of section 1 of the act, there are only two kinds of cities that can become incorporated under the commission government act. The first is a city of the second class as the same had been previously known under the general laws of the state (section 2170), and the second was a city operating under a special charter, and each of these cities, the one recognized and protected by the Constitution and the other

organized and classified by the general laws of the state, was subject to the classification applicable to both under the Black Law that they should have a population of at least 2,500 before they could enter the new classification and adopt the provisions of the new government act. See *State v. Tauslick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802.

There might be some good reason for the argument of counsel for appellant that there is uncertainty or obscurity in the act as to what general or other laws aside from the commission act should govern such cities if it were not for the fact that section 8 specifically provides that no provisions of a special charter shall apply after a special charter city has adopted the new organization. If such a city is not to apply any of the provisions of its special charter, then it is clear that the Legislature intended that it should apply the provisions of the general law applicable to a city of the class to which it did belong or would have belonged under the general laws. *Kessler v. Fritchman*, 119 Pac. 699.

[8] 3. It has been further argued that the submission of the question to the electors of Boise City was not in conformity with the requirements of section 1, art. 12, of the Constitution, wherein it is provided that cities and towns organized prior to the adoption of the Constitution might become organized under the general laws when a "majority of the electors at a general election shall so determine under such provisions therefor as may be made by the Legislature." Counsel argue that the question should be directly submitted to the electors as to whether they will suspend or surrender the special charter of such city. The question submitted to the electors of Boise City under the commission government act was as follows: "Shall the proposition to organize the city of Boise under the laws of the eleventh session of the Legislature of Idaho, approved March 13, 1911, and recorded at page 280, the session laws of said eleventh session, be adopted?" It is not to be supposed that any elector, voting for the adoption of the new form of government, supposed for a moment that the city was going to continue under the special charter if the new form of government should be adopted. The question would at once arise in the mind of the citizen when he came to voting on such a proposition as to whether he was getting something better or worse, and whether he should vote to retain the charter or would favor adoption of the new form of government. It should be observed that the Constitution does not require the Legislature to submit the question in any particular form, nor does it say that the vote shall be on the question of *abandoning the charter*, but it is rather on the question of becoming "*organized under the general laws*," and the submission of the question is to be determined by the Legislature "under

such provisions therefor as may be made by the Legislature."

[9] The Black Law is a general, and not a special, law and applies equally to all cities of the state having the required population that see fit to adopt its provisions by a popular vote.

[10] 4. It is lastly argued by counsel for appellant, and also by one of the counsel who appears as *amicus curiæ*, "that the so-called Black Law, chapter 82, of the laws of 1911, is in flagrant violation of the provisions of the federal Constitution prohibiting the passage by the Legislature of any law impairing the obligation of contracts." Counsel who appears as *amicus curiæ* has filed a very able brief setting forth in detail his objections to the Black Law and the particulars wherein he thinks it impairs the obligations of the city in regard to its bonded indebtedness. It is stipulated that the city at the time it voted to adopt the commission form of government was indebted and that such indebtedness was evidenced by its coupon bonds. It is doubtful if this question can be properly raised by the appellant herein, but, notwithstanding any doubt there may be, we have concluded to waive any consideration of the manner and form in which this phase of the question has been presented and deal with it on its merits.

The vital question urged is that under the bonding acts special provision is made for the levying and collection of an annual tax for the payment of interest and raising a sinking fund for the final redemption of the bonds, and that these provisions became a part of the contract under which the city sold the bonds, and that they are impaired by the adoption of this new form of government for the reason that the commission government act contains no provision for levying and collecting a tax to meet these obligations. It is further argued that the commission government act provides a method whereby all ordinances may be submitted to a popular vote, and that, although the city council might make a tax levy or be compelled by the courts to make such levy, still the people might refuse to cast a favorable vote and there would be no method whereby a levy could be enforced and a tax could be raised to meet these obligations.

There are several reasons which to our minds satisfactorily answer these contentions. In the first place it is a well-settled rule in this country that these municipal bond issues create contract obligations and constitute a contract between the municipal corporation and the purchaser of the bonds.

[11] It is equally true that the remedies given by law for the enforcement of these contracts and the laying and collection of taxes to meet such obligations cannot be altered or diminished so as to impair the substantial rights or interests of the holder of such obligations. *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403. See

notes and citations, 6 notes to U. S. Rep. 632, and note page 706, 1 Supp. Notes U. S. Rep. If therefore the act here in question attempts to repeal the remedy given the bondholder by the ordinances which authorized the issuance of the bonds and provided for the levy and collection of a tax and does not give to the bondholder instead thereof a substantial, equivalent remedy, the act would in so far be unconstitutional and void. When we turn to the act itself, however, we find that it was clearly not the intention of the Legislature to in any way alter or impair the obligation of the city in this respect, but rather to continue those obligations in full force and effect. We find in section 3 of the act the following provision: "All rights and property of every description which are vested in any such city under its former organization shall vest in the same under the organization herein contemplated, and no right or liability, either in favor of or against it, existing at the time, and no suit or prosecution of any kind shall be affected by such change, and such city * * * shall be subject to all the duties, obligations, liabilities and limitations now or hereafter imposed upon such municipal corporations by the Constitution," etc. It is also provided by section 3 that all existing ordinances shall remain in force under the new government until altered or repealed. It is therefore clear that so far no attempt has been made to impair or repudiate the obligations created by Boise City. Under the foregoing provision, we think the bondholders have the same rights and remedies that they have always had for the collection of their bonds, and that the commission government act was never intended to in any way alter, change, or impair those obligations.

[12] Now let us answer the contention made with reference to the referendum submission of a tax levy ordinance. An examination of the different provisions of the statute as embodied in sections 25, 26, and 74 convinces us that it was the intention of the Legislature to exclude "ordinances making the annual tax levy and appropriations" from the operation of the referendum provision. Section 74, p. 313, 1911 Sess. Laws. Section 25 provides for the submission of any ordinance to a vote of the people, provided a proper petition therefor is filed with the clerk "prior to the date when any ordinance shall take effect"; and section 26 provides that the council of its own motion may submit any proposed ordinance or measure to a vote of the people in the same manner and with the same force and effect as a question is submitted on petition. When we turn to section 74 prescribing when ordinances shall go into effect, we find the following: "Ordinances making the annual tax levy and appropriations shall take effect immediately upon their passage. Ordinances granting

franchises of any kind shall take effect not less than 30 days after their passage and approval. All other ordinances enacted by the council shall take effect not less than ten days after the date of their passage," etc. As above noted, section 25 requires a referendum petition to be filed with the clerk *before the date when the ordinance shall take effect*. It is therefore clear that it could not have been the intention of the Legislature that ordinances making the annual tax levy and appropriations should be submitted to a referendum vote. No possible method is provided for securing a petition touching such an ordinance until after it would be in effect. It seems to us that it must have been the intention of the lawmakers that ordinances making the annual tax levies and appropriations should not be submitted to a referendum vote. On the other hand, the people are given a certain length of time in which to procure petitions with reference to all other ordinances, namely, at least 30 days for ordinances granting franchises and at least 10 days for all other ordinances. No sufficient or valid objection has been called to our attention to justify us in holding the act in question invalid or unconstitutional.

It follows that the judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

STEWART, C. J., concurs.

SULLIVAN, J. I am unable to concur in the conclusion reached by the majority of the court. I concede that the act known as the Black Law was passed by both Houses of the Legislature in substantial compliance with the provisions of the Constitution in regard to what the Journals of the two Houses must contain, but that admission alone does not go to the constitutionality of the provisions of the act itself; it only goes to the constitutionality of the passage of the act. In *Kessler v. Fritchman*, 119 Pac. 602, the majority of this court held under the provisions of section 2 of the Black Law, whereby the mayor is required upon petition to submit the question of organizing as a city under said act to the electors at a "special election," that the "special election" there referred to means the same as the term "general election" as used in section 1 of article 12 of the Constitution, which section requires that a change in the form of municipal government, if made, must be made at a *general* election. Construing the words "special election" to mean "general election" was the first step by the court in construing away the clear meaning of said act, and further judicial legislation, as I view it, is now indulged in by the majority opinion in order to sustain the constitutionality of said law.

1. It is provided by said section 1, art. 12,

of the Constitution, that "the Legislature shall provide by general laws for the incorporation, organization and classification of the cities and towns in proportion to the population" and in compliance with said provision. The Legislature has classified municipalities into villages, cities of the second class, and cities under special charter. It was the evident intention to provide a fourth classification under the Black Law.

The third section of the Black Law provides: "All general laws of the state of Idaho governing or pertaining to such cities and not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act." It is conceded that there were no general laws of the state of Idaho governing or pertaining to Boise City at the time of the enactment of the Black Law except section 2239, Rev. Codes, which provides that city councils, etc., of cities, towns, and villages theretofore incorporated under special or general laws, or thereafter incorporated, are vested with authority and power to regulate or suppress and prohibit certain criminal acts. Boise City was organized and governed by a special charter, which charter could not be amended or changed by general law. And it is especially provided in said section 3 of the Black Law "that no provisions of any special charter or other special act or law which any such city may be operating under at the time of its becoming organized under this act shall thereafter be applicable to such city while it is operating under the provisions of this act." It thus clearly appears that, if Boise City attempts to organize under the provisions of said Black Law, it would have only the powers granted by said section 2239 and the powers granted by the provisions of the Black Law, for under the provisions of said section 3, as above quoted, only the general laws "governing or pertaining" to Boise City and not inconsistent with the Black Law are made applicable to Boise City after its organization under the Black Law. Section 11 of said Black Law provides that "the council shall have and possess, and the mayor and council and its members shall exercise all executive, legislative and judicial power and duties now had, possessed and exercised by the mayor, city council, board of public works, board of library trustees, and other executive and administrative officers in cities, except as hereinafter provided." And it is thereafter provided that no provisions of any special charter or other special act or law has any application whatever to a city after it is organized under the Black Law. Therefore the mayor and council of Boise City would have no powers or duties imposed by the charter and only have such powers and duties as are imposed by the Black Law. It appears from the conflicting provisions of the Black Law and its incongruities that it was hastily and carelessly drawn and

will require legislation by this court to make it effective.

It will be observed, by the adoption of the Black Law, Boise City would be deprived of the rights and powers now exercised under its special charter and essential to the maintenance of municipal government as no rights and powers other than as above mentioned are conferred by said act upon Boise City for the reason that no general laws are applicable thereto. The Black Law was not intended of itself to be a complete law for municipal government, but had to be supplemented by the general laws by which the city adopting it was governed. Boise City was not under the general laws and was not a city of the second class, and under the law it could not become such as it had a population of more than 15,000. It is conceded by the majority of the court that the general laws of the state do not provide for the organization of any cities that have a population exceeding 15,000, but they hold that, if a city organized under the general laws continues to grow and acquire a population of more than 15,000, it still operates under the general laws provided for cities of the second class. I concede that, but it must be remembered that Boise City was never under the general laws and that it has grown to a city of perhaps 25,000 inhabitants under its special charter. That being true, it could not now organize under the general law because, as I view it, no city that has a population to exceed 15,000 can organize under the general laws. When it adopted the Black Law, there were no general laws governing or pertaining to Boise City, and only such general laws as govern and pertain to the city at the time it adopts the Black Law are applicable to such city under section 3 of said act.

I think the majority of the court evades the real facts of this case when it suggests that a city organized under the general laws, when it acquired a population of more than 15,000, would not be disorganized but would continue. I concede that proposition, but deny that Boise City could have become organized under the general law after it had a population of more than 15,000, and the very fact that the Legislature has neglected and failed to provide general laws for the governing of cities of more than 15,000 inhabitants does not justify the court in extending the provisions of the general law for the government of cities of the second class beyond what was intended by the Legislature and thus judicially enacting laws for the government of such cities. After Boise City adopted the commission form of government, it had no power under its charter whatever, and, quoting from section 3 of the Black Law, "all general laws of the state of Idaho governing or pertaining to such cities (that is, cities adopting the Black Law), and not inconsistent with the provisions of this act,

shall apply to and govern cities organized under this act." Boise City was not brought under the general laws by the adoption of the Black Law for the reason that it was in no manner governed by the general laws. That being true, this court must legislate in order to bring Boise City under the provisions of the general laws.

The main object or purpose of the Black Law was to make all of the powers of the city council subject at all times to popular referendum. It was to place the mayor and common council in a position so that they could not pass an ordinance and make it effective without referring it to a vote of the people provided the people so desired. It provides for both the initiative and referendum.

2. The next point is, Does the Black Law impair the obligation of contracts, and for that reason is it repugnant to the provisions of section 10, art. 1, of the federal Constitution, which provides, among other things, that no state shall pass any law impairing the obligation of contracts? The majority of the court holds that the Black Law does not impair the obligation of contracts. It is admitted that Boise City has a large amount of indebtedness incurred under the provisions of its charter, and the charter provides adequate means whereby the levying and collecting of taxes to pay the interest and principal of such bonds was a duty imposed on the city council and was a duty that the council could be compelled by mandamus to perform. Subdivision 10 of section 50 of said charter provides that the proper officers of said city must continue to assess and collect on all taxable property within the limits thereof the necessary taxes to pay said bonds and interest as the same become due.

It is a well-settled rule and clearly stated in *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403, as follows: "Where a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract within the meaning of the Constitution and cannot be withdrawn until the contract is satisfied. The state and the corporation in such a case are equally bound." There is no conflict of authority upon this point.

Under the uniform decisions of the Supreme Court of the United States, statutory provisions may constitute a contract between the city and its bondholders incapable of impairment at the hands of the Legislature. Under the provisions of the Boise City charter, the contract rights of the bondholders were clear, specific, and adequate. If the mayor and common council failed to levy the necessary taxes, they could be compelled by mandamus to do so. The city having borrowed money and issued its bonds, the Leg-

islature had no power to change the situation between the debtor and creditor without at the same time preserving in some way the rights of the contracting parties to enforce such contracts. The Legislature might, if it chose, change the form of government of Boise City. It might abolish the office of mayor and council, but if it did that it must vest in some other officers the duty of levying the necessary taxes, and this duty must continue to be a duty or legal obligation, one whose performance could be enforced in the courts until the contracts of the city were complied with. But it could not make the levying of the required taxes depend upon the hazard of a popular vote, and, if an attempt were made to make it depend upon a popular vote, such act would be absolutely null and void.

The Illinois Legislature attempted in the case of *Von Hoffman v. City of Quincy*, supra, to change the method of levying sufficient taxes for the payment of the city's bonded indebtedness without substituting therefor a remedy as efficient as the law provided when the bonds were issued, and that act was held by the Supreme Court of the United States to be absolutely void.

While the Black Law provides for a mayor and council, it does not charge the council with the duty of levying taxes to meet the bonded indebtedness or any indebtedness. The majority opinion quotes from section 3 of the Black Law whereby it is provided that all rights and property of every description which are vested in any city under its former organization shall vest in the same under the organization contemplated by said act, and that such new organization "shall have and exercise all powers, functions, rights and privileges now or hereafter given or granted it and shall be subject to all the duties, obligations, liabilities and limitations now or hereafter imposed upon such municipal corporation." etc. It cannot be claimed that any provisions of the special charter for levying and collecting taxes remained in force after the adoption of the Black Law. The provisions of said section 3 absolutely extinguish the special charter in the following language: "Provided, that no provisions of any special charter or other special act or law which any such city may be operating under at the time of its becoming organized under this act, shall thereafter be applicable to such city while it is operating under the provisions of this act." The Black Law nowhere contains any provisions requiring the councilmen or any other officer to levy any tax to meet the requirements of the existing bond issues. If the general laws of the state governing second-class cities stood alone, they impose upon the municipal officers a lawful duty in respect to levying taxes to pay the indebtedness of the city, substantially equivalent to that imposed by the special charter. But the general laws do not stand alone. By

the Black Law they have been adopted only in so far as they are "not inconsistent with the provisions of this act." See section 3. Under the general law and under the special charter there was an imperative duty imposed on the proper officers to levy taxes for the purpose of paying the bonded indebtedness. Those officers had no alternative in the matter, and, as above stated, if they refused to do so they could be compelled by mandamus. The Black Law, however, annihilates this legal obligation so far as its practical availability to the creditor is concerned, as it puts the decision as to whether or not taxes shall be levied in the hands of the voters of the city; in other words, the question as to whether or not the contract obligations of the city shall be met may, in strict accordance with the provisions of the Black Law, be determined by the legal voters of the city who cannot by any known process of law be compelled to vote in favor of levying the tax. But it has been suggested that you could trust the people to do this; that they are honest. Conceding it, that is not the question here. The bondholder had the right to an adequate remedy not dependent upon the will or wish of the voter—a remedy as adequate and effective as he had when the bonds were issued under the special charter. There is no question as to the electors' honesty involved here. The power and duty of the council under the Black Law in regard to the levying of taxes is only such power and duty as the voters of the city choose at any time to leave in their hands. This remarkable situation is caused by the loose, sweeping provisions in which the Legislature embodied what is known as the "initiative and referendum" in said act.

Section 25 of the act provides as follows: "If, prior to the date when any ordinance shall take effect, a petition, which petition, and its requirements shall be substantially as required by the provisions of section 17 of this act, with the necessary changes made therein to meet the needs of this section, signed by qualified electors equal in number to twenty-five (25) per centum of the entire vote cast for mayor at the last preceding general municipal election, shall be filed with the clerk protesting against the enactment of such ordinance, it shall, by the filing of such petition, be suspended from taking effect. * * * Thereupon the council shall immediately reconsider such ordinance, and, if it do not entirely repeal the same, shall submit it to popular vote at the next municipal election, the council, in its discretion, may call a special election for that purpose; and such ordinance shall not take effect unless the majority of the qualified electors voting thereon at such election shall vote in favor thereof." This section also emphasizes the carelessness with which said act was drawn. It provides that the petition referred to therein shall be substantially as required

by the provisions of section 17 of said act. Turning to section 17 we find that it does not refer to petitions at all but provides for the general and special meetings of the council and the time for holding the same, and contains nothing in regard to petitions.

It is evident, in case the council levies a tax to meet the requirements of any bond issues, their action may nevertheless, in strict observance of the forms of law, be reviewed by the people at large, and, if for any reason whatever the people choose to vote against the levying of such tax, then the levy could not take effect. Suppose a proposed ordinance was sought to be enacted by the initiative as provided by section 24 of said act providing that no tax be levied for the year 1913 for the payment of the interest on said bonded indebtedness. Under the Black Law it would be the duty of the council to pass it or submit it to the electors for passage as there are no exceptions to the enactment of ordinances under the initiative. After the people had enacted such an ordinance the council would not dare, nor would they have any authority, to repeal it by enacting an ordinance levying such tax. If they undertook to do so, they no doubt would be recalled. In that case the remedy of mandamus or any other remedy would not be an adequate remedy to the bondholder.

But it is contended that section 74 of the Black Law provides that "ordinances making the annual tax levy and appropriations shall take effect immediately upon their passage," and it is urged that when they take effect it is too late to refer them to a vote of the people. Conceding that there are various ways by which the provisions of said section might or could be evaded, first, it is not required by law that a tax levy to meet the requirements of a bond issue shall be a part of the "annual tax levy" and the council might, if it chose, make such levy at a separate and different meeting. And again: Section 26 of said act provides that "the council, of its own motion, may submit to popular vote, for adoption or rejection, at any election any proposed ordinance or measure (no exception) in the same manner and with the same force and effect as provided in this act for their submission on petition." That section places it in the hands of the council of its own motion to submit to popular vote "any proposed ordinance or measure" in the same manner and with the same force and effect as provided in said act for their submission on petition. Supposing the council should submit the ordinance for the purpose of levying a tax to pay the indebtedness of the city to a vote of the people, they would be bound by the vote of the people under the provisions of said law. But the majority of the court has really read into said section after the words "any proposed ordinance" the words "except ordinances whereby taxes are levied to meet con-

tract obligations," and I think that is the clearest judicial legislation.

When this law was submitted to the people of Boise City for adoption or rejection, the whole law was submitted, and the history of that election shows that one of the main inducing causes of its adoption as proclaimed by its advocates was that under this law the sole power of legislation and of conducting the city's business would be vested in the people of the city. And no doubt many of the people believed from the statements made that if the Black Law were adopted an opportunity would be given to abrogate or repudiate certain contracts, such as the lighting contract which had been recently entered into by the state and of which some people did not approve.

Under the Boise City charter, the Legislature had provided for a mayor and common council, always amenable to the process of mandamus. This was the remedy and a part of the contract on which the bondholders and creditors of the municipality relied. In its place, under the Black Law, no officer is amenable in any practical way to the process of mandamus so far as the passage of ordinances are concerned, but the ultimate power over all ordinances and other measures is vested in the decision of the electors of the city. The only power vested in the council is such power as the people choose to leave with it. The creditors of the city had a contract they could enforce in the courts under the charter, but under the provisions of the Black Law the enactment of ordinances levying taxes for the purpose of paying the indebtedness may be left to a vote of the people, in case the council desire to leave it with the people or in case the people desire to vote upon it. Under such a condition, what becomes of the contract right of the bondholders? It is a mere hope or expectation that the people will never vote to repudiate its municipal obligations. The bondholders had an adequate remedy under the provisions of the special charter, and any act of the Legislature that deprives them of that right is unconstitutional and void.

The court in *Von Hoffman v. City of Quincy*, supra, said: "When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest as it accrued from time to time upon the entire debt. But for the act of the 14th of February, 1863 [Priv. Laws (Ill.) 1863, p. 172], there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient. * * * A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that, where a state

has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied.

* * * A different result would leave nothing of the contract but an abstract right of no practical value, and render the protection of the Constitution a shadow and a delusion."

In the state of Louisiana, after an obligation had been incurred, a statute was passed forbidding, among other things, the issuance of a writ of mandate to enforce the tax levy for its payment, and in the case of *Louisiana v. Pilsbury, Mayor*, 105 U. S. 278, 26 L. Ed. 1090, the court said: "When the contract was made, the writ (of mandamus) was the usual and the only effective means to compel the city authorities to do their duty in the premises in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy existing when a contract was made is permissible without impairment of the contract is that a new and adequate and efficacious remedy be substituted for that which is superseded. Here no remedy whatever is substituted for that of mandamus."

In the case at bar the Legislature has undertaken to do indirectly what it could not do directly. They have made the writ of mandamus ineffective by reason of authorizing the question as to whether a tax levy shall be made to be submitted to the electors of the city, and abolishes the writ of mandamus as effectively as though it had done so in express words. The writ of mandate would be of no avail against the voters of the city, and there is no way of preserving the contract obligations referred to except by judicially repealing a part of the act in question.

In the last-cited case the court said: "When the bonds were issued and taken by the creditors, a contract was consummated between them and the city as fully as if all the provisions had been embodied as express stipulations in the most formal instrument signed by the parties. On the one hand the creditors surrendered their debts against the former municipalities, and on the other hand, in consideration of the surrender, the city gave to them its bonds which carried the pledge of an annual tax of a specified amount for the payment of the interest on them and ultimately of the principal. The annual tax was the security offered to the creditors, and it could not be afterwards severed from the contract without violating its stipulations any more than a mortgage executed as security for a note given for a loan could be subsequently repudiated as forming no part of the transaction. Nearly all legislative contracts are made in a similar way. The law authorizes certain bonds to be issued or

certain work to be done upon specified conditions. When these are accepted, a contract is entered into imposing the duties and creating the liabilities of the most carefully drawn instrument embodying the provisions."

In *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620, the Supreme Court of the United States said: "The remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature, or, if they are changed, a substantial equivalent must be provided."

It requires no argument to show that the value of a contract is manifestly impaired when its payment cannot be enforced in a court. What would be the effect on negotiable paper if it were left by law to the payor to vote whether he would pay his obligation or not? This is no reflection on the honesty of anybody, but it is simply a question of obligation of contracts and their enforcement in the courts, if necessary.

Quoting further from *Von Hoffman v. City of Quincy*, supra, the court said: "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion."

It was held in *People v. Bond*, 10 Cal. 563, that a creditor has a right to the substance of the contract as he made it. It is his privilege to judge for himself whether it is for his interest for the agreement to be discharged in the particular way stipulated, or in a different mode; and neither the courts nor the Legislature can change it in any substantial particular.

The powers of the council under the Black Law are only such as are provided by the grant contained in the law itself, including whatever grants or power contained in the general law are made applicable by the Black Law, but in no event or under no circumstances do any of the old powers created by the Boise charter survive to the new council, because all of the provisions of the charter were absolutely suspended by said Black Law. As stated by counsel amicus curiæ, we have no fears that the people of Boise would ever vote to repudiate contract obligations; but it is quite possible that irresponsible agitators may call elections on questions involving municipal obligations and thus injure the city's credit and the value of its securities. Under the Black Law it costs the petitioners nothing to require the council to call an election under the initiative or referendum. The fact that the

people would vote down any attempt at repudiation is a very different and inferior kind of protection to that afforded by responsible officers with their duties defined by law and themselves amenable to the process of the courts. It is not sufficient to say that the referendum would not be invoked in respect to tax levies to meet bonded indebtedness, as the council may on its own motion submit that question to the electors under the provisions of section 28 of said act. It was held in *Curtin v. Benson*, 222 U. S. 78, 32 Sup. Ct. 31, 56 L. Ed. 102, that whether a power is within constitutional limits is to be determined by what *can* be done under it, not what *may* be done. Said act is repugnant to the provisions of section 10, art. 1, of the federal Constitution.

In order to sustain said Black Law, my Associates had to construe the words "special election" as used in section 8' of the Black Law to mean the same as the words "general election" as used in section 1, art. 12, of the Constitution, and have also construed the words "less than 15,000 inhabitants" (that being the maximum for second class cities) to mean 20,000 or 25,000, or any number more than 15,000. They have removed the maximum placed by the Legislature. They have also been required to construe the phrase "any ordinance or measure," as used in section 26 of said act, to mean "any ordinance or measure except certain ordinances and measures for levying taxes," and this construction is judicial legislation, pure and simple. It has construed plain, ordinary words and language to have an extraordinary and unnatural meaning, and carries the rule of construction past any limit, and such construction implies ignorance on behalf of the Legislature of the meaning of plain and simple words in common every day use.

The court erred in refusing to grant the injunction as prayed for in the complaint.

(23 Idaho, 74)

NEIL v. IDAHO & W. N. R. R.

(Supreme Court of Idaho. June 4, 1912.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 87*)—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT.

Section 1 of an act of Congress relating to the liability of common carriers by railroad to their employes in certain cases (Act April 22, 1906, c. 149, 35 Stat. 65, Supp. 1909, Fed. Stats. Ann., p. 584 [U. S. Comp. St. Supp. 1911, p. 1322]) provides that a railroad company shall be liable in damages to any person suffering injury, etc., resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.*]

2. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—EMPLOYER'S LIABILITY ACT.

It is provided by section 4 of said act (Act April 22, 1906, c. 149, 35 Stat. 66 [U. S. Comp. St. Supp. 1911, p. 1323]) that the employe shall not be held to assume the risk of his employment in any case where the violation by such carrier of any statute enacted for the safety of the employes contributed to the death or injury of such employe; otherwise, under said act, the defense of assumption of risk remains as at the common law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

3. MASTER AND SERVANT (§§ 204, 228*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EMPLOYER'S LIABILITY ACT.

Said act restricts the defense of contributory negligence where there is negligence on the part of the company, and restricts the defense of assumption of risk where the company has violated any statutes enacted for the safety of the employe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §§ 204, 228.*]

4. MASTER AND SERVANT (§ 86*)—EMPLOYER'S LIABILITY ACT—LIMITATION TO INTERSTATE COMMERCE.

Said act limits a recovery to a case of an employe suffering an injury while he is employed by the carrier in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. § 86.*]

5. COMMERCE (§ 27*)—SUBJECTS OF REGULATION—EMPLOYER'S LIABILITY—"ENGAGED IN INTERSTATE COMMERCE."

Held, under the facts of this case, that the respondent when he was injured was "engaged in interstate commerce."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2392-2394; vol. 8, pp. 7649-7651.]

6. ACTIONS FOR INJURIES—DEFENDANT NOT NEGLIGENT.

Where a railroad conductor, 40 years of age, being in the possession of all of his faculties, who has had large experience in railroad business as a brakeman, switchman, switchyard foreman, yardmaster, and conductor, whose train is made up, consisting of about 20 freight cars and a caboose, and who goes to the engine attached to his train and delivers to his engineer his clearance card, and steps across the space between the tracks upon the "scale track" and walks leisurely back toward the caboose on his train, and the switch engine that made up his train and left it standing on the "passing track" proceeds down in the yards to get four cars loaded with coal and returns up the scale track with said cars, with the bell ringing so that it could be heard at least a thousand feet, and the engine laboring up a 1 per cent. grade and running at from 8 to 12 miles an hour, and the exhaust of steam and noise of the engine could be heard for a quarter of a mile, and the fireman on the switch engine had seen the respondent walking on the track when he was about 500 feet away, and respondent is not noticed thereafter by the fireman or engineer until he is struck by the engine, *held*, that the railroad is not guilty of negligence.

7. RELIANCE ON CARE OF PERSON INJURED.

A person in charge of a switch engine in a railroad yard, used for the purpose of moving cars and making up trains, has a right to act

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on the belief or presumption that the various employes in the yard, familiar with the continuously recurring movements of the cars, will take reasonable precaution against the approach of the cars, particularly where the cars are moving so slowly that ordinary attention on the part of the employé would enable him to avoid injury.

8. RELIANCE ON CARE OF PERSON INJURED.

When an engineer sees an adult, apparently in the full possession of his faculties, walking on the track ahead of his engine, he has a right to presume that such person will get off the track before the train reaches him.

9. RELIANCE ON CARE OF PERSON INJURED.

Held, under the facts of this case, that ordinary care on the part of the engineer and fireman did not require them to anticipate that respondent would not step off the track, and such care did not require them to stop the train and send some one forward to remove respondent from the track.

10. RELIANCE ON CARE OF PERSON INJURED.

Under the facts of this case, and in the light of the presumption that one in the possession of his faculties, walking on a railroad track, will step off the track in time to avoid injury, the engineer and fireman on the switch engine had reasonable grounds to believe that the respondent would step off the track before the engine struck him.

11. RELIANCE ON CARE OF PERSON INJURED.

Under the facts of this case, the engineer and fireman were not bound to anticipate and provide against extraordinary, unusual, and improbable conditions which would involve inattention on the part of respondent, and their duty to him began only when they had good reason to suppose that he was unconsciously, or otherwise, in peril.

12. RELIANCE ON CARE OF PERSON INJURED.

The engineer and fireman on a moving train, with bell ringing and the exhaust of steam and the train making considerable noise, may presume, when they observe a railroad conductor walking on the track, that he will heed the ringing of the bell and the noise of the train and step off the track in time to save himself from injury, unless something indicates the contrary.

13. RELIANCE ON CARE OF PERSON INJURED.

Every railroad employé about a switching yard must be taken to know and understand the hazards of the situation and that safety requires the utmost vigilance.

14. RELIANCE ON CARE OF PERSON INJURED.

Held, that the question in this case is not what the engineer might have done, but what his duty to the respondent conductor required him to do in view of the latter's apparent duty and ability to protect himself.

15. RELIANCE ON CARE OF PERSON INJURED.

When an engineer observes a man who possesses his faculties, walking upon the railroad track and in no immediate danger, the obligation of care and effort on his part arises only at the moment when the person on the track is seen or believed to be in a perilous situation.

16. MASTER AND SERVANT (§ 228*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EMPLOYER'S LIABILITY ACT.

Under said act of Congress, contributory negligence on the part of the plaintiff is not a bar to recovery; but the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

17. LAST CLEAR CHANCE—DOCTRINE NOT APPLICABLE.

Held, that the doctrine of the "last clear chance" has no application to this case.

18. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Held, that the verdict of \$35,000 is excessive, even if negligence on the part of the railroad company had been shown.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

19. GIVING AND REFUSAL OF INSTRUCTIONS—ERROR.

Held, that it was error to give certain instructions; also, that it was error to refuse to give certain proposed instructions.

Stewart, C. J., dissenting in part.

Appeal from District Court, Kootenai County; John M. Flynn, Judge.

Action by Joseph Nell against the Idaho & Washington Northern Railroad. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Chas. L. Heltman, of Spirit Lake, and John P. Gray, of Coeur d'Alene, for appellant. Elder & Elder, of Coeur d'Alene, for respondent.

SULLIVAN, J. This action was brought under an act of Congress relating to the liability of common carriers by railroad, to their employes in certain cases (see Supp. 1909, Fed. Stats. Ann., p. 584; Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1822]), to recover for damages sustained by the plaintiff for personal injuries alleged to have been received by him, on account of the careless and negligent operation of a switch engine hauling four loaded cars of coal in the switchyards of the company at Spirit Lake in the state of Idaho, on the morning of October 4, 1910, whereby plaintiff was so seriously injured as to necessitate the amputation of one leg just above the knee and the other just above the ankle.

The railroad company defended on the ground that the accident occurred wholly on account of the carelessness and negligence of the respondent. The action was tried by the court with a jury and resulted in a verdict and judgment in favor of respondent for \$35,000. A motion for a new trial was made and overruled by the court. The appeal is taken both from the judgment and the order denying a new trial. Errors are assigned in regard to the admission and rejection of certain testimony, the insufficiency of the evidence to support the verdict, and the giving and refusing to give certain instructions.

It appears from the record that the appellant was a freight conductor about 40 years of age and had been engaged during nearly all of his adult life in railroad work. He had been, prior to his injury, brakeman, switchman, yard foreman, yardmaster, and conductor and since the 14th of July, 1896, had been continuously engaged in train service and in railroad yards. He commenced work for the appellant company September 22,

1909, as a freight brakeman, and in March 1910, was promoted to freight conductor, and continued in that capacity until the time of his injury.

At the time of the accident, respondent was working as conductor on freight train No. 54, a train running between Spirit Lake, Idaho, and Metalline Falls, Wash. On the morning of the accident his train had been made up in the yards upon what is called the "passing track" by switch engine No. 22; that being the engine which afterwards struck the respondent and caused the injury. At the time of the accident, freight train No. 54, of which respondent was conductor, was standing on the "passing track" and was being inspected by the train inspector, whose duty it was to make a complete examination of the train in order to see that everything was in perfect order before it was permitted to depart. The main line track runs in a southeasterly and northwesterly direction. Just north of it is the "passing track" upon which train No. 54 had been made up and was being inspected at the time of the accident, and north of that is the "scale track," so called because weighing scales were connected with it. Said "scale track" was used as one of the switch tracks in said yards. Train No. 54 was made up to leave in a westerly direction. Just prior to the injury, the respondent had gone to the engine on train No. 54 and there talked to his engineer for a short time and delivered him his clearance card, and turned and started back toward the rear of his train, and in doing so went over to the "scale track," some 10 or 12 feet from the "passing track," and walked easterly on said track. It appears that said switch engine No. 22 had passed down the "scale track" three or four minutes before the accident occurred, and was hitched to four cars of coal, for the purpose of switching the same up to the coal chute. The railroad track through the yard had a grade of 1 per cent., rising in an easterly direction, and said engine No. 22, with the four cars of coal attached, was going upgrade when it struck respondent.

Respondent testified that he was walking along the "scale track" so that he could better examine his train and was stooping over looking at the brake rods and brakes to see if they were all in good order. It appears that there was a space of about 10 feet between the track on which said train No. 54 was standing and the "scale track," and that respondent could have walked on that space had he desired to do so. But he testified that it did not require him to stoop quite so low to look under his train if he walked on the scale track as it would had he walked on the space between the two tracks. He also testified that, when he finished talking with his engineer, he stepped right over on the "scale track" and continued to walk down the "scale track" until he was struck by engine No. 22; that as he stepped upon

the track he kind of glanced over his shoulder casually to see if anything was coming; that he saw nothing at all and thereafter did not look behind him; that it was a calm, quiet morning; and that an engine would have to use steam pulling four cars of coal up said grade and would necessarily make considerable noise. It also appears that a large automatic bell on said engine was ringing from the time the train started with said coal cars up said grade until after respondent was struck; that said bell could be heard for more than 1,000 feet; that from the point where the engine was hitched to said coal cars to where the respondent was struck by the engine was a distance of 500 or 600 feet, and there was a slight curve to the left in the track as it extended easterly across said yards. The fireman who sat on the left side of the engine saw the respondent walking on said track when the engine was about 500 feet from him, and testified that he supposed, of course, he would get off the track when the engine came near him. The engineer testified that he did not see him on the track at all. This was evidently because of the curve in the track. Evidently the attention of the fireman was attracted to his other duties, and he paid no more attention to the conductor, the respondent, and he did not see him again until after he was struck by the engine.

It further appears that the train was running from 8 to 12 miles an hour, and it is not claimed by the respondent that that speed was excessive. There is very little conflict in the evidence as to the manner in which the accident occurred. Respondent testified that he was making an inspection which was required of him by the rules of the company. The evidence on behalf of the appellant tended to show that he was simply walking down the track smoking a pipe, and that he had no duty whatever to perform in the way of inspecting the train, as the train at that terminal point was inspected by an inspector appointed for that duty. There is no dispute but that the switch engine was laboring and, as the witnesses testified, was "working steam" and necessarily making considerable noise. The fact that the automatic bell was ringing was testified to by the fireman, engineer, and brakeman on engine No. 22, and by the brakeman and engineer on train No. 54, and by the car inspector. The engineer on engine No. 22 testified that where the engine hooked on coal cars was 12 or 15 car lengths of 40 feet each from the engine on train No. 54; that from the time engine No. 22 passed down the scale track to hook on the coal cars, until it came back, was not over three or four minutes; that he set the automatic bell ringing on his engine; that it continued to ring until he shut it off after the respondent was struck; that said scale track was used particularly for switching cars and had been used by him constantly every day for a year and a

half, and that fact was generally known to all railroad employes. He also testified that engineers when they see a person walking ahead on the track, pay no attention to him if he is a railroad employe; he is expected to get off the track, and that with the engine making as much noise as it was going up the grade, if he saw a person on the track eight or ten car lengths ahead, he would expect him to get off the track; that in the yards employes are constantly walking ahead of the trains; that he did not see the respondent on the track prior to the time of the accident; that, when the fireman gave him the signal to stop his engine, he stopped it as quickly as possible in a little over the length of the engine.

The fireman of engine No. 22 had been working as fireman on appellant's road for a little over two years. He testified that, after they hooked onto the coal cars, the bell was ringing all the time until after the engine stopped when Neil, the respondent, was hurt; that the bell was being rung by air and could be heard distinctly; that the engine was laboring hard and was making a good deal of noise; that he was on the left side next to the "passing track"; that he saw Neil, the respondent, on the "scale track" while his engine was going toward the depot drawing the coal cars; that the respondent was walking up the "scale track" with his back toward engine No. 22; that at that time respondent was about twelve car lengths down the "scale track," approximately 500 feet; that he paid no more attention to respondent; that he glanced back toward the rear of his coal cars for any signals that might come from the brakeman there; that he did not pay any more attention to the respondent; that he did not think any more about him; that he had to watch both ways on the switch engine; that he supposed respondent would get off the track; that the bell was ringing and the engine laboring until Neil was struck; and that he (witness) did not see respondent again from the time he saw him about 500 feet away until after the accident. Witness testified that he gave the engineer on No. 22 the signal to stop; that he received it from Hennessy, the brakeman on respondent's train; that Hennessy was standing by the caboose about six or seven car lengths away; that he gave one signal which witness at first interpreted for setting the air on respondent's train to test the brakes, but thereupon Hennessy gave what is called a "wash-out" signal; and witness then notified the engineer on engine No. 22 to stop the train, which he did as quickly as possible.

The respondent testified that it was his duty to inspect his train, and that he was doing that at the time he was struck, and in order to show that it was his duty, he introduced in evidence the railroad company's rule No. 903, which is as follows: "903. Before leaving initial points, see that their

trains are provided with proper tools and sufficient supplies of all kinds. Know that the cars in their trains have been inspected and that the brakes are in proper working order. Compare time with their enginemen before starting on run, and with their brakemen, flagmen and baggagemen as soon thereafter as is practicable. Show all train orders to brakemen." That rule, as I construe it, does not require the conductor to inspect the train at initial points, and Spirit Lake was an initial point on said road where the road kept a train inspector.

The train inspector, whose name was Baum, testified that he was inspecting train No. 54, but had not completed it, and had just come around the end of the caboose when he saw Neil, the respondent, walking in the center of the "scale track" smoking his pipe; that his face was turned toward witness; that he was walking straight ahead, standing up; that respondent put his hand to his mouth, took his pipe out, and put it back; that when he saw Neil he could also see engine No. 22 coming along; that respondent was perhaps a car length or less ahead of it; that he also saw Hennessy, the brakeman on respondent's train, giving a signal to stop, but witness thought the first signal was given to set the air on train 54 for him, the second signal being a quick one; that the bell on engine No. 22 was ringing when he first saw the respondent, and continued to ring until engine No. 22 stopped; that the engine was also making considerable noise with the exhaust; that the engine stopped immediately after Hennessy gave the second signal.

The brakeman on engine No. 22 testified that it was a quiet morning; that the bell was operated by air and continued to ring until after the respondent was struck; that the train was going between six and eight miles an hour; that from engine No. 54 engine No. 22 could have been seen where it hooked onto the coal cars.

The engineer on train 54 testified that the bell was ringing as engine No. 22 passed his engine (No. 54), and continued to ring until after it stopped after the accident; that he was sitting in the cab of his engine, and engine No. 22 was laboring as it went up the "scale track"; that it was a clear, quiet morning, and the noise could be heard a considerable distance; that from his engine, looking down the "scale track," engine No. 22 could be seen where it coupled onto the coal cars; that there were no obstructions there whatever; that he saw respondent from the time he left witness' engine, No. 54, to go up the "scale track," until engine No. 22, which struck him, obstructed the view; that he was walking straight ahead smoking a pipe, not looking to the left nor the right, but straight ahead, and not stooping down; that his engine was about eight or nine car lengths from where respondent was struck; that he had been running the en-

gine under respondent for two or three months; that he had never known respondent to inspect his train in the morning before they went out; that if he had been doing it daily, as respondent testified, witness would very likely have seen him; that he asked respondent when he was at the engine, just before he was struck, what was delaying the train getting out, and respondent said something about car inspectors and said he would go back and see what they were doing.

The car inspector, Baum, also testified that it was his business to inspect the train in the morning at the junction point, and that the conductor had nothing to do with it and never did it.

Hennessy, the brakeman on train No. 54, testified that he had been freight conductor on that road, and that the freight conductors never made personal inspections of the train before going out; that the car inspectors did it.

It seems that this witness stood at the caboose of the respondent's train, and that respondent was between him and the engine hauling the coal cars when the accident occurred. He testified that he saw engine No. 22 coming up the "scale track" with the bell ringing, and it continued to ring until the engine was stopped; that it was working steam, pulling four cars of coal, and made considerable noise; that he saw the respondent just before he was hurt, walking on the "scale track" five or six car lengths from the caboose where witness was standing; that he was walking along, not stooping over, facing in a southerly direction; that, when he first saw respondent, he paid no attention to him and made no sign for him to get off the track, because he thought respondent would get off the track; that it was a usual thing for employes to walk on the track around the yards; that later he gave the respondent a sign to get off the track; that at that time he had ample time to get off; that he thought respondent was looking in his direction; that he next gave a stop sign to the fireman on engine No. 22, and he next gave the "wash-out" signal; that at that time the engine was very close to respondent; that in his opinion, after he gave the stop signal to the fireman, the engine could not have been stopped before respondent was struck if he remained upon the track.

The respondent testified that he was walking along on the "scale track" smoking his pipe, stooped over, and looking under his train to see that the brake rods, etc., were all in condition, and that he did not hear the bell nor the train until the engine was upon him. Some of the witnesses testified that, when they saw respondent walking on the track, he was erect and smoking a pipe, and that he was not stooped over.

The foregoing statement of facts may be summarized briefly as follows: A freight

conductor, experienced in his work and familiar with switching yards and their operation, stepped upon a track which he knew was constantly used for switching purposes, and walked along that track for several hundred feet without giving any attention to the track behind him. A switch engine attached to four loaded cars, with the bell ringing and the engine laboring up a 1 per cent. grade, struck and injured him. He was seen by one of the employes on the engine some 500 feet away, apparently in the full possession of his faculties, and recognized as an employe, and known by that fireman to be a conductor and to be familiar with his surroundings. The fireman paid no further attention to him, but presumed and assumed that he would step off the track, before the engine reached him, in identically the same manner that another employe, Gregory, had stepped off the same track when engine No. 22 passed him.

A motion for a nonsuit was made at the close of plaintiff's testimony and renewed at the end of all of the testimony and denied. The appellant also moved for a directed verdict, which was denied.

As before stated, this action was brought under the act of Congress relative to injuries to employes by interstate railroads, and the appellant contends that said act of Congress is not applicable to this case, for the reason that respondent was not engaged in interstate commerce at the time of the accident, and also contends that there was no negligence whatever shown on the part of appellant.

1. We will first determine whether said act of Congress is applicable to the facts of this case.

That act of Congress refers only to interstate commerce, abrogates the fellow-servant rule, extends the carrier's liability to cases of injury and death, and restricts the defense of contributory negligence and assumption of risk.

In *Mondou v. N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 58 L. Ed. 327, said act was construed and held to be constitutional. Referring to the theory of that act, the court, in *Fulgham v. Middle Valley Railroad Co. (C. C.)* 167 Fed. 660, said: "The theory of this legislation is that the public should share the misfortune of the families of those who are injured or killed in the quasi public business in which railroads are engaged. So it is provided, in substance, where the employe is injured in the service of a railroad while engaging in interstate commerce, he shall have a cause of action for that injury, and this action he can maintain in his own name, although he may have by his own negligence contributed to the injury; but the damages in such case shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. Here the common-law doctrine of

contributory negligence is abrogated in the interest of the employé, and the doctrine of comparative negligence substituted, which pro tanto encourages care and diligence on the part of the employé."

[1] Under section 1 of said act, it is provided that the railroad company shall be liable in damages to any person suffering injury or death resulting in whole or in part "from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines," etc. Under said act, where the person is injured or killed on account of the negligence of the company, he may recover, although he may have by his own negligence contributed to the injury; but the damage in such a case must be diminished by the jury in proportion to the amount of the negligence attributed to the employé.

[2] Under the provisions of section 4 of said act, it is provided that the employé shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employes contributed to the death or injury of such employé, and, as it is not claimed in this case that the company had violated any statute enacted for the safety of employes, the defense of assumption of risk remains as at the common law.

[3] Said act thus restricts the defense of contributory negligence where there is negligence on the part of the company, as well as the assumption of risk where the company has violated any statute enacted for the safety of the employé.

[4] Said act limits a recovery to a case of an employé suffering an injury "while he is employed by such carrier in such commerce"; that is, interstate commerce.

[5] Then, was the respondent engaged in interstate commerce at the time he was injured? His train was made up, consisting of about 20 cars, with intrastate and interstate freight. He had gone to the engine on the front end of his train and had a conversation with his engineer and had given him his clearance card and was going back to his caboose. It appears from the evidence that at that time the car inspector was inspecting the respondent's train, and the respondent, instead of returning to his caboose on the open space between the track on which his train was standing and the "scale track," on which the switching was being done, went upon the "scale track" and, according to his testimony, was inspecting his train as he proceeded on his way to the rear of his train. Whether it was necessary for the conductor to return from the engine to the caboose on his train does not appear, but it does appear that it was not necessary for him to walk on the "scale track."

In *Van Brimmer v. Texas & P. Ry. Co. (C.*

C.) 190 Fed. 394, it was held that where a railroad brakeman was injured in making a flying switch to set out a car transported wholly in intrastate traffic, though it was a part of the train carrying both interstate and intrastate freight, his injury did not occur while he was engaged in interstate commerce, and therefore was not within the provisions of said act of Congress. The primary object of said act was to promote the safety of employes of railroads while actively engaged in the movement of interstate commerce. As bearing upon this question, see *Smead v. Central of G. Ry. Co. (C. C.)* 151 Fed. 608.

In *Phila., B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, which involved the negligent killing of one Tucker, the court said: "When Tucker was killed, he was upon the premises of the defendant in response to its call, to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage." And there laid down the rule that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance with his contract with the master, is rightfully and necessarily upon the premises of the master.

It is contended by counsel for appellant in the case at bar that the respondent, in walking upon said "scale track," could not have been engaged within the scope of his employment; that there was nothing in his employment requiring that he should be on said "scale track"; that, on the contrary, the proper discharge of his duties would require that he should not be there. While it may not have been his duty and was carelessness on his part, under the facts of this case, to walk upon said "scale track," still we think he was engaged in interstate commerce to the extent of getting his train ready for that purpose. It seems to us that preparation was being made to have his train leave Spirit Lake, and that he was engaged in getting his train ready for the transportation of freight both within the state and beyond its boundaries, and that he was "engaged in interstate commerce," within the meaning of that term as used in said act of Congress.

[6] 2. The next question presented is whether negligence has been shown on the part of the appellant. The respondent was an employé of varied and long experience in railroading. He was of mature years, in the full possession of his faculties. He had been employed by the appellant, and had had considerable experience in, and was thoroughly familiar with, said yards, the tracks, and the use to which such tracks were put. He knew that upon the switch track cars were apt to be moved at any time, and, regardless of his knowledge and experience, he went upon the switch track without paying any heed or attention to the movement of the switch en-

gine or to the ringing of the bell, which could be heard on the bright clear day on which the accident occurred at least a thousand feet, or to the noise made by the engine in its laboring up a 1 per cent. grade with four loaded coal cars. The exhaust of the steam and noise of the cars could be heard at least a quarter of a mile. The train was not running to exceed from 8 to 12 miles an hour. The noise of the train and the ringing of the bell were heard by persons much farther away than was the respondent. Could the respondent, regardless of the consequences, carelessly or heedlessly pay no attention to the movement of the train, under all of those facts and circumstances, and legally charge the appellant with negligence? We have not been able to find, nor have we been cited to, a single decision where a railroad company has ever been held guilty of negligence under such circumstances and facts as surround this case. It is true, respondent testified that he did not hear the train nor hear the bell ring. He must have become oblivious to his surroundings and so absorbed as to have lost all sense of sight or sound. But there is no evidence to show that the engineer or fireman had any reason to believe that respondent was in that condition. Five or six witnesses on behalf of the defendant testified that the bell was ringing up to the time respondent was struck by the engine. These several witnesses also testified that the engine was laboring very hard and making considerable noise that could be heard at least a quarter of a mile in hauling said coal cars up said grade. The court was fully justified in giving instruction No. 10, by which the jury were instructed, as a matter of law, that they must find that the bell did ring up to the time respondent was struck by the engine.

[7] The Supreme Court of the United States, in *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, held that a person in charge of a switch engine in a railroad yard, used for the purpose of moving cars, has a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movements of the cars, will take reasonable precaution against their approach, particularly where the cars are moving so slowly that ordinary attention on their part would enable them to avoid them, and that a railroad company is not guilty of negligence as against an employe, in moving its cars by a switch engine in its yards slowly, without sending a man in front of the cars to give notice to employes of their approach. In that case the court held that an abundance of time elapsed between the moment the cars entered upon the track upon which the employe was working and the moment they struck him, and that there could have been no thought or expectation on the part of the engineer or any other employe that the employe thus at work

in a place of danger would pay no attention whatever to his safety, and that the engineer was not bound to assume that any employe, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars, and that the engineer had the right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach, and that it could not be held, under such circumstances, that the defendants were compelled to send some one in front of the cars for the mere sake of giving notice to employes, who had full knowledge of what was to be expected.

It seems to us that the case at bar is a stronger case for the defendant upon the facts than was that case. In the case at bar the bell was ringing, the engine laboring up the grade, making a great deal of noise, at the time respondent was struck. In that case the plaintiff was engaged in working upon the track. In the case at bar the respondent claims he was inspecting his train, but from the great weight of evidence in the case he was doing no such thing; he was simply walking on the railroad track smoking his pipe. But had he been looking over his train, that would not have excused him from taking reasonable care to protect himself from the switching engine.

[8-15] In *Anderson v. Great No. Ry. Co.*, 15 Idaho, 513, 99 Pac. 91, this court, speaking through Chief Justice Ailshie, said: "When an engineer sees an adult on the track ahead of him, he ordinarily has a right to presume that he will get off the track before the train reaches him."

Smith v. Atlanta & C. R. Co., 130 N. C. 344, 42 S. E. 139, was a case very similar to the one at bar. The plaintiff was engaged in painting a switch target on one of the tracks of the defendant, the track being straight for several hundred feet, and in doing his work he was compelled to put himself in danger of passing trains, and while he was so engrossed he was struck by a switch engine, and in passing upon that case the court said: "The plaintiff labored under no infirmity. He was sober, intelligent, occupied a position where he could do his work with entire safety if he would only keep watch for the passing trains." And it was there held that an engineer who sees a person, apparently old enough to understand the necessity for care and watchfulness, walking along in front of a moving engine, may act upon the assumption that the person will step off the track in time to avoid injury. In the case at bar the fireman, who saw the respondent on the track, knew it was the conductor, and paid no more attention to him, assuming, of course, that he would get off the track in time to protect himself. In the *Smith Case* the court said: "The fault, then, with his honor's charge, as

we see it, is that he allowed the jury to consider, under the first issue, the continuing of his work by the plaintiff as evidence that he was engrossed in his work, and on that account was inadvertent to the approach of the train. The engineer, it appears to us, had the right to assume that the plaintiff, in possession of all his faculties, and not hampered by any obstructions that would have prevented his instantaneous avoidance of danger, would have stepped out of danger. It would be a difficult matter, indeed, for any important railroad system to carry on its business if each engineer of a switch engine is to stop his engine whenever he sees an employé continuing his work upon the approach of the engine, or the employé is to stop his work except for the second to step out of the way of the train."

In *Pennsylvania Co. v. Meyers*, 136 Ind. 242, 36 N. E. 32, the Supreme Court of Indiana said: "And, second, even if appellant's servants had known of the presence of the deceased on the track in front of the moving train in time to have stopped it before the collision, they had a right to presume that he would step off the track in time to avoid injury, up to the last moment before he was struck. * * * Therefore ordinary care on their part did not require them to anticipate that he would not so step off, and did not require them to stop the train and send a force forward sufficient to remove him."

In the case of *Louisville & N. R. Co. v. Cronbach*, 12 Ind. App. 666, 41 N. E. 15, the court affirmed the doctrine laid down in the last above-cited case. Referring to the presumption that one walking on a railroad track would step off the track in time to avoid injury, the court said: "In the light of this presumption, there is no evidence, either direct or circumstantial, in our opinion, authorizing the inference that they had reasonable ground to believe, before the engine struck him, that Cartmell was unconscious of his danger, or that he was unable to avoid it. On the contrary, they may well have presumed that Cartmell knew before the engine reached him that it was moving towards him, and that he would step from the track before he was overtaken."

In *Campbell v. Kansas City, etc., R. Co.*, 55 Kan. 536, 40 Pac. 997, the court said: "It is contended that Campbell was seen 500 feet ahead of the engine, and therefore the engineer should have stopped the train before reaching him. An engineer, however, is not bound to stop a train whenever he sees a person ahead upon the railroad, but has a right to assume that an adult person, apparently in the possession of his faculties, will exercise his senses, and step out of the way of danger before the engine reaches him." And later in the decision the court said: "Campbell was a man of mature years, who had the use of his faculties; and, as he

was moving and apparently capable of taking care of himself, the engineer had a right to presume until the last moment that he would leave the track, and not be run over."

In *Cin., etc., Ry. Co. v. Long*, Adm'r, 112 Ind. 166, 13 N. E. 650, which was a case of a switchman, familiar with the locality and movement of the trains at the place where he was injured, the court, in discussing the case, said: "Persons in the control of railroad trains have a right to presume that men of experience will act reasonably in all given contingencies. They are not bound to anticipate and provide against extraordinary, unusual, and improbable conditions which involve inattention on the part of others, and their duty to persons who are thus situated only begins when they have good reason to suppose that such persons are unconsciously in peril, or disabled from avoiding it. It is a presumption that a person of mature age, and in the possession of his faculties, will exercise care for his own safety, and that he will not go to or remain in a perilous position when a slight effort would carry him to a place of safety. Accordingly, a watchman or lookout on a train, moving slowly, with bell ringing, may presume, when he observes a man walking soberly on or near the track, that such person has observed the train, if by the exercise of care he could have observed it. He may therefore reasonably presume, unless something indicates the contrary, that the person on the track will step aside, so as to avoid any injury." And the court concludes that the facts of that case did not make a case of negligence against the railroad company.

To the same effect is *Carrier v. Mo. Pac. Ry. Co.*, 175 Mo. 470, 74 S. W. 1002.

In *Norfolk & W. Ry. Co. v. Gesswine*, 144 Fed. 56, 75 C. C. A. 214, which opinion was delivered by Judge Lurton, now on the Supreme Bench of the United States, the court held that, in an action for death of a brakeman by collision with a passing train, as he was repairing the track, an instruction that his place of employment was a dangerous place, and that, if he was hurt while trains were being managed and operated in the usual and ordinary way, there could be no recovery, was proper.

The case at bar was not tried upon the theory that no warnings were given, but on the theory that it was the duty of the railroad company to stop its train and notify the respondent to remove himself from the track in order to avoid injury. Under the law, before the plaintiff could recover in this action, it must be shown that those in charge of the switching train knew that he did not hear the warnings or would not heed them and would not get off the track, and that they then wantonly continued to run the train, and as a result injured him.

In *Copp v. Maine Cent. R. Co.*, 100 Me. 568, 62 Atl. 735, it was held that engineers

running locomotives are not bound to stop, or even decrease the speed of the locomotive, merely because they see persons walking upon the track. They may ordinarily assume that such persons have made themselves aware of the approach of the locomotive and will seasonably leave the track for its free passage, and held that, if such engineer makes all possible effort to stop the locomotive as soon as he has reason to believe that a person walking upon the track is in fact not aware of the approach of the locomotive, he is not guilty of negligence.

There is nothing in the record to show, or which proves or tends to prove, that the engineer or fireman on the switch train failed to make every possible effort to stop the locomotive after they, or either of them, had reason to believe that the respondent was not aware of the approach of the train. See, also, *Everett v. Los Angeles, etc., R. Co.*, 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350; *Bookman v. Seaboard Air Line Ry. Co.*, 152 Fed. 686, 81 C. C. A. 612.

It is held by many decisions that every one about a switchyard, as an employé or as a trespasser, must be taken to know the hazards of the situation and that safety requires the utmost vigilance. The danger is apparent, and every instinct of self-preservation sounds a loud warning. *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786.

In the case of *Norfolk & W. Ry. Co. v. Dean's Adm'r*, 107 Va. 505, 59 S. E. 389, the court, referring to the action of the conductor, said: "If the emergency brake had been applied at the instant Whitworth discovered the presence of Dean upon the track, the accident would have been averted; but in the honest exercise of his discretion, in the light of his long experience, he did not at that moment consider Dean in a position of peril."

So in the case at bar. When the fireman on the switch engine saw the conductor walking leisurely on the track, in the honest exercise of his discretion, and in the light of long experience, no doubt he did not at that moment consider the respondent in any peril whatever. *Teel v. Ohio Riv. R. Co.*, 49 W. Va. 85, 38 S. E. 518; *Raines v. Chesapeake & O. Ry. Co.*, 39 W. Va. 50, 19 S. E. 565, 24 L. R. A. 226.

As said in the last-cited case, we know of no rule, and can find no case, making it the duty of the engineer, under facts and circumstances like those in the case at bar, not to approach a man walking on a track nearer than the distance within which the train can be stopped. If the engineer saw the respondent on the track, and could have stopped the train, still he was fully justified, knowing him to be the conductor, in believing up to the last moment that he would move out of the way. *Norwood v. Raleigh*, 111 N. C. 236, 16 S. E. 4; *Louisville & N. R. Co. v. Black*, 89 Ala. 313, 8 South. 246.

In *Exum v. Atlantic Coast Line R. Co.*, 154 N. C. 408, 70 S. E. 845, 33 L. R. A. (N. S.) 169, the court said: "In this class of cases it will be found generally that, where the company has been held liable, it is in cases where the party injured was not upon equal chances with the engineer to avoid the injury, where there was something suggesting the injured party's disadvantage or disability, as where the party injured is lying on a railroad track, apparently drunk or asleep, or is on a bridge or trestle, where he cannot escape, or cannot do so without great danger." *Smalley v. So. Ry. Co.*, 57 S. C. 243, 35 S. E. 489.

In a note to *Railroad Co. v. Vaughan*, 93 Ala. 209, 9 South. 468, by Mr. Freeman, it is said: "The true principle, it is conceived, is that the engineer should see that the track is clear, but that, when an obstruction is perceived, the proper course to adopt will depend upon whether it is a living or inanimate object, and, if it is a living object, whether it is an intelligent human being, capable, under ordinary circumstances, of discerning the means of securing safety, or a brute, which has no guide but mere instinct. If the object seen is an intelligent human being, it seems to be generally agreed that the engineer has a right to presume that he will get out of harm's way before the engine reaches him, and that it is not negligence to act upon that presumption."

In *Norfolk & Western R. Co. v. Johnson's Adm'r*, 103 Va. 787, 50 S. E. 268, 80 Am. St. Rep. 50, the court said: "In the case at bar there was nothing to put the engineer upon his guard. The preponderance of the evidence shows that the plaintiff's intestate was doing what was done daily at that point. The engineer was confronted with no unusual situation, and he was not negligent, under such circumstances, in treating the plaintiff's intestate as free from danger."

In *Waldron v. Boston, etc., R. Co.*, 71 N. H. 362, 52 Atl. 443, the court said: "It is therefore immaterial whether the engineer in fact saw the deceased before the accident, or in time to have avoided the collision; for the question is, not what he might have done, but what his duty to Waldron required, in view of the latter's apparent duty and ability to protect himself." *Atlantic Coast Line R. Co. v. Miller*, 53 Fla. 246, 44 South. 247.

The fireman saw and recognized the respondent, who was a railroad conductor of experience, and expected, and had a right to expect him to adopt ordinary and usual precautions of self-preservation. See *Ray's Work on Negligence of Imposed Duties*, p. 134; *Elliott on Railroads*, § 1258; 33 Cyc. 800; *Wharton on Negligence*, § 389a.

In the case at bar, when the fireman saw the respondent on the switch track 500 feet ahead of the engine and the engine was hauling 4 cars of coal up a 1 per cent. grade at the rate of about 10 miles an hour, with

the bell ringing and the train making a noise that might easily be heard a quarter of a mile, the fireman and engineer were confronted with no unusual situation, and the question presented here is not, what the engineer might have done, but what his duty to the respondent required, in view of the latter's apparent duty and ability to protect himself by stepping off the track in time to avoid any injury. The engineer had a right to assume that the respondent, being a conductor, was in possession of his faculties of hearing and seeing, and to assume that he would not become so engrossed or engaged in his own thoughts as not to protect himself by stepping off the track before the engine struck him, for under the great weight of authority, even if the engineer had seen him up to the time the engine got to within a hundred feet of him, he had the right to assume that the respondent would protect himself from injury by stepping off the track. It would not have been negligence for the engineer to act upon that presumption. The respondent was an intelligent human being, had been long engaged in railroad service, had had large experience in switchyards and as brakeman and conductor on trains, and the engineer had a right to expect him to protect himself from injury, under the circumstances, as any man of ordinary judgment and prudence would do. It would be unreasonable for this court to hold, under the facts of this case, that the engineer should have stopped his train and sent forward a brakeman to invite the conductor to get off the track, as, under the facts of this case and the law applicable thereto, there was no negligence whatever shown on the part of the appellant.

In 2 Thompson on Negligence, § 1735; the author, in referring to the obligation of care and effort on the part of the railroad company, states that such care and effort do not generally commence at the time when one is seen on a railroad track and in no immediate danger, and says: "It arises at the moment when he is seen to be in a perilous situation; then, but not until then, the effort to stop the train must commence. In fact, the language of most of the decisions, which speak upon this question, speak of the obligation of care and effort in favor of the trespasser as arising at the point of time when his perilous situation is discovered or is known; they must have become aware both of his presence and his peril."

Conceding that the fireman on said engine knew of the presence of the conductor on said track, he had not become aware of the conductor's peril until Hennessy gave the "wash-out" signal to stop the engine, and it was then too late to protect the respondent from injury. Could it reasonably be presumed or assumed by the fireman and engineer that a conductor, familiar with the switching yards, the methods used in switching and making up trains, and the use to

which said "scale track" was put, would walk upon said track and become so absorbed in a matter that was or was not his duty to perform as to become oblivious to, and unconscious of, the ringing of the bell, the noise made by the laboring engine and cars, and the exhaust of steam? And was it negligence on the part of the company if its fireman and engineer presumed and assumed that a conductor, under such facts and circumstances, would step off the track? I think not. They may have known of his presence on the track, but certainly under the facts they did not know that he was in peril until it was too late to stop the train and prevent the accident. In railroad yards, where a large amount of switching is done, often many men are employed at various kinds of work that requires them to pass over or remain on some of the numerous tracks in doing their work, and, if an engineer were required to stop his engine within a hundred feet of such men if they did not step off the track, the workmen would lose a great deal of time or the switch engine would make slow progress with its work. It is the custom in such yards for the employees to continue their work and step off the track in time to save themselves from accident, and if a hard and fast rule is adopted, requiring the engineer in a switchyard, where trains are run slowly, to stop his engine under such conditions and circumstances, it would greatly retard transportation, both of passengers and freight. It is a well-recognized psychological fact that many persons will not step off a railway track until the train is nearly upon them, and it is also well recognized that many people would delight in stepping upon the track and stopping the train in order to show their importance, if it was the duty of the conductor to stop the train as soon as they stepped upon the track. But it is a well-established rule that where the engineer sees a person on the track, apparently in the full possession of his faculties, he has a right to presume that such person will step off in time to save himself from injury. To hold otherwise would go beyond any rule of negligence laid down in the books.

[16] 3. The act of Congress under which this action was prosecuted provides that contributory negligence on the part of the plaintiff should not be a bar to recovery, but that damages should be diminished by the jury in proportion to the amount of negligence attributable to such employee. The trial court gave the proper instruction upon this question, and also advised the jury that the plaintiff was guilty of contributory negligence and instructed them that it was their duty to diminish the damages in such proportion as they found his negligence contributed to the injury. The court also instructed the jury that they should reduce the amount of verdict by the amount of money he had received from the railroad company

subsequent to his injury. It would appear from the verdict of \$35,000 that the jury paid no attention whatever to those instructions of the court. The evidence shows that the company paid him \$987.85 subsequent to the injury, and it does not appear that the jury paid any attention whatever to the instruction of the court upon that question.

4. The provisions of section 4 of said act of Congress do not remove the defense of assumption of risk unless the injury or death of the employé was contributed to by the violation on the part of the common carrier of any statute enacted for the safety of the employes. As before stated, it is not claimed in this case that the railroad company violated any such statute, or that any such violation in any manner contributed to the injury of respondent, and it is clear that the respondent assumed certain risks in regard to his railroad work. He knew as much about the track where he was injured and its use and general surroundings and the probability that trains would be moved backward and forward thereon in switching operations as any one, and also had the common knowledge that trainmen would presume, if they saw him upon the track, that he would get off before the engine would strike him; and, if he was upon the track in the performance of his duty, he knew he was in danger of being injured, if he did not heed the warnings of the bell upon the engine. See *O'Neill v. Pittsburg, etc., R. Co.* (C. C.) 180 Fed. 204; *Goodes v. Boston & A. R. Co.*, 162 Mass. 287, 38 N. E. 500; *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90.

[17] 5. It is suggested by counsel that the doctrine of the "last clear chance" is applicable to this case. We are not in accord with that suggestion, as it does not appear that the appellant presumed, or was bound to presume, that the respondent would not step off the track before the accident occurred, and, when the engineer first realized that the respondent was in peril, the evidence clearly shows that he stopped his train within 80 feet, which was as quickly as it could have been stopped; and it does not appear that by the exercise of reasonable care and prudence the engineer could have prevented the accident.

[18] 6. It is next contended that the verdict of \$35,000 is excessive, and shows that it was rendered through passion and prejudice and without due deliberation. The respondent testified that he was 40 years of age; that his salary as conductor averaged about \$125 a month, which, if he worked continuously every month in the year, would amount to \$1,500 a year. The amount of the verdict, \$35,000, if put at interest at 7 per cent., would give a return of \$2,450 per year, which would probably be double the amount the respondent would earn, taking it one year with another, and at the death of respondent would leave \$35,000. The amount of the verdict is so excessive that it leads

us to believe that it was rendered through prejudice and passion and without deliberation.

7. Some errors are assigned as to the admission and rejection of certain evidence; but we do not think it necessary to pass upon those any further than to say that there was not such error as would warrant a reversal of the judgment for that reason alone.

[19] 8. The giving and refusing to give certain instructions is assigned as error. We will not undertake to repeat the instructions here, but will refer to them by number as they appear in the record.

The giving of instructions Nos. 1 and 3 was not error, as they correctly stated the law. Instruction No. 4 should not have been given. Instruction No. 14, as modified and given by the court, was a correct statement of the law. Instruction No. 6 should not have been given, as there is no evidence in the record showing that the respondent was oblivious to danger while walking on the track. Instruction No. 5, as requested by the defendant, correctly stated the law and should have been given. It was not error for the court to refuse to give instructions Nos. 10, 16, 18, and 20 as requested by defendant. It was error for the court to refuse to give instructions Nos. 11, 15, and 17, as they correctly stated the law. Instruction No. 19, requested by defendant, as modified and given by the court, correctly stated the law.

For the foregoing reasons, the judgment must be reversed, and a new trial granted, and it is so ordered, with costs of this appeal in favor of appellant.

AILSHIE, J. (concurring specially). I agree with the general rule of law as stated by Mr. Justice SULLIVAN. This court has followed the most advanced and liberal rule that has ever been approved by the courts in allowance of damages in this class of cases. *Anderson v. Great Northern R. Co.*, 15 Idaho, 513, 99 Pac. 91; *Fleenor v. O. & S. L. R. Co.*, 16 Idaho, 781, 102 Pac. 897; *Wheeler v. O. R. & N. Co.*, 16 Idaho, 375, 102 Pac. 347; *Maloney v. Winston Bros. Co.*, 18 Idaho, 740, 111 Pac. 1080. Where, however, there is a total failure to show negligence on the part of the defendant, there can be no recovery, and precaution and diligence cannot be required to such an extreme as would prevent an individual or company from carrying on its ordinary business. In this case it is clearly shown and is not denied that the respondent was guilty of gross negligence. He was at a place where his employment did not require, but rather forbade, him being. The fact, however, that he was in a place of danger, did not license the company to run over him or to in any degree lessen its vigilance in maintaining a lookout for any one who might come in the way of its engines. Clearly respondent was in no real or apparent danger when walking on the

track 500 feet ahead of the switch engine, and the engineer was then under no duty to slow up or stop the train on this account. He was an employé and train conductor physically and mentally sound and under no disability. The engineer and fireman say they did not see him any more until after the accident, yet it is clearly shown that he was on the track from that time until he was injured. I realize that the company is not required to maintain the same degree of vigilance in its switchyards, when making up trains and cutting out cars, in the way of maintaining lookouts and slowing up when some one comes onto the track, that is required of it outside its yards and at crossings. Notwithstanding this consideration, I am not prepared to say in this case that there is absolutely no evidence of any negligence on the part of the company in not discovering the respondent on the track sooner than was done, or, in other words, in not maintaining more or greater vigilance in its lookout over the track in the direction in which this engine No. 22 was backing up.

Since this case must be again tried, I refrain from any further comment on the evidence on this point.

In any possible view of the law, the verdict in this case is exorbitant and excessive. If the jury should find the company guilty of negligence sufficient to support a verdict, still they are commanded by the act of Congress to diminish the damages in proportion to the amount of negligence attributable to the employé. This they certainly failed to do in the present case. I concur in reversing the judgment and ordering a new trial.

STEWART, C. J. (dissenting in part, and concurring in part and in the judgment). I am unable to agree with that portion of the opinion written by Mr. Justice SULLIVAN in which he discusses the law of negligence on the part of the railway company, and applies the same to the facts proven in this case.

It appears that both the engineer and fireman were in a position to have seen the respondent upon the track from the time that Moore first saw the respondent, up to a point not more than a car's length distant from the respondent at the time he was struck.

It is also shown by the evidence that after the respondent was seen by Moore, who was fireman on the engine which struck the respondent, no effort was made by either the fireman or the engineer upon the engine to give the respondent any different signal of the approaching of such engine than was being given by the ringing of the bell and the noise from the engine before the respondent was seen by Moore, the fireman.

There is no evidence to show that, during the time intervening between the time Moore first saw the respondent upon the track and the time the engine struck the respondent, either the engineer or the fireman were in

any way engaged so as to prevent them from seeing the respondent during that period of time, and no reason given why they did not again look down the track and see whether the respondent was leaving or had left the track after he had first been seen. With the knowledge of the company that the respondent was upon the track, and that if he did not leave it he would be struck by the engine, the employés in charge of the engine which struck the respondent did not exercise special care or watchfulness at any time between the time they first ascertained that the respondent was on the track and in danger of being struck by the engine, to the time he was struck, and with full knowledge during all such times that the respondent was on the track and would be struck if he did not leave the track. These are questions to be considered in determining the negligence of the appellant; and, also, did the employés exercise ordinary care which a reasonable and prudent person should exercise under the circumstances to avoid the injury to the respondent? The determination of these questions, in the first instance, was with the jury. The jury having found negligence on the part of the appellant, such verdict should not be disturbed by this court, if there is evidence from which reasonable men might disagree as to negligence. The verdict should not be set aside. *Wheeler v. O. R. & N. Co.*, 16 Idaho, 375, 102 Pac. 347. To say as a matter of law, as is said in this opinion by Mr. Justice SULLIVAN, that there was no negligence on the part of the appellant, is, in my judgment, not justified by the law, nor is it a proper regard for the value and protection of human life. I do not believe that the cases upon which Mr. Justice SULLIVAN relies, when closely analyzed, sustain the rule announced in that opinion. I shall not undertake in this dissenting opinion to analyse those cases, for the reason that the judgment rendered is to be reversed and the case may come to this court again upon appeal, when this question may again be considered.

Mr. Justice SULLIVAN says in his opinion, after reviewing a number of cases from other courts, "It would be unreasonable for this court to hold, under the facts of this case, that the engineer should have stopped his train and sent forward a brakeman to invite the conductor to get off the track, as under the facts of this case and the law applicable thereto there was no negligence whatever shown on the part of the appellant." The substance of this statement is repeated a number of times in the opinion, and it would seem to be the rule announced in that opinion. I cannot approve this rule. I am clearly of the opinion that the facts were sufficient to justify the jury in finding that there was negligence on the part of the appellant, and that such negligence was the proximate cause of the injury. Neither do I think it necessary for this court to hold,

under the facts of this case, that it was the duty of the engineer in charge of the train that struck the respondent to have stopped his train and sent forward a brakeman to invite the conductor to get off the track. It is very easy to make that kind of a statement in order to protect an employé who does not do his duty, and also in defense of the wrongful acts and carelessness of the company in operating its train; but that result does not follow from the rule of law which imposes a duty on the part of the railway company, under the facts of this case, to use all reasonable care in averting the injury, which clearly appears not to have been done under the evidence shown in this case.

As I understand the general rule of law applicable to the facts of this case, it is that one's own negligence in such cases precludes recovery, subject to the qualification that where the defendant has discovered or had knowledge of the peril of the plaintiff's position, and it is apparent that the plaintiff makes no effort whatever to escape therefrom, the duty becomes imperative for the defendant to use all reasonable care to avoid the injury, and that, if this is not done, the defendant becomes liable, notwithstanding the negligence of the plaintiff or deceased. This rule, in my opinion, is applicable to the facts shown by the evidence in this case. I do not believe that where a railway company, operating a train upon its right of way, either upon its general track or in the yards where trains are transferred and made up, after a danger or peril becomes apparent to those in charge of the train, and after it is brought to the knowledge of the employes in charge of such train that the danger is not recognized or appreciated by a person passing along the track in front of the train, such facts can excuse the company from exercising reasonable effort to stop the train and prevent the injury.

From an examination of the cases cited in Mr. Justice SULLIVAN'S opinion, and other cases, it will be observed that the facts recited in such cases are generally different, and that the conduct and acts of the employes under circumstances which tend to show negligence on the part of the railway company are not alike, and that each case is determined by its own facts and circumstances. An examination of these various opinions leads me to believe that, under the facts shown by the record in this case, the trial court, and also this court, should not determine as a matter of law that the railway company had discharged itself from liability, by its employes observing all the precautions which the circumstances and emergency demanded. *Neary et al. v. Northern Pac. Ry. Co. et al.*, 37 Mont. 461, 97 Pac. 944, 19 L. R. A. (N. S.) 446; *Riley v. Northern Pac. Ry. Co.*, 86 Mont. 545, 93 Pac. 948; *Louisville & N. R. Co. v. Morlay*, 86 Fed.

240, 30 C. O. A. 6; *Bouwmeester v. Grand R. & I. Co.*, 53 Mich. 557, 30 N. W. 337; *Kelley v. Chicago, B. & Q. R. Co.*, 118 Iowa, 387, 92 N. W. 45; *Louisville & N. R. Co. v. Trammell*, 93 Ala. 350, 9 South. 870; *Watts v. Richmond & D. R. Co.*, 89 Ga. 277, 15 S. E. 365; *Kansas & Ark. V. Ry. Co. v. Fitzhugh*, 61 Ark. 341, 38 S. W. 960, 54 Am. St. Rep. 211; *St. Louis S. W. Ry. Co. v. Bishop*, 14 Tex. Civ. App. 504, 37 S. W. 764; *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500, 43 N. W. 382, 5 L. R. A. 786; *Schulz v. Chicago, M. & St. P. Ry. Co.*, 57 Minn. 271, 59 N. W. 192; *Mollon v. Great N. Ry. Co. (Minn.)* 134 N. W. 116; *Brown v. C., B. & Q. R. Co. (Minn.)* 134 N. W. 315; *Chamberlain v. Missouri Pac. R. Co.*, 133 Mo. 587, 38 S. W. 437, 34 S. W. 842; *Isbell v. N. Y. & N. H. Ry. Co.*, 25 Conn. 556; *Dale v. Colfax Coal Co.*, 181 Iowa, 67, 107 N. W. 1096.

This court, also, in my judgment, in the case of *Anderson v. G. N. Ry. Co.*, 15 Idaho, 513, 99 Pac. 91, announces the same general principle of law, and this rule should be adhered to by this court in a case where the facts shown are of the same general character as the facts in this case.

I concur in the opinion of Mr. Justice SULLIVAN in his discussion of the Employer's Liability Act enacted by Congress in 1908 and the amendment made in 1910 (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1324]) and I also concur in the opinion as to the judgment being excessive. It is apparent that the jury did not observe the instructions of the trial court with reference to their duty to consider the contributory negligence of the plaintiff in determining the amount of damages in case they found for the plaintiff, and, on account of such judgment, I think it is the duty of this court to reverse the judgment.

(87 Kan. 796)

STATE ex rel. DAWSON, Atty. Gen., et al. v. BRANINE, County Clerk, et al.

(Supreme Court of Kansas, July 22, 1912.)

CONSTITUTIONAL LAW (§ 68*) — JUDICIAL POWERS—POLITICAL QUESTIONS.

The courts cannot be called upon to decide political matters further than the statutes clearly require.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 125-127; Dec. Dig. § 68.*]

Original proceeding in mandamus by the State of Kansas on the relation of John S. Dawson, Attorney General, and others, against C. E. Branine, County Clerk, and others. Dismissed.

John S. Dawson, Atty. Gen., Fred S. Jackson, C. W. Trickett, F. L. Martin, W. L. Huggins, Howard Lewis, and C. A. Matson, for plaintiffs. F. Dumont Smith, Fred B. Stanley, D. R. Hite, D. W. Mulvane, and Chester I. Long, for defendants.

PER CURIAM. The court is of the opinion that the district court of Harvey county had jurisdiction to entertain the petition filed therein, and to issue a restraining order, pending its examination of the case. It is further of the opinion that such petition does not state a cause of action for a kind of fraud cognizable by a court of law or equity. Assuming the facts stated to be true, they are political in their nature, and the remedy of the plaintiffs is by political methods. The courts cannot be called upon to decide political matters further than the statutes clearly require; and the statutes of Kansas do not, expressly or by implication, authorize the granting of the relief asked of the district court of Harvey county.

It is assumed that the district court of Harvey county will reach the same conclusion, and dismiss the action pending before it. Upon such dismissal, the occasion for the proceeding in this court will be removed; and consequently this proceeding is dismissed. All the Justices concurring.

(87 Kan. 796)

MARKS et al. v. DAVIS et al.

(Supreme Court of Kansas. July 27, 1912.)

Appeal from District Court, Harvey County.

Injunction by R. A. Marks and others against Samuel A. Davis and others. Judgment for defendants denying the injunction and dismissing the action, and plaintiffs appeal. Affirmed.

F. B. Stanley, Fred Dumont Smith, D. R. Hite, D. W. Mulvane, and Chester I. Long, for appellants. Howard S. Lewis, F. S. Jackson, F. L. Martin, C. W. Trickett, and C. A. Matson, for appellees.

PER CURIAM. The court adheres to its ruling in the case of *State ex rel. v. Brantine et al.*, 125 Pac. 343; and, since the questions involved in the present case are political and moral in their nature, and the wrongs complained of are of a kind for which the courts are not authorized to grant relief, the judgment of the district court, dismissing the action and denying the injunction, must be affirmed. The court refrains from the expression of any opinion respecting the regularity or irregularity of the conduct of any political faction or organization.

JOHNSTON, C. J., and BURCH, MASON, and PORTER, JJ., concurring. WEST, J., concurring specially.

WEST, J. (concurring specially). This case is now here, regularly and properly on appeal, and presents a situation heretofore unheard of. This being so, there are no decisions arising out of similar facts by which we may be guided, and the question is one of vital and far-reaching importance.

By the Australian Ballot Act and the Primary Election Law, the Legislature has made party organization, machinery, discipline, and control no less possible and certain at primary elections than at general elections. Whether wisely or unwisely, the law-making department of the government has determined that through political parties the public servants are to be chosen, and has made it impossible for citizens who are dissatisfied with existing parties to accomplish anything until they have drawn to themselves sufficient numbers to constitute a new organization, then to be governed exactly in the same way as other parties are now governed.

As I view this case, it is this: The plaintiffs charge that their names were procured upon the nominating papers of certain candidates by false pretenses. Were the charge made that the names were forged, a crime made a felony by the statute would be alleged. Whatever moral distinction there may be between false pretenses and forgery need not be discussed. Upon our hearing of the recent mandamus case, my Brethren felt convinced that this injunction suit presented no legal, but only a political, question. I was not so convinced, but, not being sure of the contrary, I did not dissent. Since giving the matter further thought and attention, I am willing to join with my Brethren in saying that the mere announcement of a candidate for presidential elector that he will not vote for the nominee of the party would not be a sufficient ground to enable the signers of his petition to maintain this suit. But, to my mind, the right of the signers, before the primary ballot is printed, to have their names removed, if procured by false pretenses, is probably a legal right which, under the Anglo-Saxon system of law, should not be a right without a legal remedy. It is also apparent that incidentally involved in this proceeding is the right of thousands of voters in this state to vote for the nominee of their party, and, in my opinion, the result is likely to be, to this extent, their political disfranchisement at the coming election. True they may have a right at the primaries to select electors of their own faith; but in the inevitable confusion of names and locations on the ticket every sensible man knows that it will be difficult to cast an intelligent and effective ballot. The gentlemen in question, not following the example of the new national committeeman and withdrawing, because out of harmony with the decree of the party, reply through their counsel to the claim of fraud that the nomination at Chicago was fraudulently procured. But certainly the law cannot deem one fraud a justification for another, whatever the facts as to fraud may be. To my mind, the legal right to remain upon the ticket, if based alone on false pretenses, is a right too

slender to be regarded with judicial favor. I may say frankly that I am not convinced by any means that the charges of false pretenses could be established upon trial; but, for the purposes of this case, the verified and undenied allegations must be taken as true.

The exigencies are such that sufficient time cannot be taken to come to a final conclusion, based on irrefragable authority and logic; and, while my inclinations are as already indicated, both out of deference to the judgment of the other members of the court, and because a dissent would be futile, I concur, but express the hope that the Legislature, which has so thoroughly guarded primary and general elections by statutory restrictions, both civil and criminal, will make it possible for the wrong now complained of for the first time in our history to be speedily avoided or remedied.

McNEILL & CO. v. DOE et al. (S. F. 5,782)
(Supreme Court of California. July 16, 1912.)

1. VENUE (§ 77*)—CHANGE—EXHAUSTION OF RIGHT.

Where defendant's motion, under Code Civ. Proc. § 395, for a change of the place of trial to the county in which he resided was insufficient and properly overruled, and the ruling accepted by him, his right to move in that respect was exhausted.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 59, 134, 138; Dec. Dig. § 77.*]

2. VENUE (§ 77*)—RIGHT TO CHANGE—EXHAUSTION OF RIGHT—REVIVOR.

After defendant had exhausted his right to move, under Code Civ. Proc. § 395, for a change of the place of trial, such right was not revived by an order, entered with plaintiff's consent, that defendant's subsequent motion for a change be argued on briefs.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 59, 134, 138; Dec. Dig. § 77.*]

3. VENUE (§ 42*)—CHANGE—DISCRETION.

Where defendant's affidavit in support of his motion for change of place of trial on the ground of inconvenience to his witnesses was met by plaintiff's affidavit, showing that his witness would be inconvenienced by a granting of a change, denial of the motion was not an abuse of discretion.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 64; Dec. Dig. § 42.*]

4. APPEAL AND ERROR (§ 965*)—VENUE (§ 52*)—REVIEW—DISCRETION—CHANGE OF VENUE.

The granting of a change of the place of trial for the convenience of witnesses rests in the sound discretion of the superior court; and the Supreme Court will not disturb its determination, in the absence of any abuse of its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. § 965.* Venue, Cent. Dig. §§ 76, 77; Dec. Dig. § 52.*]

5. TRIAL (§ 6*)—SETTING OF TIME—NOTICE.

Code Civ. Proc. § 594, requires merely that the defendant shall have five days' notice of the time set for trial, and does not require that he shall have notice of the intended application to have a day fixed for the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 13-18; Dec. Dig. § 6.*]

Department 2. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by McNeill & Co. against John Doe (real name Charles Reick) and another. From an order denying a motion of defendant Reick for change of place of trial, and from judgment against him, he appeals. Affirmed.

T. E. Clark, for appellant. Strother & Aynesworth, for respondent.

LORIGAN, J. This appeal is from an order denying the motion of defendant Reick (sued as John Doe) for a change of the place of trial of the action, and from the judgment entered against him.

The suit was in claim and delivery to recover from defendant Reick possession of a piano, alleged to have been delivered to him by the defendant Hirsch, a piano salesman for plaintiff, in exchange for a secondhand automobile, without authority so to do.

The action was commenced in the superior court of Fresno county, and summons served on defendant Reick in Tulare county on May 17, 1910. On June 9, 1910, defendant Reick filed a demurrer to the complaint, and at the same time served notice and demand for a change of the place of trial from Fresno county to Tulare county, on the ground that he was a resident of the latter county when the action against him was commenced. This demand was accompanied by what purported to be an affidavit of merits. Before the day noticed for hearing of his motion, Reick filed a supplemental affidavit of merits. The motion was denied on June 20, 1910. The order of denial was clearly right, as the original and supplemental affidavits of merits were radically defective in essential particulars. No claim to the contrary is made by appellant. In fact, no appeal has been taken from this order.

On July 5, 1910, defendant Reick filed his answer, and therewith served another notice of demand for a change of the place of trial, on the ground of his residence in Tulare county when the action was commenced, and on the further ground of the convenience of witnesses; this demand also being accompanied by an affidavit of merits. On July 18th this motion, on both grounds, was denied—properly, as applying to the demand for a change on the ground of the residence of defendant, for reasons hereafter to be given, and properly, also, on the ground of alleged convenience of witnesses, as the affidavit of merits contained neither the names of the witnesses, nor any statement of the matters to which they would testify. Nothing, however, need further be said about this order, as no appeal has been taken from it.

On August 27, 1910, defendant again served a notice and demand for a change of the place of trial, both on the ground of his res-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Index

idence in Tulare county when the suit was commenced, and the further ground of the convenience of witnesses, filing therewith an affidavit of merits addressed to both grounds. The plaintiff filed a counter affidavit on the matter solely of the convenience of witnesses. The motion for a change came on for hearing on September 12, 1910, when it was agreed that it should be submitted to the court on briefs; and it was so ordered. Thereafter, on October 10, 1910, the court entered an order denying it. This appeal is taken from this last order, and from the judgment subsequently entered against the defendant.

[1] The order appealed from, as far as it denied the application for a change of the place of trial on the ground of the residence of the defendant, was correct. Section 395, Code of Civil Procedure, gives to a defendant sued in an action, such as was brought against appellant here, the right to a trial of the cause in the county where he resided when suit was brought. The procedure for securing this right—the filing of a demand that it be had in the county of his residence, made at the time he answers or demurs, accompanied by an affidavit of merits—is provided for by section 396 of the Code of Civil Procedure. Thereunder but one right is given to a defendant to move on that ground, and but one time fixed when he may assert it; and he is only then entitled to an order therefor upon a sufficient showing in his affidavit of merits. The appellant here was required to make his motion for the change when he filed his demurrer, and he did so; but, as his affidavit of merits was entirely insufficient, within the plain requirements of the law, the court properly denied his motion. He accepted this ruling as correct, as it undoubtedly was; and it was conclusive of any right to subsequently renew his motion on his own initiative, and on the same ground. His right to move ended with that denial. Hence, when he made this third motion on the same ground of residence in Tulare county, the court properly denied it, as his right to move in that respect was exhausted with the denial of his original application.

[2] Appellant claims, however, that because counsel on both sides agreed to submit this last motion to the court to be argued on briefs, and the court entered an order to that effect, this operated as a consent on the part of counsel for plaintiff and the court that appellant might renew the motion, and related back so as to revive the original motion. There is nothing in this claim. The court simply entertained the motion because it was made, and it was its duty to do so, and pass upon it; and, as far as the agreement to submit on the part of plaintiff is concerned, it only operated to just the extent it was intended, namely, to

permit a written argument on the motion, instead of arguing it orally.

[3, 4] As to the denial of the motion on the ground of the convenience of witnesses. Appellant lays but little stress for a reversal of the order on this point. Whatever other reasons might be assigned in support of the order of the court, denying a change on this ground, it is sufficient to say that, while the affidavits on the part of appellant tended to show some inconvenience in the attendance of his witnesses, should the trial be held in Fresno county, the affidavit of the plaintiff in some degree tended to show a like inconvenience to the witnesses of plaintiff if the trial was changed to Tulare county. The matter of granting a change of the place of trial on the ground of convenience of witnesses is a matter addressed to the sound discretion of the superior court; and this court will not interfere with its exercise, unless it appears that such discretion has been abused, or injustice done by the ruling. The situation presented here does not admit of such a claim.

[5] As to the appeal from the judgment, little need be said on that subject. Under section 594, Code of Civil Procedure, on application of counsel for the plaintiff, and without notice to the appellant, the cause being at issue, the court fixed the day for its trial. Plaintiff served notice on the attorney for appellant of the day fixed therefor by the court, and on failure of the appellant or his counsel to appear on the day set judgment was entered for plaintiff. The claim of the appellant is that he should have had notice of the intended application to the court by counsel for plaintiff to have a day fixed for the trial. But the section does not require it; only that he shall have five days' notice of the time set for trial, and this he fully had. The validity of the judgment is attacked on other grounds; but, as they are of less merit than the point last considered, we do not discuss them.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

VINCENT et al. v. MOTT et al. (S. F. 6278.) (Supreme Court of California. July 17, 1912.)

1. ELECTIONS (§ 52*)—ELECTION OFFICERS—STATUTORY PROVISIONS.

Pol. Code, § 1142, requiring the appointment on boards of elections of persons, half of whom shall belong to each of the two parties casting the highest number of votes at the last election, applies to recall elections held under the Oakland city charter.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 46; Dec. Dig. § 52.*]

2. MANDAMUS (§ 154*)—PROCEEDINGS AND RELIEF—SUFFICIENCY OF PETITION.

A petition for a writ of mandate to require the council of a city to appoint on the election

boards for a recall election persons, half of whom belong to each of the two parties casting the highest number of votes at the last election, as required by Pol. Code, § 1142, not alleging that the council threatens to disobey that section, is insufficient.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

In Bank. Application by Robert Vincent and others for a writ of mandate against Frank H. Mott and others, Mayor, Commissioners, City Council, and Ex. Office Board of Election Commissioners of the City of Oakland. Application denied.

R. M. Royce, for petitioners.

PER CURIAM. (1, 2) It does not appear from the petition presented that the Oakland council has been asked to appoint on the election boards to hold the recall election persons of whom half belong to the Republican party and half to the Democratic party, as required in section 1142 of the Political Code. We think that under the provisions of the charter that section applies to recall elections held under said charter. But because of the failure to aver that the council threatens to disobey that section, the application for mandamus is denied.

(163 Cal. 317)

GOLDNER v. SPENCER et al. (See 1, 934.)

(Supreme Court of California, July 13, 1912.)

Rehearing Denied Aug. 12, 1912.)

1. APPEAL AND ERROR (§ 717*)—REVIEW—WRITTEN OPINIONS OF TRIAL JUDGE.

A court, on appeal, cannot consider written opinions of the trial judge, filed and incorporated in the bill of exceptions, to determine whether or not his findings are sufficiently supported by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2967; Dec. Dig. § 717.*]

2. FRAUDULENT CONVEYANCES (§§ 300, 301*)—EVIDENCE—LACK OF CONSIDERATION—INTENT TO DEFRAUD.

In an action for foreclosure of a mortgage, evidence held to show that the note and mortgage securing it were given for a valuable consideration, and with no fraudulent intent on the part of the mortgagee to hinder or defraud any creditor of the mortgagor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 896-903, 904-907; Dec. Dig. §§ 300, 301.*]

3. FRAUDULENT CONVEYANCES (§ 282*)—BURDEN OF PROOF.

Where, in an action to foreclose a mortgage, a valuable consideration therefor was shown, the burden of showing that the mortgagee had knowledge of a fraudulent intent of his mortgagor to make the conveyance to hinder or defraud creditors was on a creditor joining as a defendant, who claimed priority for his later filed judgment lien.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 817, 818; Dec. Dig. § 282.*]

4. FRAUDULENT CONVEYANCES (§ 295*)—EVIDENCE—EXCESSIVE INTEREST—CONCLUSIVENESS.

While the fact that a mortgage sought to be foreclosed, and claimed by a defendant to be in fraud of creditors, secured a note calling for

an excessive rate of interest may be evidence tending to show fraud, it is not conclusive; and its importance depends upon the facts of the particular case.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 867-875; Dec. Dig. § 295.*]

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Edward C. Goldner against William Crane Spencer and others to foreclose a mortgage. From a judgment directing a foreclosure subject to the lien of Thomas E. Curran, and from an order denying a new trial, plaintiff appeals. Judgment and order reversed.

L. W. Lovey and Meredith & Landis (R. L. Benjamin, of counsel), for appellant, Francis Dunn and Henry N. Beatty, for respondents.

ANGELLOTTI, J. This is an action to foreclose a mortgage on lands in Placer county, alleged to have been given by defendant Spencer to plaintiff to secure the payment of a note for \$21,000, dated November 15, 1907, payable one year after date, alleged to have been given by said Spencer to plaintiff. Defendant Curran, administrator, etc., was made a party defendant, because he had an interest in the mortgaged premises, which interest was alleged to be subject to plaintiff's mortgage. Defendant Spencer filed an answer, admitting all the allegations of the complaint, except the allegation as to the amount due, alleging that \$500 had been paid on February 19, 1909, on account of the interest that had accrued on the note. This allegation was admitted by plaintiff's attorneys on the trial to be true. Defendant Curran, administrator, filed an answer, denying all the allegations of the complaint as to the note and mortgage, and the allegation that such mortgage was superior to his lien. He alleged his lien on the mortgaged premises to be that of a judgment obtained by him in the superior court of the city and county of San Francisco against said Spencer on March 27, 1908, for \$10,946.46 and costs, a certified transcript of which judgment was recorded in the office of the county recorder of Placer county on April 6, 1908. By his amended answer served and filed at the commencement of the trial, he further alleged that said note and mortgage were executed and delivered without consideration, at a time when Spencer was heavily indebted to him and numerous other creditors, and insolvent, and when he had no other property, except the property described in the mortgage, out of which he (Curran) and such other creditors could satisfy their claims against him; that such note and mortgage was executed and delivered for the purpose of defrauding, delaying, and hindering him (Curran) as a creditor of Spencer, and other creditors; that plaintiff well knew that the

were executed and delivered for that purpose; and that at no time since their execution has Spencer ever had any other property out of which Curran and other creditors of Spencer can satisfy their claims. By supplemental answer he alleged the sale to himself, on January 11, 1910, on an execution issued on said judgment, of said property for the sum of \$10,000.

The trial court found that the note and mortgage were executed as alleged in the complaint; that at the time of their execution Curran, as such administrator, was a creditor of Spencer on the claim subsequently reduced to judgment; that at such time Spencer was insolvent; that such note and mortgage were without consideration; that said note and mortgage were made, executed, and delivered by Spencer to plaintiff, with intent to hinder, delay, and defraud his creditors; that plaintiff accepted the same knowing these facts, and knowing that Curran was one of said creditors, and with the intent to assist Spencer in his purpose to hinder, delay, and defraud his creditors. Judgment was given, declaring the amount due to plaintiff on his note, namely, \$24,388.10, and directing a sale of such portion of the mortgaged premises as had not been released to pay said amount, with interest and costs, subject, however, to the claim and lien of Curran, which was adjudged to be prior to plaintiff's claim. Plaintiff's motion for a new trial was denied. This is an appeal by him from the judgment, and from the order denying his motion for a new trial.

The validity of Curran's claim against the mortgaged premises is not questioned; the only question in regard thereto being whether it is superior to or subject to plaintiff's mortgage. The mortgage was recorded in Placer county on March 18, 1908, while Curran's certified copy of the transcript of his judgment was not recorded in such county until April 6, 1908. The conclusion of the trial court was that the note and mortgage were void as against Curran, because of the matters stated in the findings to the effect that the same were given by Spencer and accepted by plaintiff without consideration, and for the purpose of hindering, delaying, and defrauding Curran and other creditors of Spencer. The principal claim on this appeal is that such findings were utterly without support in the evidence.

[1] It is earnestly urged by plaintiff that it is apparent from written opinions filed by the trial judge on April 29, 1910, and May 19, 1910, which have been incorporated in the bill of exceptions, that he was satisfied by the evidence that plaintiff actually loaned Spencer \$21,000, and took the note and mortgage therefor, and that he did not in any way collude with Spencer to defraud any creditor, and that the only reason for holding the mortgage void as against Curran was

that he accepted a note and mortgage calling for a higher rate of interest than that to which he was entitled, knowing that Spencer was heavily indebted to Curran and others. But, as has often been said, we cannot consider these written opinions in determining whether or not the findings are sufficiently supported by the evidence. Although, in fact, in the bill of exceptions, they constitute no proper part of the record for any such purpose. The findings of fact filed October 20, 1910, must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision. The only question for us is whether these findings have sufficient legal support in the evidence and such inferences as may reasonably be drawn therefrom. Learned counsel for Curran frankly admit in their brief that "there is practically no conflict in the evidence, i. e., there is no point on which the testimony of one witness was directly contradicted by the testimony of any other witness," and that "the problem of deciding the case reduces itself into drawing the proper conclusions from the facts shown."

Addressing ourselves, first, to the question of want of consideration for the note. Plaintiff and Spencer are half-brothers. Plaintiff, during, and ever since the year 1907, resided in Paris, France. In April, 1907, Spencer went from San Francisco, his place of residence, to Paris, and did not return to San Francisco until October. He was then heavily interested in the California City Rock Company, a rock-quarrying enterprise, and was anxious to obtain money with which to further develop this enterprise, in which he apparently had great confidence. While in Paris, he obtained amounts of money aggregating nearly \$30,000. His bank book, containing his account with the bank Société Générale, showed deposits from June 11 to October 18, 1907, aggregating 146,500.85 francs; the last being one of 94,000 francs on October 18, 1907. He testified that he received not exceeding 50,000 francs from his stepfather's estate, and acknowledged that 45,000 francs of the amount so deposited was so received by him. When he returned to San Francisco, he brought at least two drafts for \$8,000 each, issued by said bank on October 22, 1907, one of which was deposited in the Crocker National Bank on November 15, 1907, and cashed by the Wells Fargo National Bank on November 16, 1907, and the other of which was paid by the latter bank on January 9, 1908. As to the source from which the money procured in Paris was obtained, he testified positively that amounts aggregating \$21,000 were borrowed from plaintiff in Paris; the last item so borrowed being that of 94,000 francs on October 18, 1907, on his promise to send plaintiff a note and mortgage for the whole \$21,000 on his return to San Francisco. Robinson, Spencer's attorney, who was with him

in Paris, testified that he heard Spencer say to plaintiff that he desired to borrow some money from him, and that plaintiff replied that he "would loan him some money." Spencer testified that his reason for not giving the mortgage while in Paris was that he did not have a description of the real property to be mortgaged at hand. On his return to San Francisco, he prepared and signed the note and mortgage and acknowledged the execution of the mortgage on November 19, 1907, before a notary public; and he testified that he sent the same by mail to plaintiff at Paris, with the suggestion that, if satisfactory, the mortgage be returned to him to be recorded. It was subsequently recorded at Spencer's request in Placer county. He testified that plaintiff did return it to be recorded, and that after recordation he sent it back to plaintiff at Paris. Plaintiff's attorney, Mr. Lovey, testified that in August, 1909, he received both the note and mortgage from plaintiff by mail from Paris, with a letter from plaintiff, stating that no part of the principal or interest had been paid, and directing him to press for collection, and, if necessary, to begin a suit to foreclose the mortgage and buy in the lands, if necessary. This letter was introduced in evidence. The action was commenced September 10, 1909. In reply to a letter of inquiry from Mr. Lovey to plaintiff for definite information as to the circumstances of the loan, written in October, 1907, plaintiff wrote to Mr. Lovey, regretting that no satisfactory settlement had been possible, and regretting the consequent necessity of the expense of a foreclosure suit, and informing him that the money was given to Spencer by his "personal check on my bank, with the exception of 3,500 francs, which he owed me at the time," and giving the items and dates, which corresponded with the last five items in Spencer's French bank book; the last item being that of 94,000 francs on October 18, 1907. Spencer produced in evidence a receipt from himself to plaintiff, which was as follows: "Paris le 18 Octobre, '07. Received from Edward C. Goldner ninety-four thousand francs, being part of the \$21,000 note and mortgage to be executed by me on my return to San Francisco. Wm. Crane Spencer."

Spencer testified that he gave this receipt to plaintiff on October 18, 1907, when the 94,000 francs were loaned to him, and that plaintiff returned it to him with the mortgage when he sent the latter to be recorded. When introduced in evidence, it bore the indorsement: "Paid by note Nov. 15-07. Ed. C. Goldner." The genuineness of the signature of plaintiff to this was apparently not questioned, and Spencer testified that he received it from plaintiff so indorsed. Mr. Robinson, Spencer's attorney, testified that in January, 1909, plaintiff, who was in California from about October, 1908, to April, 1909, told him that he had a note and

mortgage against Spencer and could not collect his money, and asked him what he could do; and that he (Robinson) told him that he could not act for him, because he was Spencer's attorney, and recommended to him three or four San Francisco attorneys, including Mr. Lovey.

No witness testified directly to anything in conflict with the foregoing. Opposed to it are only certain circumstances, which, respondent claims, warranted an inference on the part of the trial court to the effect that there was no consideration for the note and mortgage. In considering these it must be borne in mind that, by reason of certain facts that cannot be disputed, if, in fact, there was no consideration, plaintiff must have deliberately assisted in the fabrication of evidence, for the purpose of consummating a fraud on Spencer's creditors. That plaintiff accepted the note and mortgage from Spencer, that he indorsed Spencer's receipt of October 18, 1907, to him for 94,000 francs, "Paid by note, Nov. 15-07. Ed. C. Goldner," that he furnished to his attorney a written statement to the effect that he had loaned to Spencer the various sums stated therein, on the dates named, aggregating 105,000 francs, and that he directed the institution by his attorney of the foreclosure action, is absolutely established. These things cannot be reconciled with the idea of want of consideration, except upon the theory that he was actively engaged in a deliberate attempt to defraud. They fully corroborate Spencer in his testimony as to the borrowing of \$21,000 from plaintiff, the agreement as to the giving of the note and mortgage therefor, and the claim that such note and mortgage were given in pursuance of such agreement.

The matters relied upon by respondent as warranting a conclusion on this point opposed to plaintiff's claim and to Spencer's direct testimony are all as consistent with honesty on the part of plaintiff as with fraud. Spencer was in need of money. The Curran suit was pending, having been commenced in April, 1907, but no answer was filed therein until February 5, 1908. Outside of his interest in the quarry company, Spencer had nothing, except his Placer county land and some \$10,000 that he had just received from his stepfather's estate. These things were probably all known to plaintiff. Plaintiff advanced the money on Spencer's mere request, without any security being given, leaving it to Spencer to send him a note and mortgage on his return to America, and without taking any step to ascertain the condition of the title of the property proposed to be mortgaged. He may have known that the property was not worth to exceed \$16,000. He subsequently trusted Spencer to record the mortgage. He subsequently, at the request of Spencer, executed two partial releases covering small portions of the mortgaged property, without receiving any considera-

tion therefor. He never appeared as a witness in this proceeding.

Of course, some of these facts are not reconcilable with the idea that plaintiff, in his dealings with Spencer, was a cold and keen business man, careful to guard himself against loss. But it is to be borne in mind that he was a half-brother of Spencer; that the relations between plaintiff and Spencer had always been most friendly; and that Spencer had the greatest confidence in his rock quarry enterprise, and fully believed that he would make a great deal of money out of it, and had probably imbued plaintiff with the same confidence. Plaintiff was not dealing with a stranger, but with his half-brother, whom he desired to aid financially, and in whom he had every confidence. It would not be at all surprising, under the circumstances, assuming that he was financially well situated, which does not appear to be questioned, had he been willing to advance the money without any security whatever, and it certainly is not a very material circumstance, in view of the relations between the parties, that he was willing to trust Spencer to subsequently furnish him with such security as he had promised to give, and to see that the instrument furnishing such security was properly recorded. The same is true as to the fact that he was willing to take inadequate security for his loan, and also as to the fact that he was willing to execute the partial releases without consideration. All these things are entirely consistent, under the circumstances shown, with perfect honesty and good faith on his part. We are unable to see any sufficient foundation for a conclusion that this action was brought as the result of any collusion between plaintiff and Spencer. His failure to personally appear during the trial is not of any particular importance in view of the facts shown by the record.

[2] We have given these matters very careful consideration, and are unable to find anything therein that warrants the rejection of the clear and uncontradicted evidence as to the actual making of the loan of \$21,000 by plaintiff to Spencer upon the promise by Spencer that he would give therefor the note and mortgage in suit here. Even if, as claimed by learned counsel for Curran, the situation was such as to throw the burden on plaintiff to show a valuable consideration for the note and mortgage, the evidence was such, in our opinion, as to compel a conclusion that these were the facts. The circumstances claimed to be opposed to this conclusion cannot be held to constitute such "satisfactory" evidence as justifies a verdict. They are at best "slight evidence." Code Civ. Proc. § 1835.

[3] What we have said applies with equal force to the matter of good faith on the part of plaintiff in the acceptance of the note and mortgage. There was nothing in the nature of evidence sufficient to support a conclu-

sion that plaintiff had knowledge of any intent on the part of Spencer, in giving the mortgage, to thereby destroy, hinder, or defraud any other creditor, if, indeed, such intent did exist on the part of Spencer. If a valuable consideration for the note and mortgage was shown, the burden of showing plaintiff's knowledge of a fraudulent intent on the part of Spencer was on Curran. See *Hart v. Church*, 126 Cal. 481, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195; *Roberts v. Burr*, 135 Cal. 159, 67 Pac. 46. It may be freely conceded that, if there was satisfactory evidence to show that it was understood between the parties that the loan was in fact to be one without security, and that the mortgage was a mere device to protect the property from other claims for the sole benefit of Spencer, and was not to be enforced against him in any event, a different conclusion could be sustained. But certainly there is not satisfactory evidence of any such understanding. Looking at the evidence in the light most favorable to Curran, we have at most, in the circumstances we have above detailed, some slight evidence affording ground for vague surmise and suspicion as to the motives of the parties, in no degree measuring up to the standard provided by law for what is termed "satisfactory evidence."

[4] Something has been said about the matter of interest. The note called for interest at the rate of 8 per cent. per annum, "compounding quarterly." In the mortgage it was declared that the same was given as security for the payment of \$21,000 on November 15, 1908, "with interest thereon at the rate of eight per cent. per annum according to the terms and conditions of a certain promissory note of even date with the mortgage, in words and figures following, to wit;" but the note was not set forth in the mortgage. So far as the record shows, nothing was said at the time of the loan as to the rate of interest; but it does not appear from the record that any point was made in regard to interest, either in the pleadings or at the trial, except in so far as a waiver of interest in excess of 7 per cent. and the written opinions filed by the trial judge indicate that something was said about the matter in argument. At the time of the first submission of the case, April 7, 1910, plaintiff's attorney filed a disclaimer and waiver of all interest "in excess of seven per cent. (7%) per annum upon said note from the date of the execution thereof." The learned trial judge apparently was of the opinion that there was no agreement as to the amount of interest, and that consequently plaintiff was entitled to only 7 per cent. per annum; and, furthermore, that by reason of certain early decisions of this court (*Taaffe v. Josephson*, 7 Cal. 352; *McKenty v. Gladwin*, *Hugg & Co.*, 10 Cal. 227), if plaintiff, with full knowledge that Spencer was largely indebted, knowingly and intentionally took a note calling for a larger rate of interest than he had

agreed to accept, or to which he was entitled, the note and mortgage must be held void in toto. It is conceded by learned counsel for Curran that, in so far as the cases cited may be considered as holding that the acceptance by a creditor from a debtor known to be financially involved of an evidence of indebtedness calling for more than is due, either in principal or interest, is conclusive evidence of fraud, they have been overruled. At most such a fact may be evidence tending to show fraud, which is purely a question "of fact and not of law," except as otherwise provided in sections 3440 and 3442 of the Civil Code. Its importance as a circumstance tending to show fraud is necessarily dependent upon the facts of the particular case. In the case at bar, there is not the slightest basis in the facts we have set forth in regard to the matter of interest for a conclusion that there was any fraudulent intent on the part of anybody, and especially on the part of plaintiff. Assuming that nothing was said as to the rate of interest when the money was advanced, which is the most that is claimed by respondent, that matter was simply left to be provided for in the note and mortgage which Spencer agreed to give plaintiff on his return to San Francisco. Plaintiff had the right to assume that the note would provide for interest at a reasonable rate. It cannot be claimed that there was anything unreasonable about the rate of interest prescribed, especially in view of the law as it then was relative to the payment of taxes by the mortgagee. We are utterly at a loss to see how the acceptance by plaintiff of the note and mortgage containing the provision in regard to interest to which we have referred, where nothing had theretofore been agreed upon in regard to the rate, could warrant any inference of a fraudulent intent on his part with relation to the other creditors of Spencer.

From what we have said, it is apparent that our conclusion is that certain findings essential to support the judgment subordinating plaintiff's lien to the lien of Curran's judgment are without sufficient support in the evidence, and it is unnecessary to discuss other points made in the briefs.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

(163 Cal. 322)

LAGUNITAS WATER CO. v. MARIN
COUNTY WATER CO. et al.
(S. F. 5,778.)

(Supreme Court of California. July 16, 1912.)

1. INJUNCTION (§ 158*)—INJUNCTION PENDENTE LITE—EFFECT.

As the granting of an injunction pendente lite is not a matter of right, but within the discretion of the court, and the court, in passing on such an application, is not bound to pass

on the merits of the controversy, the denial of it is not a determination of anything as to the merits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 841; Dec. Dig. § 158.*]

2. INJUNCTION (§ 137*)—INJUNCTION PENDENTE LITE—DISCRETION OF COURT.

Where, in an action to establish riparian rights, the only showing of damage which would accrue to the plaintiff from the maintenance of a dam pending the suit was that a tenant of his property would be deprived of water for the use of his cattle, and the opposite parties showed that the plaintiff's tenant had sufficient water for that purpose, independent of the flow of water in the creek in which the riparian right was claimed, the refusal of the court to grant a temporary injunction was a proper exercise of its discretion.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 807, 809; Dec. Dig. § 137.*]

Department 2. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by the Lagunitas Water Company against the Marin County Water Company and another. From an order denying an application for an injunction pendente lite, plaintiff appeals. Affirmed.

A. E. Shaw, for appellant. Jesse W. Lienthal, for respondents.

LORIGAN, J. This is an appeal by plaintiff from an order denying its application for an injunction pendente lite and dismissing the order to show cause why it should not be issued.

The application for the order was heard upon the complaint and affidavits produced on both sides.

The complaint alleged that plaintiff is the owner of an undivided one-third interest in a tract of land, known as the Berry ranch, in Marin county (particularly described in the complaint), and that said tract is riparian to a natural water course, known as Lagunitas creek; that said creek rises upon the slope of Mt. Tamalpais, flows thence in a northerly direction into the Lagunitas reservoir owned by defendants, and thence through the premises of plaintiff for about seven miles; that the water of this creek at and above the easterly boundary line of the premises of plaintiff flows continuously during the year until the late dry season, when the waters thereof above said point sink and flow underground, coming to the surface again upon the premises of the plaintiff; that said creek, by itself and its tributaries, carries all the waters falling upon the watershed thereof east of the boundary line of the plaintiff, and all said waters falling upon said watershed are accustomed to flow in the channel of said Lagunitas creek in well-defined channels or tributaries thereof, which join said Lagunitas creek above where it enters the land of plaintiff at the eastern boundary thereof, and upon and through the said premises of plaintiff; that said defendants

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

have no right to the waters of said Lagunitas creek, other than the right to impound a sufficient quantity of said waters to fill said reservoir, known as the Lagunitas reservoir, above referred to, which is situated near the headwaters of said creek; that defendants threaten to and will divert from said creek other waters than the said waters to which they are entitled, as aforesaid, unless restrained by decree of court. It is then alleged generally that plaintiff has been greatly damaged and will be irreparably injured by the diversion of said waters by defendants. A decree was asked establishing the right of plaintiff to the waters of said creek as a riparian owner, that defendants by final decree be perpetually enjoined from making such diversion or interfering with such right, and for a restraining order pendente lite.

On filing the complaint and an affidavit on behalf of plaintiff, an order to defendants to show cause why an injunction pendente lite should not issue was made. On the hearing thereof, affidavits were presented on behalf of the respective parties. Those on behalf of plaintiff tended to support the allegations of the complaint, and averred that the particular method of diversion contemplated and threatened by defendants was the construction of a dam to bedrock across the creek near the eastern boundary of the lands of plaintiff, for the purpose of impounding the waters of the creek, the effect of which construction, it was claimed in the affidavits, would be to prevent the flow of the water of the creek in its accustomed channel below the dam and on and through the premises of plaintiff.

The affidavits on behalf of defendants denied that the construction of the proposed dam was intended to or would divert any of the water of the Lagunitas creek or its tributaries, or other waters than storm or freshet waters; averred that the Lagunitas creek was not a living stream, except during the winter or freshet season, and that shortly after the cessation of rains said creek above the site of the proposed dam became wholly dry; denied that any water of the Lagunitas creek, at or above the point where the dam is proposed to be constructed, sinks or flows underground, or comes to the surface on the land of plaintiff, but in fact that such waters as come to the surface on said land come from living springs thereon, the waters of which flow into the Lagunitas below the proposed dam site; further averred that if the waters above the dam were impounded there would still be at all times a sufficient water supply from the feeders upon the Berry ranch to provide all the water for domestic, culinary, or irrigation purposes to which the owners thereof were entitled by virtue of their riparian rights.

In addition to affidavits of persons having official connection with the corporations

plaintiff and defendant, there were also presented on behalf of either side the affidavits of expert civil and hydraulic engineers, who had examined the proposed dam site and the locality and water conditions surrounding it. Those offered by plaintiff supported its claim that the watershed above the proposed dam site drained into the channel of the Lagunitas, or into channels of streams tributary thereto, and sunk, flowed underground, and came again to the surface on the land of plaintiff, and that the construction of said proposed dam would cut off such flow through said lands; while those produced on the part of the defendants flatly denied the existence of any such conditions, or that the proposed dam could have that effect.

In addition, defendants offered in evidence a conveyance, made in 1871, by the predecessors in title of plaintiff to the defendant the Marin County Water Company of certain tracts of land, one of which, designated and described as "the Fish Gulch Tract," was conveyed in fee. The other tracts were conveyed for a term of 10 years, with the right, however, granted to said water company, for a period of 50 years, to divert and appropriate all waters flowing on the described tracts, or in gulches or creeks therein. It was asserted by defendants that the waters which they intended to impound by their dam did not include any waters, except such as flowed from the Fish gulch tract or catchment or surface waters on the tracts described in the above conveyance; and that as to those they were entitled to divert or impound them under the deed.

It is proper to say, as to this deed, appellant claimed that it did not convey the lands where defendants contemplate constructing their dam, nor confer any rights to divert the water at that point.

Upon a hearing, the only damage or injury which it was claimed plaintiff would sustain, unless defendants were restrained during the pendency of the action, was with respect to a tenant of plaintiff, who had rented and was in possession of a portion of the land of plaintiff for dairy purposes, and had about 80 head of cattle on the premises. It was averred, as to such tenant, that during the dry months of the year, from about July to December, he depended upon the waters of the Lagunitas creek flowing through the dairy premises for his stock; and that if the construction of the proposed dam was not restrained said tenant would be deprived of the use of said waters for such purpose. It was not claimed that any of the waters of the creek were being used, or ever had been used, to irrigate any of the lands of the plaintiff, or for any other purpose than watering cattle.

Respecting this claim, the showing on the part of defendants was that this tenant of plaintiff never at any time depended upon the waters of the Lagunitas creek flowing

above the proposed dam site for watering stock, or for any other purpose; that four springs arose on the land of plaintiff, each running a large volume of water all the year around, which flows into the Lagunitas creek on the land of plaintiff below the proposed dam site, and furnishes, and always has furnished, more than sufficient water to supply the cattle of said tenant, or any cattle which the lands of plaintiff could maintain; that, in addition, two streams, flowing all the year around, the waters of which would not be impounded by the proposed dam of defendants, empty into the Lagunitas creek on the lands of plaintiff, either one of which is sufficient to supply water for all the cattle that could be maintained on the premises.

We refer to this evidence produced on both sides at the hearing for the preliminary injunction to show that the essential facts stated in the complaint, upon which plaintiff based his right of action, as well as all the material facts in support thereof contained in the moving affidavits, as well as the matter of the injury which, it was claimed, would be sustained by plaintiff during the pendency of the action, were denied and disputed by counter affidavits on the part of the defendants.

Counsel for appellant, on the assumption that the superior court, in denying the application for the temporary injunction, did so by deciding against appellant on the merits of the case, discusses at length the affidavits addressed to them on the hearing and the law respecting the right of a riparian owner to enjoin the threatened diversion of a natural water course, whether he has present use for the waters thereof or not, and aside from any question whether present injury may accrue to him thereby.

[1] But on the hearing of this motion it was not necessary for the superior court, in order to warrant a denial by it of the motion of plaintiff, to pass upon the merits of the case. The court may have concluded, as the essential facts were so clearly in dispute, and the right of plaintiff to any relief in doubt, under the showing on the preliminary hearing, that it would decline to grant any injunction at all until the trial on the merits. It is to be borne in mind that the matter from which this appeal is taken was an application solely for a temporary injunction pending the trial of the cause, on the ground that, unless it was so granted, plaintiff would suffer great and irreparable injury. But a preliminary injunction is not a matter of right. It is addressed to the discretion of the court. In denying it the court does not necessarily determine anything as to the merits of the main controversy. It may conclude that from the evidence produced on the application for a preliminary injunction it does not appear that, pending a trial, any possible injury can result to the

plaintiff, and may decline to grant an injunction until after the trial of the cause.

[2] Here the only injury which it was claimed by plaintiff it would suffer pending the trial, unless the preliminary injunction was granted, was that a tenant of its property would be deprived of water for the use of his cattle. The showing on the part of the respondents was that no such injury would be suffered, as the plaintiff had an abundant supply of water on the ranch for that purpose, and independent of the flow of any water in the Lagunitas creek, or from its alleged tributaries. It must be assumed that the court found that this only claim of plaintiff to injury during the pendency of the trial was unfounded, and so declined to award any injunction until upon the final hearing. This it was clearly in the discretion of the court to do.

As said in *Santa Cruz Ass'n v. Grant*, 104 Cal. 309, 37 Pac. 1085: "The granting of a preliminary injunction is not a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case; and its action upon such application will not be reviewed in the appellate court, unless it shall clearly appear that there was an abuse of its discretion."

In that case the court quoted with approval the language of Chancellor Walworth from a case cited therein that: "There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction in limine. The final injunction is, in many cases, matter of strict right, and granted as a necessary consequence of the decree made in the case. On the contrary, the preliminary injunction before answer is a matter resting altogether in the discretion of the court, and ought not to be granted, unless the injury is pressing and the delay dangerous."

As, under the evidence, the court was warranted in concluding that no injury could occur to plaintiff pending the trial on the merits, there was no abuse of discretion in refusing to grant the application of plaintiff. The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

WRIGHT et al. v. BOARD OF PUBLIC WORKS OF CITY OF LOS ANGELES et al. (L. A. 3,124.)

(Supreme Court of California. July 1, 1912.)

1. APPEAL AND ERROR (§ 1138*)—DETERMINATION AND DISPOSITION—ACADEMIC QUESTION.

Where, between the denial of one application for a temporary injunction, to restrain a sale of lots to pay assessments for the widening of a street and the making of a second ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plication for such an injunction, which was also denied, the sale of the property sought to be enjoined took place, an affirmance of the orders made was proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4456-4461; Dec. Dig. § 1138.]

2. INJUNCTION (§ 12*)—OBJECTIONS TO RELIEF—INEFFECTIVENESS OF WRIT.

A court properly refused to grant a temporary injunction restraining the sale of lots to pay assessments for the widening of a city street, where, at the time of the making of the application therefor, the sale had already taken place.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hatton, Judge.

Injunction by William Wright and others against the Board of Public Works of the City of Los Angeles and others. From orders denying successive motions for a temporary injunction, plaintiffs appeal. Affirmed.

Chase, Overton & Lyman, for appellants. John W. Shenk, for respondents.

SLOSS, J. The plaintiffs appeal from two orders denying successive motions for a temporary injunction.

The plaintiffs are owners of various tracts of land upon which the authorities of the city of Los Angeles undertook, in attempted compliance with the provisions of the street opening act of 1903 (Stats. 1903, p. 376), to levy assessments to pay the damages and costs to be incurred in the widening of Sunset boulevard in said city. The complaint describes the several parcels of land affected, alleges that they are owned by the respective plaintiffs, and states the amount "pretended to be assessed" against each. It then alleges that on February 17, 1911, the plaintiffs herein, together with Constance D. Simpson, brought an action in the superior court of Los Angeles county against the defendants. The purpose of the action, which may be designated as the Simpson suit, was to obtain a decree that the proceedings and assessments under the ordinance for the opening and widening of Sunset boulevard, so far as they affected the properties of the plaintiffs, be declared void and be canceled, and that the defendants be enjoined from asserting any liens or claims against said properties by reason of said proceedings, and from executing deeds of plaintiffs' respective lots. On July 12, 1911, a judgment was entered, granting to plaintiffs in said Simpson suit the relief for which they had prayed. Notice of the entry of such judgment was duly served upon the defendants. Notwithstanding their knowledge of the decree, the defendant members of the board of works thereafter, in August and September, 1911, published a notice that they would, on Friday, September 15, 1911, sell the properties of

plaintiffs for the delinquent assessments claimed under the aforesaid proceedings. It is alleged that such sales will be followed by certificates and deeds, which will cloud the plaintiffs' respective titles to their lots, and that such sales and the issuance of such certificates and deeds will be in violation of the injunction in the Simpson case. The prayer is for an injunction restraining the board of works from selling the said properties of plaintiff; that the judgment and decree heretofore rendered be "enforced and rendered effectual"; that the titles of respective plaintiffs be quieted, and the defendants enjoined from asserting any claims under the proceedings mentioned in the complaint.

The record contains a verified answer filed by the defendants. From the pleadings, and from the arguments contained in the briefs, it appears that the principal point of difference between the parties is the construction of the decree in the Simpson case. The contention of the plaintiff is that that decree adjudged to be void all of the proceedings looking to the widening of Sunset boulevard, while the defendants take the position that the decree went no further than to set aside so much of the proceedings as required the support of a due recording of the assessment and diagram; and that, upon a re-recording of these documents, the board of works was authorized to collect the assessments by taking anew the further statutory steps. There is no occasion to consider the soundness of these respective views of the merits of the controversy.

The complaint shows that the defendant board of works had given notice that they would sell the properties of plaintiffs on September 15, 1911. The complaint was filed, and the first application for a temporary injunction restraining such sale made on the same day. The application was denied. The court then issued its order, requiring the defendants to show cause on the 19th day of September why an injunction should not be issued, restraining the defendants from selling the properties described in the complaint. The answer was presented in response to said order to show cause. It alleges that on the 15th day of September, 1911, after the hearing of the first application, the board of works did offer for sale and sell all of the property advertised in the notice of delinquent sale.

[1] It appears, therefore, that the act sought to be restrained has been done since the making and denial of the first application; and that it had already been done at the time the order to show cause came on for hearing. Under these circumstances, neither order should be reversed.

[2] The second application was properly denied, regardless of its merit or want of merit in other respects, on the ground that a court of equity will not undertake to restrain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

the doing of an act, single and complete in its nature, that has already been performed. 22 Cyc. 759; Clark v. Willett, 35 Cal. 534; Coker v. Simpson, 7 Cal. 340; Gardner v. Stroever, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90; Ball v. Kehl, 87 Cal. 505, 25 Pac. 679.

And, if it were conceded that an injunction against the threatened sale might or should have been granted when first applied for, on the day the complaint was filed, the order denying that motion should nevertheless be affirmed upon the showing that the sale has taken place since the denial of the order. Where a reversal would prove fruitless, the appellate court will not reverse the judgment or order, appealed from, 3 Cyc. 188; Id. 420. The rule has been applied by this court to cases just like the one at bar—cases, that is to say, of an appeal from an order refusing an injunction pendente lite, where, after the order, and before the disposition of the appeal, the act sought to be enjoined has been performed. Foster v. Smith, 115 Cal. 611, 47 Pac. 591; Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031. See, also, Horton v. City of Los Angeles, 119 Cal. 603, 51 Pac. 956; Weaver v. Reddy, 135 Cal. 480, 67 Pac. 683. In Foster v. Smith, the court said that: "To re-establish the restraining order, or to issue an injunction pendente lite, would be a vain and frivolous act. Any opinion that we might give upon the merits of the plaintiffs' application to the superior court would not, therefore, be followed by any action on the part of that court, and would not have any binding authority, or constitute an adjudication of the rights of the parties." The disposition of the present appeals from the orders denying a temporary injunction will not, of course, affect the trial of the cause on its merits, in so far as such trial may involve a demand for further relief than that sought by the application for injunction pendente lite. The plaintiffs may, for example, ultimately show that they are entitled to an injunction against the execution of deeds to the purchaser at the sale. But they did not, on the applications under review, ask for any such injunction, and we can, on these appeals, consider nothing more than their right to the injunction for which they applied, which was an injunction against the sale which has actually been made.

In some jurisdictions the courts, upon presentation of a state of facts like that here shown with reference to the first motion, affirm the judgment or order appealed from without consideration of the merits. In California, however, it seems to have been the practice to dismiss the appeal, upon the view that it presents no real controversy, but only a moot or academic question. This was the course followed in Foster v. Smith and in Bradley v. Voorsanger.

The appeal from the order of September 15, 1911, is dismissed. The order of September 19, 1911, is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

GRAY v. BONNELL (MAGNEY, Intervener).
(Civ. 1,097.)

(District Court of Appeal, Second District, California. June 10, 1912.)

1. CONTRACTS (§ 246*)—RESCISSION—ESTOPPEL.

Where an inventor engaged two promoters to sell stock in a corporation to be organized to market his invention, and agreed that 400,000 shares of stock should be placed in escrow until a certain date, or until the corporation should be on a good financial basis, and that at the expiration of the escrow period 100,000 shares should be transferred to the promoters, the act of the inventor in entering into a subsequent written agreement that, in consideration of 50 additional shares of stock to be delivered to the promoters, the 100,000 shares might remain in escrow for a longer period, and then be issued to the promoters, at all events estopped him from contending that the promoters failed to sell stock, as agreed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1131-1138; Dec. Dig. § 246.*]

2. PARTNERSHIP (§ 42*)—CONTRACT WITH THIRD PARTY.

Where, at the time of such second escrow agreement, all partnership matters between the promoters had been adjusted, and the part each was to receive of the 100,000 shares had been determined, such second agreement was not binding on one of the promoters, who refused to consent thereto, and made no claim to any part of the 50 shares to be given as consideration.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 57; Dec. Dig. § 42.*]

3. APPEAL AND ERROR (§ 877*)—RIGHT TO COMPLAIN—PARTY IN INTEREST.

An intervener could not complain that a judgment was ineffectual as to a corporation organized by him, or that it was imperfect in respect to parties other than himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Earl D. Gray against A. O. Bonnell, in which J. P. Magney intervenes. From judgment for plaintiff, the intervener appeals. Affirmed.

George Beebe, for appellant. Geo. E. Cryer, for respondent.

JAMES, J. On the 7th day of May, 1908, the intervener, who is the only appellant herein, entered into a contract with plaintiff and defendant Bonnell; the design of intervener being to obtain the services of Gray and Bonnell in the promotion of a corporation which was to be organized for the purpose of placing on the market a spring tire for use on automobiles and other vehicles, of which intervener was the inventor. The written agreement, after providing for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

organization of the corporation, set forth terms under which Gray and Bonnell were to take charge of the selling of the shares of the capital stock of that corporation as fiscal agents thereof, and fixed their compensation of 50 per cent. of the amount to be received from such sales. As additional compensation to be received by Gray and Bonnell, the written agreement, signed by the three parties to this action, provided that 400,000 shares of stock, which were to be issued to Magney, should be placed in escrow until January 1, 1909, "or until such time as that the said company shall, through the sale of stock by parties of the second part [Gray and Bonnell], or through the conducting of its business, be on a good financial basis," and that Magney would transfer and assign 100,000 shares of such stock to Gray and Bonnell when the term of the escrow had expired. The corporation was duly organized, and Gray and Bonnell entered upon the work of making sales of its stock, and did sell a large number of its shares. In December, 1908, Bonnell made a written demand upon Magney, which recited the substance of the agreement respecting the delivery of the 100,000 shares of stock to Bonnell and Gray, and demanded that Magney comply with that agreement. Magney objected to releasing the stock from the escrow, but finally did deliver it to Bonnell, and entered into another agreement with Bonnell, whereby Bonnell on his own part, and also on the part of plaintiff, Gray, agreed, in consideration that Magney would deliver 50 shares of stock in addition to the 100,000, that the 100,000 shares of stock might remain in escrow for a further period of time, and until the 1st day of September, 1909. Gray was not a party to this agreement, and at the time it was made there were no unsettled accounts between himself and Bonnell, except that pertaining to this block of 100,000 shares of stock, of which each was entitled to receive one-half. Gray objected to this latter escrow agreement, and demanded of Bonnell that he deliver him the stock which he had received, and, upon that demand being met with a refusal, brought this action against Bonnell and the Spring Tire Company to obtain the stock to which he was entitled. This action was commenced on the 20th day of August, 1909. The Spring Tire Company made appearance, and, upon its application, the action was dismissed as to it, and Magney was allowed to file a complaint in intervention. In this complaint he alleged that Bonnell and Gray had failed to fulfill the obligations of the first contract made with them, and sought to enforce rescission thereof. On his behalf, it was also claimed that the contract made with Bonnell, requiring that the 100,000 shares of stock be held in escrow until the 1st day of September, 1909, was binding upon Gray, notwithstanding that he had not signed it; this claim being made under intervenor's the-

ory that Gray and Bonnell were copartners, and that the act of one was binding upon the other. All of the issues were found in favor of plaintiff, and the intervenor appealed from the judgment.

[1] In our opinion, there is little merit in any of the contentions advanced on behalf of appellant. The question as to whether or not Gray and Bonnell had fulfilled the obligations of their contract in making sales of stock of the Spring Tire Company was determined affirmatively by the trial court in its findings, which were based upon sufficient evidence. Moreover, it seems clearly to appear that Magney estopped himself from contending that there was a lack of performance on the part of Gray and Bonnell when he issued the stock and made the new arrangement with Bonnell to have it held further in escrow. This second arrangement was based upon an entirely new and different consideration, to wit, that 50 shares of stock should be paid to Bonnell and Gray. In this second agreement, which was reduced to writing, there was no mention of any other consideration than the delivery of the 50 shares of stock; and it was provided that all of the escrow stock should be held only until the 1st day of September, 1909. So that it then appears that when Bonnell demanded of Magney that he deliver the 100,000 shares of stock, which was to be paid to Gray and Bonnell as part consideration for their efforts in making sales of the capital stock of the Spring Tire Company, Magney complied with that demand, but attempted, by the making of a new agreement, based upon a new consideration, to cause the stock to be held in escrow for an additional definite time, at the expiration of which it was to be issued at all events. Under these facts, no ground for rescission, attempted to be made long after this second alleged agreement was entered into, is shown. It may be noted, also, that the court found, and the evidence sustains the finding, that Magney was cognizant of the methods employed by Gray and Bonnell, and of the quantity of stock which they had effected a sale of at the time the 100,000 shares of stock was attempted to be escrowed under the second agreement.

[2] It was made clear by the evidence that, in so far as the dealings between Bonnell and Gray had partaken of the nature of partnership affairs, all of these matters had been adjusted, and no partnership accounts remained unsettled between the parties. The proportion which each was to receive of this 100,000 shares of stock, to wit, one-half each, had been determined upon, and the plaintiff was entitled, in his own right, to have that stock delivered to him. The agreement, whereby Bonnell attempted to bind Gray, which required that the stock so issued be held further in escrow, was without effect upon the latter, because he had given no consent thereto; and he made no claim, so far

as appears in this action; to any part of the 50 shares of stock agreed by Magney to be delivered as a consideration of the second escrow agreement.

[3] Some argument is made by the intervenor that the judgment is ineffectual as to the Spring Tire Company, and not perfect in other respects as affecting the other parties to the action; but of such deficiency or imperfection he is not entitled to complain. The judgment as to him is in plain terms, and sufficiently explicit to enable plaintiff to exact performance thereunder.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(19 Cal. App. 234)

NATIONAL LUMBER CO. v. WICKLIFFE.
(Civ. 1,095.)

(District Court of Appeal, Second District, California, June 7, 1912. Rehearing Denied by Supreme Court Aug. 6, 1912.)

1. MECHANICS' LIENS (§ 271*) — CONSTRUCTION OF PLEADING—PRESUMPTION.

It will be presumed, against one seeking to foreclose his lien for materials furnished the contractor, that the contract of the owner did not provide for payment of more than \$1,000, and so, though not filed for record and not in writing, was not, under Code Civ. Proc. § 1183, void; his complaint not stating the contract price, and the amendment thereof, made after the sustaining of a demurrer specifically pointing out such defect, not attempting to cure that defect.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 494-513; Dec. Dig. § 271.*]

2. MECHANICS' LIENS (§ 271*)—ENFORCEMENT—COMPLAINT.

It appearing affirmatively elsewhere in the complaint of a materialman to foreclose his lien that the purchase was not made by the owner of the premises, but that the goods were sold and delivered to the contractor, the allegation therein that the contractor was acting as the agent for the owner and as such purchased the materials, with the preceding statement that there was never any written contract, or contract filed for record, will be considered not an attempt to allege a sale to the owner through an agent in fact; but as a statement of a conclusion, with reference to Code Civ. Proc. § 1183, providing that where the amount agreed to be paid by the owner exceeds \$1,000, the contract, unless in writing and filed for record, shall be void, and materials furnished by all persons, except the contractor, shall be deemed to have been furnished at the personal instance of the owner, and they shall have a lien therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 494-513; Dec. Dig. § 271.*]

3. PLEADING (§ 54*)—SEPARATE COUNTS—REPETITION OF ALLEGATIONS.

An allegation in the first cause of action, in a complaint by a materialman to foreclose his lien, that there was money in the hands of the owner due the contractor at the time of the delivery of the stop notice and the filing of the lien, not being repeated in the second cause of action, forms no part of it.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 118; Dec. Dig. § 54.*]

4. APPEAL AND ERROR (§ 984*)—PRESUMPTIONS.

All intendments being in favor of a judgment, it must be presumed that the contract and papers before the court were such as to justify the judgment for defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

5. MECHANICS' LIENS (§ 121*)—MATERIALMEN—NOTICE.

A building contract having been valid, and the whole of the contract price having been paid under its terms before the filing of notice of lien or stop notice by one who furnished materials to the contractor, nothing remained in the owner's hands on which the notice of lien could operate, regardless of whether the building was completed 97 or 108 days before the filing of such notices, or of the effect which should be given Code Civ. Proc. § 1187, declaring an estoppel to assert a lien has not been filed in time if the owner of a building does not within a certain time after its completion file for record a notice of the completion.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 164; Dec. Dig. § 121.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the National Lumber Company against G. W. Wickliffe. Judgment for defendant. Plaintiff appeals. Affirmed.

R. L. Horton, for appellant. G. W. Wickliffe and P. M. Nash, for respondent.

ALLEN, P. J. The action is one to foreclose a mechanic's lien. The complaint originally set forth two causes of action. Plaintiff dismissed as to the first cause of action, and the case proceeded to trial upon the second. This alleged the ownership by defendant of a parcel of ground; that a contract was entered into between the owner and a certain corporation for the construction of a dwelling on the property for the sum of \$——, under and by the terms of which said contractor agreed to furnish materials and labor and perform the contract; that the contractor purchased of plaintiff the materials mentioned in the complaint; that the same were sold to be used and were actually used in the construction of the house; that the house was completed on the 2d day of November, 1908, and no notice of completion has ever been filed; that on January 29, 1909, plaintiff filed its claim of lien, and on the 27th day of January, 1909, served upon the owner a stop notice under section 1184, Code of Civil Procedure. The answer denied the material allegations of the complaint, and upon the trial it was stipulated that the allegations of the complaint were true, except as to the labor done and materials furnished on the 2d of November, 1908, and of the date of the completion of the building. Upon these issues the court found in favor of defendant, and found that the building was in fact completed on the 22d of October, 1908, except for a certain lock for the front door and a certain lock for a sliding door which were furnished by plaintiff and put into said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

buffing on the 2d of November, 1908, at the request of defendant, in place of other locks placed therein prior to October 22d, which had also been furnished by plaintiff; that defendant took possession of said building and moved into the same on the 24th of October, 1908; that the changing of the locks on November 2d was the correction of a trivial imperfection in the work. There is evidence in the record tending to support these findings. The court found that plaintiff was not entitled to any lien against the property and gave judgment for defendant for costs. A motion for a new trial was filed, which was denied, and plaintiff appeals from the judgment and from the order denying a new trial, upon a bill of exceptions.

[1] It will be observed that the contract was entered into and all work connected with the construction of the building performed before the amendment to sections 1183 and 1184, Code of Civil Procedure (Laws 1911, p. 1818). As section 1183 stood at the time of this contract and work, no contract of \$1,000 or under need be reduced to writing or recorded. To the original complaint a demurrer was filed, specifically pointing out the defect in not stating the contract price. The demurrer being sustained, plaintiff amended its complaint, but made no attempt to cure the defect, and the case proceeded to trial without any matter appearing in the complaint as to the amount of the original contract price, nor does such amount appear in the record. If therefore the contract was for \$1,000 or under, which must be presumed under the rule for the construction of pleadings, it was valid, and the only rights possessed by laborers or materialmen was to cause the contract price to be applied to the payment of their demands. In *Stockton Lumber Co. v. Schuler*, 153 Cal. 412, 101 Pac. 308, it is said: "The lien, in the case of a valid contract, extends to the contract price, and such contract price is the limit of the liability which may be imposed upon the owner or his property."

[2] The second cause of action alleges that there never was any written contract, nor any contract filed for record, which is followed by the statement that the contractor was acting as the agent for the owner in the premises and as such agent purchased the materials set forth. Taking the whole allegation together, it is not an attempt to allege a sale by the plaintiff to the defendant through an agent in fact, but a statement of the condition arising by noncompliance with the statute with reference to the recordation of a written contract where such is required by section 1183, Code of Civil Procedure, and the stipulation that the allegations of the complaint were true can be said to extend no further than that the contract was not in writing and was not recorded, but cannot be construed as an admission of an independent purchase by defendant, for it elsewhere ap-

pears affirmatively in the complaint that the purchase was not made by defendant, but that the goods were sold and delivered to the contractor.

[3] There is no allegation in the second cause of action that any sum was in the hands of the owner and due the contractor at the time the alleged stop notice was delivered or the lien was filed. We do find such allegations in the first cause of action, but they were not repeated and formed no part of the second. There was therefore nothing upon which the stop notice could have an effect, if the contract were a valid one.

[4] All intendments being in favor of a judgment, it must be concluded that the contract and papers before the court were such as to justify the court in its rendition of a judgment for the defendant, for the court finds, notwithstanding the failure to file for record, that defendant was entitled to a judgment. This judgment was warranted upon the theory that the contract was valid without recordation.

[5] If the contract were a valid one and the whole amount thereof paid under its terms before filing the notice of lien or stop notice, nothing remained in the owner's hands upon which the notice of lien could operate, regardless of the question of completion of the building, or the effect which should be given to section 1187.

Our conclusion, therefore, is that no facts showing the invalidity of the contract were either pleaded or proven, and the plaintiff's rights depend upon the fact whether or not the owner had any money in his possession belonging to the contractor at the time of the service of notice or filing of lien.

There being no claim in that regard, the judgment and order of the trial court should be affirmed; and it is so ordered.

We concur: JAMES, J.; SHAW, J.

KERN VALLEY BANK v. KOEHN. (Civ. 1,102.)

(District Court of Appeal, Second District, California. June 10, 1912. Rehearing Denied by Supreme Court Aug. 9, 1912.)

APPEAL AND ERROR (§ 194*)—PRESENTATION BELOW—ANSWER TO AFFIRMATIVE DEFENSE.

Where the defendant in an action on a promissory note filed a cross-complaint to which the plaintiff demurred, and the case went to trial without the demurrer being ruled on or any answer to it being filed, he could not on appeal for the first time complain of the want of such answer; the want of a formal answer to an affirmative defense being waived where both parties treat such defense as denied.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Kern Valley Bank against Charles A. Koehn. From judgment for plaintiff and order denying a new trial, defendant appeals. Affirmed.

See, also, 157 Cal. 237, 107 Pac. 111.

E. L. Foster (E. J. Emmons, of counsel), for appellant. Geo. E. Whitaker, for respondent.

SHAW, J. Action to recover upon a promissory note. Judgment went for plaintiff in accordance with the verdict of a jury to which the issues were submitted for trial. Defendant appeals from the judgment and an order of the court denying his motion for a new trial.

The execution of the note was admitted. As an affirmative defense it was alleged the note was made without consideration, and that it was given in renewal of a former note made and executed by defendant to plaintiff, which first note at the time of executing the note herein involved had been paid by the transfer to the bank of certain personal property, which, though transferred as a pledge to secure payment of said first note, was, in case defendant failed to pay the same at maturity, to be accepted by the bank in full payment and satisfaction of the indebtedness evidenced thereby. He made default in the payment thereof, and notwithstanding the alleged agreement he gave the new note herein sued upon which he says was requested by the bank as a matter of form only in order to balance its books. It is apparent from the verdict of the jury that it gave little weight to the meager evidence offered in support of these allegations.

Defendant with his answer filed a cross-complaint wherein, besides reiterating the affirmative defense set up in his answer, he asked to have a statement, whereby the plaintiff certified that the bank held certain personal property as security for the payment of the note in question, reformed so as to state that the bank had received the personal property in payment of said note. Plaintiff interposed a demurrer to the cross-complaint, and, as shown by the record, the parties went to trial without any ruling of the court thereon or the filing of any answer thereto. Appellant insists that, by reason of plaintiff's failure to file an answer thereto, the allegations of the cross-complaint should be deemed admitted. Plaintiff was not in default in not answering the cross-complaint for the reason that its demurrer was pending. Both parties, however, appear to have deemed the allegations of the cross-complaint in issue, and evidence touching the truth of the allegations was offered, without objection, as though there had been a formal denial of the same. Under these circumstances, appellant will not on appeal for the first time be permitted to raise the question of the want of an answer

to the cross-complaint. *Conant v. Jones*, 6 Idaho (Hash.) 606, 32 Pac. 250; *Netcott v. Porter*, 19 Kan. 131. The rule is well established that, where both parties treat an affirmative defense as denied, the want of a formal answer thereto will be deemed waived.

An examination of the instructions given disclose no error which upon this record could have misled the jury to the prejudice of defendant.

The court properly excluded from evidence a letter of the bank wherein it was stated that it held certain personal property as collateral security for the payment of the note. The record discloses no theory upon which the statement could be deemed material or competent evidence.

The appeal is wholly without merit, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

BAXTER v. BAXTER et al. (Civ. 1,108.)
(District Court of Appeal, Second District, California. June 8, 1912. Rehearing Denied by Supreme Court Aug. 7, 1912.)

1. FRAUDULENT CONVEYANCES (§ 110*)—RESERVATIONS FOR BENEFIT OF GRANTOR—CONVEYANCE FOR FUTURE SUPPORT.

Where a grantor conveyed all her property in consideration of the grantee's contract to support her during her lifetime, she had an interest in the property which was subject to execution on a judgment against her; at least in so far as the value of the property exceeded the value of the support already given; a conveyance of all one's property in consideration of future support being void and presumptively fraudulent as to existing creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 352-359; Dec. Dig. § 110.*]

2. FRAUDULENT CONVEYANCES (§ 225*)—CONVEYANCE FOR FUTURE SUPPORT—ESTOPPEL.

While a creditor who agrees to his debtor's conveying all her property to another in consideration of future support, is estopped to enforce his claim against the property conveyed, mere knowledge by the creditor that the conveyance is to be made, and his failure to object, do not create such an estoppel, although the grantee enters upon his contract without being aware of the debt, especially where the creditor did not know that the conveyance was to include all the debtor's property.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 653-657; Dec. Dig. § 225.*]

3. FRAUDULENT CONVEYANCES (§ 282*)—PRESUMPTIONS—FUTURE SUPPORT.

A grantee, who promises future support to the grantor in consideration of the conveyance, is presumed to know that the transaction is fraudulent as to existing creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 817, 818; Dec. Dig. § 282.*]

4. FRAUDULENT CONVEYANCES (§ 225*)—ESTOPPEL.

A grantee, who accepts a deed given in consideration of a promise of future support, cannot invoke the doctrine of estoppel against the grantor's creditor who is seeking to enforce his claim against the property conveyed, where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he has acted in reliance upon the validity of the deed, and not upon any act or omission of the creditor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 653-657; Dec. Dig. § 225.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by William A. Baxter against J. A. Baxter and another. From a judgment for plaintiff, defendant named appeals. Reversed.

Valentine & Newby, for appellant, Edw. F. Wehrle, for respondent.

SHAW, J. On March 9, 1906, one E. M. Baxter by deed conveyed all her property, consisting of certain real estate of the value of \$5,000, to plaintiff herein; the consideration therefor being an agreement on the part of plaintiff to keep, maintain, and care for her during her lifetime. Upon the execution of the deed plaintiff entered upon the duties imposed upon him by his agreement. At the date of the transaction E. M. Baxter was indebted to J. A. Baxter in the sum of \$669.83, for which sum, in an action instituted on October 17, 1906, a judgment was duly recorded against her. Thereafter, by virtue of an execution issued upon said judgment, the sheriff levied upon all interest of the judgment debtor in the real property so conveyed by her to plaintiff and advertised the same for sale to satisfy such execution. This action was brought to perpetually enjoin the sale of the property. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant J. A. Baxter appeals.

[1] It clearly appears that the effect of the conveyance was a transfer of the property to the use of the grantor, and since she possessed no other property out of which payment of the judgment so rendered could be enforced, she, in so far at least as the value of the property exceeded the value of the support theretofore given, had an interest therein subject to execution. As against existing creditors, one cannot transfer all his property in consideration of future support, and thus defeat the creditor in enforcing his claim. Under such circumstances, the law presumes the act to be done with fraudulent intent to hinder and delay the creditor in the collection of his debt. *Harris v. Brink*, 100 Iowa, 366, 69 N. W. 684, 62 Am. St. Rep. 578; *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Harting v. Jockers*, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341.

[2] At the close of the evidence plaintiff, by leave of court, filed an amendment to his complaint wherein, among other matters pleaded by way of estoppel, it was alleged that defendant "agreed and consented that the plaintiff should take said property; that

the same should be conveyed to him by said E. M. Baxter in consideration of such care and maintenance." This alleged fact, denied by the answer, tendered a material issue which, if found in favor of plaintiff and relied upon by him, would estop defendant from enforcing his claim against the property. The court, however, failed to make any finding thereon. As to other allegations, the court found: "That on said 9th day of March, 1906, and prior to the execution of the deed described in the complaint on file herein, wherein and whereby E. M. Baxter deeded, granted, bargained, sold, conveyed, and confirmed unto W. A. Baxter all the property described in the complaint, the defendant J. A. Baxter had knowledge and notice that the said E. M. Baxter contemplated and intended to convey said property to said W. A. Baxter, the plaintiff herein, in consideration of the plaintiff agreeing to care for and maintain the said E. M. Baxter for and during the term of her natural life, and said J. A. Baxter did not object to such conveyance of said property; that immediately after the execution of said deed, and before the plaintiff entered upon the performance of his agreement and contract to so maintain said E. M. Baxter, the defendant J. A. Baxter had notice and knowledge of the execution of said deed, for the purposes hereinbefore mentioned; that he, the said W. A. Baxter at no time prior to a few days before the commencement of that certain action brought in the superior court of the county of Los Angeles, state of California, by the defendant J. A. Baxter against E. M. Baxter, being action No. 53,853 of said court, wherein a judgment was rendered on or about the 8th day of March, 1907, in favor of the defendant J. A. Baxter, had no notice or knowledge that the defendant J. A. Baxter had any claim against the said E. M. Baxter, or that the defendant J. A. Baxter made any claim that said E. M. Baxter was indebted to him, said J. A. Baxter, in any sum whatsoever; that plaintiff informed said J. A. Baxter of the execution and delivery of said deed on the day the same was executed and delivered, and the defendant J. A. Baxter made no objection of any kind or nature to the same; that plaintiff closed his business in the city of Monrovia, Cal., and then and there took charge of said E. M. Baxter and devoted the greater part of his time to her care; that it was impossible for plaintiff to care for said E. M. Baxter under the terms of his contract so executed with her without closing and discontinuing his said business in the city of Monrovia, Cal., aforesaid; that defendant J. A. Baxter had notice and knowledge of all of the foregoing facts; that the defendant J. A. Baxter did not at any time give plaintiff herein any notice of any claim against said E. M. Baxter until a few days before the commencement of that certain action brought by J. A. Baxter against said E. M. Baxter

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

hereinbefore referred to; that plaintiff, relying upon said deed so made and executed by said E. M. Baxter, entered upon the performance of his said contract, and ever since said date has been and now is caring for and maintaining said E. M. Baxter; that plaintiff, prior to and before he had any notice or knowledge of any claim of said J. A. Baxter against said E. M. Baxter, had for many months cared for and maintained said E. M. Baxter and had disposed of and closed his said business to enable him to carry out the terms of said agreement so made between plaintiff and said E. M. Baxter for her care and maintenance."

The effect of an estoppel, since it denies the owner's right to assert his claim, is to transfer his property to another. Hence, in order to justify a court of equity in decreeing an estoppel, there must not only be some degree of turpitude in his conduct, but it must appear: "First, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved." *Boggs v. Merced M. Co.*, 14 Cal. 368. Measured by the rule thus laid down the findings disclose no facts upon which to predicate the claim that defendant is estopped from enforcing the collection of his debt against the property. All that appears therefrom is that, prior to the execution of the deed, defendant knew of the intention of E. M. Baxter to transfer the real estate to plaintiff in consideration of the latter's promise to support her for life, and that when informed of the execution of the deed he interposed no objection to the transaction; that at the time plaintiff did not know that defendant was a creditor of E. M. Baxter; and that defendant, with knowledge that plaintiff had entered upon the performance of his duties pursuant to the contract, did not acquaint him with the fact that he was a creditor of E. M. Baxter until a short time before instituting suit against her for the collection of the debt. There is nothing in the facts found to show any degree of turpitude in defendant's conduct.

[3] As a matter of law, plaintiff is presumed to have known the transaction was fraudulent as to existing creditors; hence it was his duty, since he had the means of acquiring such knowledge, to make inquiry and ascertain whether or not there were existing creditors. Neither is it made to appear that defendant knew that E. M. Baxter, his debtor, was divesting herself of title to all her estate. If she had other property sufficient

to pay his debt, then such transfer was not a matter which concerned him. *Harting v. Jockers*, supra.

[4] Moreover, the findings clearly show that plaintiff did not rely upon the silence of defendant in failing to give him notice of the fact that he was a creditor of E. M. Baxter, but it is expressly stated that he relied upon the validity of the deed whereby he acquired the property. Since plaintiff relied upon the deed, rather than upon anything done or omitted to be done by defendant, and without which reliance there can be no estoppel, he cannot claim to have relied upon the doctrine of estoppel. *Powell et al. v. Rogers*, 105 Ill. 318. Certainly it cannot be said that a creditor of one who fraudulently transfers his property will, as against the fraudulent grantee, be estopped from asserting his claim because, having knowledge of the proposed transfer, he fails to act affirmatively and notify such grantee that he is a creditor.

The facts found are insufficient to constitute an estoppel against defendant, and the judgment and order are therefore reversed.

We concur: ALLEN, P. J.; JAMES, J.

THOMAS et al. v. SPENCER et ux.

(Supreme Court of Washington. Aug. 5, 1912.)
WATERS AND WATER COURSES (§ 138*)—APPROPRIATION—PRESCRIPTIVE RIGHT.

Where defendants' predecessors in title had acquired the right to obstruct the outlet of a lake by a prior appropriation, for the purpose of creating water power, but from 1892 to 1909, during which time complainants and their predecessors acquired title to the land surrounding the lake, there had been no obstruction at the outlet, except for a short time in 1907, when complainants consented to a temporary interruption of the natural flow of the water at that point, defendants' right of re-entry was barred by adverse possession.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 150, 161; Dec. Dig. § 138.*]

Department 1. Appeal from Superior Court, San Juan County; Geo. A. Joiner, Judge.

Action by John L. Thomas and others against Theodore W. Spencer and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Hadley, Hadley & Abbott, for appellants. Neterer & Pemberton, of Bellingham, for respondents.

GOSE, J. The litigation in this case arose out of the maintenance of the appellants of dams at the mouth of each of two small, unmeandered lakes, hereafter called the "upper" and the "lower" lake. The lower dam is at the mouth of a small lagoon, an extension of the lower lake. The respondents' lands entirely surround the upper lake, and surround the lower lake, except a small por-

tion of its outlet. There is a flowing stream from the upper to the lower lake during the rainy season of the year; but no water flows therein during the summer months. A small stream of water flows from the lagoon to the appellants' sawmill. The purpose of the upper dam is to use the bed of the lake for a storage reservoir during the rainy season. In the summer season the flood water is released, thus permitting it to flow into the lower lake and lagoon as needed for the operation of the appellants' mill. The purpose of the lower dam is to raise the level of the water in the lower lake, to be diverted and used at the mill for power purposes. The maintenance of these dams operates to flood the bottom land owned by the respondents. The appellants assert the right to maintain each of these dams at their present level, contending that their predecessors in title built the dams and the mill and appropriated the water for power purposes in 1883 or 1884, when all the land surrounding the lakes was public land of the United States; and that they have since used the water by a gravity flow for power purposes. The court found that the upper dam was entirely removed in 1892 or 1893; that in the winter season of each year since its removal the appellants have thrown into the bottom of the outlet of the lake some pieces of wood and rock to a height of 12 to 20 inches, thereby raising the water of the lake to a like height; that such work would require from 15 minutes to a half hour; that they would remove the obstruction in April or May of each year; and that neither the respondents nor their predecessors in title knew of this obstruction. The court also found that the mouth of the lake was otherwise unobstructed after the removal of the dam in 1892 or 1893, until the construction of the present dam in November, 1909, except that a dam was maintained by the appellants' lessees for about four months in 1907, in accordance with an agreement between them and the respondents. The court also found, both as a matter of fact and law, that the respondents had been in the open, exclusive, notorious, and adverse possession of the upper lake and its outlet, and the land through which the outlet flows, and the land bordering upon the lake, for more than 12 years prior to the commencement of the action. The present dam was constructed in November, 1909, and the action was commenced in March, 1910. The court found further that in the fall of 1907 the appellants, without right, raised the lower dam six inches higher than it had theretofore been maintained, thereby raising the water in the lagoon and lake to a corresponding level, and flooding the respondents' land. A decree was entered, which provides that a mandatory injunction shall issue, requiring the appellants to remove six inches

from the top of the lower dam, and requiring them to remove the upper dam, so as to restore the outlet of the lake to its natural condition. This appeal followed.

The findings are amply supported by the evidence. Indeed, we think that the court might have gone farther and found from the evidence that from 1892 to 1909 there had been no obstruction at the outlet of the upper lake, except for a short time in 1907, when the respondents consented to a temporary interruption of the natural flow of the water at that point. Assuming that the appellants' predecessors in title acquired the right to obstruct the outlet of the lake by a prior appropriation, and that this right passed to the appellants, as they contend, we are of the opinion that the right has been lost by disseisin, and by the adverse possession of the respondents and their grantors for the statutory period. The court rightfully found that the respondents and their predecessors in title had been in the open, exclusive, notorious, and adverse possession of the shores of the upper lake and its outlet for more than 10 years when the dam was constructed in 1909. The mere fact that the appellants once each year in the rainy season, without the knowledge of the respondents or their grantors—and they admit that they had no knowledge thereof—threw a few pieces of wood and a few stones into the narrow bed of the outlet of the lake, and removed them in April or May thereafter, did not interrupt the running of the statute. The removal of the dam in 1892 operated as a dispossession of the appellants; and a re-entry, to be effective, had to be of such a character as to impart notice to those asserting a hostile right. "When a party is once dispossessed, it is not every entry upon the premises, without permission, that would disturb the adverse possession. He may tread upon his own soil, and still be as much out of possession of it there as elsewhere. An entry, to defeat a subsisting, actual possession, must be with the actual intention of taking possession. This intention must be sufficiently indicated by words or acts, by express declaration, or by exercise of acts of ownership inconsistent with a subordinate character. Occasional or temporary intrusions upon the land will not be sufficient to interrupt the running of the statute. The acts should be open and notorious, and continue unbroken for a sufficient time to give notice to the person interested that a claim of right is intended by them." 1 Cyc. pp. 1010, 1011, subds. (b) and (c). See, also, *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199. The record is barren of evidence of such a re-entry.

The decree is affirmed.

CHADWICK, PARKER, and CROW, JJ., concur.

(60 Wash. 437)

STATE v. REESE.

(Supreme Court of Washington. Aug. 5, 1912.)

INDIANS (§ 84*)—SALE OF LIQUOR TO INDIANS.

Under Rem. & Bal. Code, § 6288, providing that any person who shall sell, give away, dispose of, or barter intoxicating liquor to an Indian shall be guilty of a felony, one who, as an agent of an Indian, procures intoxicating liquor for such Indian is guilty of a felony.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 60; Dec. Dig. § 84.*]

Department 1. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

John R. Reese was charged with the crime of disposing of spirituous liquor to an Indian, and from an order sustaining a demurrer to the information the State appeals. Reversed.

Ralph C. Bell, of Everett, for the State.

PARKER, J. The defendant was charged, by information filed in the superior court, with the crime of disposing of spirituous liquor to an Indian. The only language of the information requiring our attention is the following: "On or about the 11th day of January, 1912, in the county of Snohomish, state of Washington, then and there being, the said defendant, John R. Reese, did unlawfully, and with money delivered to him and furnished him for such purpose by one Joseph Shelton, an Indian, . . . purchase of and procure from and of some person or persons unknown to your informant spirituous liquor, to wit, whisky, for said Joseph Shelton, aforesaid, and did then and there deliver to and surrender into the custody and possession of said Joseph Shelton, aforesaid, such spirituous liquor." The defendant demurred to the information on the ground that it does not state facts constituting a crime. The trial court sustained the demurrer and discharged the defendant, and thereupon the state appealed to this court.

The law claimed by the prosecuting attorney to have been violated by the acts of the defendant, as alleged in the information, is found in section 6288, Rem. & Bal. Code, the provisions of which, so far as necessary for us to notice them, are as follows: "Any person who shall sell, give away, dispose of, exchange or barter any malt, spirituous or vinous liquor of any kind . . . to an Indian, shall be guilty of a felony and punished therefor," etc. Recitals in the order of the trial court, sustaining the demurrer and discharging the defendant, indicate that the only question there raised was as to the meaning of the words "dispose of," as used in the law. That is, whether or not the acts charged by the information as being committed by the defendant are within the meaning of those words, as used in the law. This is also the only question presented here.

It is manifest that the purpose of this law is to prevent Indians from acquiring intoxicating liquor. If it may be avoided in the manner the defendant is here charged with aiding the Indian in acquiring intoxicating liquor, then the enactment of the law was a mere waste of words. It would seem that when the Legislature used the words "sell," "give away," "dispose of," "exchange," and "barter," practically every imaginable method of an Indian acquiring intoxicating liquor was described. If the allegations of this information are true, then the defendant was the direct, voluntary instrument of the disposition of the liquor to the Indian. Even assuming that the defendant was the mere agent of the Indian, and that the person from whom he purchased the liquor with the Indian's money had knowledge of the purpose of the purchase, yet the defendant acquired possession and control over the liquor, and this possession and control he transferred to the Indian. Surely by that act he disposed of the liquor. True he did not "sell" or "give away" the liquor; but the very fact that the Legislature used the words "dispose of," in addition to "sell" and "give away," shows the intent of the Legislature to include every possible subterfuge by which an Indian might acquire liquor through the voluntary act of another. This view finds support in 14 Cyc. 516, and cases there cited. The judgment of the superior court is reversed.

GOSE, CHADWICK, and CROW, JJ., concur.

(60 Wash. 438)

CITY OF HILLYARD v. BOARD OF COM'RS OF SPOKANE COUNTY.

(Supreme Court of Washington. July 30, 1912.)

1. ELECTIONS (§ 48*)—ELECTION PARAGRAPHS—STATUTES.

Laws 1890, c. 7, § 110 (Rem. & Bal. Code, § 7678), which was part of an act entitled "An act to provide for the organization, classification and incorporation of municipalities," provides that all elections in cities of the third class shall be held in accordance with the general election laws; and that the city council shall give notice of each election, and shall appoint boards of election and establish precincts and polling places. Laws 1907, c. 130, § 1 (Rem. & Bal. Code, § 4798), provides that the board of county commissioners shall divide the counties into election precincts, except that in cities of the first class such duties shall be performed by the city council. Held, that the power given to the city council of cities of the third class applied only to municipal elections, and did not limit the provisions of the later general statute.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 42; Dec. Dig. § 48.*]

2. APPEAL AND ERROR (§ 843*)—DETERMINATION—MOOT QUESTIONS.

In an action by a city of the third class to annul the action of the county commissioners in establishing election precincts within its corporate borders, where the commissioners

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had that power with respect to general elections only, the question of whether the city council might fix such precincts for municipal elections is moot, and need not be determined; the commissioners having no interest in the power of the city council to control municipal elections.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 343.*]

Department 1. Appeal from Superior Court, Spokane County; C. F. Miller, Judge.

Action by the City of Hillyard against the Board of County Commissioners of Spokane County. From a judgment for defendant, plaintiff appeals. Affirmed, with directions.

Thos. P. Ferry and Chas. W. Gillespie, both of Hillyard, for appellant. John L. Wiley and O. J. Saville, both of Spokane, for respondent.

PARKER, J. The plaintiff is a city of the third class, situated in Spokane county. It seeks to have annulled and declared void the action of the county commissioners of that county, establishing election precincts within its corporate boundaries. From a judgment of the superior court in favor of the validity of the action of the county commissioners, the city has appealed.

[1] The cause was an agreed case in the superior court. On November 11, 1910, the county commissioners established election precincts within the boundaries of the city, acting under the provisions of Laws of 1907, p. 241 (section 4798, Rem. & Bal. Code), providing, among other things, as follows: "The board of county commissioners of each county in the state shall, at their first session after the taking effect of this act, divide their respective counties into election precincts, and establish the boundaries of the same. Such board of commissioners shall designate one voting place in each precinct and each precinct shall contain two hundred and fifty electors or less, based on the number of votes cast at the last general election; but no precinct shall contain more than three hundred electors. If at any election hereafter three hundred or more votes shall be cast at any voting place, it shall be the duty of the inspector in such precinct to report the same to the board of county commissioners, who shall, at their next regular meeting, divide such precinct as nearly as possible so that the new precincts formed thereof shall each contain two hundred and fifty electors, as nearly as practicable: Provided, that in cities of the first class, the duties herein conferred upon the county commissioners shall be performed by the city council of such city; and reports of inspectors herein provided for shall be made to such city council." This was enacted as an amendment to the general law regulating voting at state and other elections (Laws of 1890, p. 400); the only change being the adding of the proviso relating to cities of the

first class. The original act made no exception, in terms, as to the establishing of election precincts by the commissioners in cities or towns. In January and July, 1911, the city passed ordinances establishing election precincts within the city, the boundaries of which precincts did not conform to those theretofore established by the county commissioners. In the passage of those ordinances, the city acted under the powers conferred by the general law providing for the organization and government of municipal corporations (Laws of 1890, pp. 131-215), which provides, among other things relating to cities of the third class, as follows: "All elections in such city shall be held in accordance with the general election laws of the state, so far as the same may be made applicable, and no person shall be entitled to vote at such election unless he shall be a qualified elector of the county and shall have resided in such city for at least thirty days next preceding such election. The city council shall give such notice of each election as may be prescribed by ordinance, shall appoint boards of election and fix their compensation, and establish election precincts and polling places, and may change the same: Provided, that no part of any ward less than the whole thereof shall be attached to any other ward or part thereof in forming election precincts." Laws of 1890, p. 181, § 110; Rem. & Bal. Code, § 7678.

It is contended by counsel for the city that the law last above quoted, conferring power upon its council to establish election precincts within the city, is a special law, in so far as it relates to elections; and that it is therefore not repealed or its force in any way impaired by the general election law or amendment thereto, above quoted, notwithstanding such amendment was subsequently enacted. If the law giving the city the power to establish election precincts purported to give power to establish such precincts for the purpose of state and county elections, as well as for municipal elections, there would be a conflict in these laws calling for our decision thereon in this case. We are of the opinion, however, that the power given to the city council has no relation to any elections save municipal elections. The act in which the power is found is entitled "An act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency." Laws of 1890, p. 131.

We need not now determine the sufficiency of this title to support some provision which might have been made in the body of the act relating to general state or county elections; but we notice the words of the title as throwing light upon the meaning of section 110, above quoted, and as indicating that the election precincts which the council is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

there given power to establish are precincts for the purpose of municipal elections only. Indeed, we think this is the meaning of that section suggested by its own language, aside from the language of the title and apparent purpose of the act. We conclude that the action of the county commissioners establishing election precincts within the city was within their power; and that such precincts thereby became the legally established election precincts for the purpose of state and county elections.

[2] Some argument is made by counsel touching the question of whether or not the establishing of the election precincts by the county commissioners is binding upon the city for the purpose of its municipal elections. Counsel for the city seek our decision upon this question, to which counsel for the commissioners consent. But it seems to us this calls for our opinion upon a moot question only. We do not see how this could become a subject of controversy between the city and county commissioners. The action of the commissioners can be given full force and effect as to state and county elections in any event; and what further interest the commissioners have in the matter, we are not able to see. Indeed, there is nothing in this record showing that they are demanding more. We think we are not called upon to determine the validity of the city ordinances establishing election precincts, except in so far as such ordinances are claimed to establish such precincts for the purpose of elections other than municipal. When some one having the right so to do challenges the validity of those ordinances as establishing election precincts for purposes of municipal elections by some proceeding in the courts, such question will be entertained.

It is not very clear from the language of the judgment whether or not the trial court intended to decide that the ordinances creating the election precincts are invalid as to municipal election, and the action of the commissioners is valid and binding as to municipal elections. We will assume that that question was not decided, in view of the fact that it would be a moot question in that court, as it is here. Thus construing the judgment of the trial court, we are of the opinion that it should be affirmed. In order, however, to render the judgment certain and free from seeming to decide a question not properly in controversy, we direct that the judgment be set aside, and a new judgment entered in conformity with the views herein expressed. In view of this disposition of the cause, and that it was submitted as an agreed case, neither party will recover cost in this court.

ELLIS, CHADWICK, GOSE, and FULLERTON, JJ., concur.

FIRST NAT. BANK OF GOLDFIELD v. MURPHY. (No. 1,865.)

(Supreme Court of Nevada. July 13, 1912.)

ATTACHMENT (§ 40*)—GROUNDS—SURRENDER OF SECURITY.

Laws 1869, c. 112, § 123, as amended by Laws 1907, c. 58, authorizes an attachment in an action on an unsecured contract, for the direct payment of money, and, if so secured, when such security has been rendered nugatory by the act of the defendant. In an action on a note secured by certain stock, an attachment was issued on an affidavit, which, after setting out the making of the note and defendant's failure to pay it, recited that it was secured by 50,000 shares of stock which were afterwards surrendered and placed in escrow by defendant and rendered nugatory. Defendant applied to dissolve the writ and filed affidavit that plaintiff accepted the stock certificate as security for the note, and at all times had retained the same as such security, that it had never been surrendered, and was still held as security for the indebtedness. Plaintiff, in opposition to the motion to dissolve, alleged that, after the certificate was delivered, it had never been transferred on the books of the company, and was later withdrawn from plaintiff and placed in escrow under an agreement for sale; either the proceeds or the certificate to be returned to plaintiff. Held, that such escrow agreement, if carried out, would enable plaintiff to deduct the proceeds of the stock from the note and interest, and hence it did not render the security nugatory, so as to justify an attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 92-106; Dec. Dig. § 40.*]

Appeal from District Court, Esmeraldo County; Theron Stevens, Judge.

Action by the First National Bank of Goldfield against J. T. Murphy. From an order dissolving an attachment, plaintiff appeals. Affirmed.

Thompson, Morehouse & Thompson, for appellant. Robert L. Hubbard, for respondent.

NORCROSS, J. This is an appeal from an order dissolving an attachment. Action was brought by the appellant against the above-named respondent to recover upon a promissory note. At the time the complaint was filed a writ of attachment was issued, based upon an affidavit, which, after setting out the making of a certain promissory note and the failure of the defendant to pay the same, recited "that the same was secured by 50,000 shares of stock, which were afterwards surrendered and placed in escrow by said defendant, and rendered nugatory."

The defendant moved to dissolve the attachment upon the ground of insufficiency of the affidavit upon which it was based, and in support of the motion to dissolve also filed an affidavit in which he alleged the making of the note sued upon and the delivery to the defendant of certificate No. 80 of the Great Western Gold Mining & Milling Company for 50,000 shares of its capital stock as security for the payment of the

amount specified in the note; that the plaintiff accepted such certificate of stock as security for the payment of said note; that at all times since the indorsement and delivery of said certificate of stock the said plaintiff has held and retained the same as such security; that said certificate has never at any time been surrendered to or otherwise delivered to defendant by the plaintiff or by any one else; that, at the time of the issuance of said writ of attachment, said certificate of stock was so held as security for the payment of said indebtedness, and for no other purpose; that the affidavit on attachment is false and untrue in so far as it states or pretends to state that said stock was ever surrendered to the defendant or that said security was ever rendered nugatory.

In opposition to the motion to dissolve, an affidavit on behalf of the plaintiff, made by the cashier of the bank, among other things, recites: "That to secure the payment of said note the said defendant delivered to plaintiff stock certificate No. 80, showing that defendant was the owner of 50,000 shares of the capital stock of the Great Western Gold Mining & Milling Company. That no transfer of the stock represented by said certificate was made to this plaintiff upon the books of said mining company, or otherwise, except as above set forth. That on or about the 12th day of June, 1909, said defendant withdrew said certificate No. 80 from plaintiff as such security and placed the same in escrow. That said certificate of stock and the stock represented by the same was by agreement of said defendant placed in said escrow by agreement with one S. H. Brady by the terms of which said Brady was to pay certain specified sums of money for the use of defendant and others, and upon such payments said stock was to be delivered to said S. H. Brady. But in case said payments were not made then said escrow directed as follows: 'In case any of the above payments are not promptly paid, the contents are to be returned to the grantors, on demand, within 30 days, of such default, upon the payment of charges, and the bank's responsibility for the custody hereof ceases at the expiration of said 30 days. No assignment or transfer of this escrow can be made, but contents may be withdrawn by mutual consent.' That at the time said certificate No. 80 was placed in said escrow the said defendant delivered to plaintiff the following order, to wit: (Goldfield, Nevada, June 11, 1909. First Nat. Bank, Goldfield, Nevada—Dear sir: I hereby authorize you to deduct such sums of money from a certain escrow between S. H. Brady and J. T. Murphy et al, as may be coming to me for my proportion of same to the extent of six thousand

dollars and interest, the amount of a certain note which I owe to you. Yours truly, John T. Murphy.' That said Brady did not make the payments specified in said agreement or option, and said certificate No. 80 still remains in said escrow."

The ground upon which the attachment was based is the first cause specified in section 123 of the old practice act (Laws 1869, c. 112), as amended (Stats. 1907, p. 105), which recites: "In an action upon a judgment or upon a contract, expressed or implied, for the direct payment of money, which is not secured by mortgage, lien or pledge upon real or personal property, situated or being in this state, and if so secured when such security has been rendered nugatory by the act of the defendant." Section 124 of the same act provided: "The clerk of the court shall issue the writ of attachment upon receiving and filing an affidavit by or on behalf of the plaintiff showing the nature of the plaintiff's claim, that same is just, the amount which the affiant believes the plaintiff is entitled to recover, and the existence of any one of the grounds for an attachment enumerated in the preceding section."

Considering the affidavit on attachment alone, it does not specifically allege that the note sued upon was not at the time the suit was instituted secured by mortgage, lien, or pledge. So far as appears from the affidavit, the note may have been otherwise secured than by the stock certificate described. If we consider the affidavit as alleging the giving of security which has subsequently been rendered nugatory by act of the defendant, it falls in this respect to comply with the requirements of the statute. If the placing of the stock certificate in escrow rendered the security nugatory, the plaintiff was as much the cause thereof as the defendant, for the plaintiff, holding the certificate of stock as a pledge, had to consent to any modification of the conditions of its security.

When we consider the affidavits in support of and in opposition to the motion to dissolve, it cannot be said, we think, that the security originally given was ever rendered nugatory by act of the defendant. Plaintiff continued to hold possession of the stock certificate under the escrow agreement, which agreement, if carried out, would enable the plaintiff to deduct the amount of its note with accrued interest and costs from the payments paid in accordance with the escrow agreement. If the escrow agreement was not carried out, the plaintiff still held the stock certificate as security for the payment of the note.

The order appealed from is affirmed.

SWEENEY, C. J., and TALBOT, J., concur.

(29 Wyo. 490)
DILLMAN, County Clerk, v. STATE ex rel
MERRILL.

(Supreme Court of Wyoming, June 18, 1912.)

1. ELECTIONS (§ 54*)—UNORGANIZED COUNTIES—ELECTIONS—"SUCH ELECTION."

Comp. St. 1910, § 1054, authorizes the commissioners appointed to organize a new county to appoint a clerk and to hold a special election on the question of division from the old county, but provides that such election may be held coincident with the general election. Section 1056 provides that, in the event of a favorable vote, the voters of the county shall at the next general election, or at the same election if the special election is held coincident with the general election, vote for state, district, and county officers. Section 1057 authorizes the organization commissioners and clerk to perform all duties connected with "such election" imposed by law on county commissioners and county clerks in organized counties and to canvass the returns and declare the result. *Held*, that since commissioners are appointed to organize the county, and it is not fully organized until officers are elected, and since section 1056 when originally enacted as section 6, Laws 1895, c. 59, provided for an election of officers in the new county at the general election following the appointment of the commissioners, and contained no provision concerning a special election, and has been changed only by the addition by Laws 1909, c. 75, § 3, of the provision that, when the special election is held coincident with the general election, the election of officers shall be held at the same time, the provision of section 1057 for the conduct of "such election" by the organization commissioners and clerk does not refer only to the special election, but to the election at which state, district, and other officers are to be elected.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 51; Dec. Dig. § 54.*]

For other definitions, see Words and Phrases, vol. 7, pp. 8750-8754; vol. 8, p. 7808.]

2. ELECTIONS (§ 47*)—STATUTES (§ 89*)—UNORGANIZED COUNTIES—ELECTIONS—STATUTORY PROVISIONS—SPECIAL LEGISLATION.

The provision of Laws 1911, c. 7, § 3, that until the county of Platte therein created shall have selected officers who shall have duly qualified, such portion of the county as was previously a part of another county shall be attached to that county for judicial, revenue, and elective purposes, merely continues that county as a part of Laramie county until its organization for election purposes as to such elections only conducted by the old county as would be participated in by the electors in the new county, if no provision had been made for the creation of such new county, and does not conflict with Comp. St. 1910, § 1057, providing for the conduct of the general election in new counties before their organization by the organization commissioners and clerk, especially since to construe it as conflicting with that section would make it contrary to Const. art. 12, § 2, providing that the Legislature shall provide by general laws for the organization of new counties.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 41; Dec. Dig. § 47.* Statutes, Cent. Dig. § 97; Dec. Dig. § 89.* Counties, Cent. Dig. § 23.]

3. ELECTIONS (§ 166*)—UNORGANIZED COUNTIES—ELECTIONS.

Under Comp. St. 1910, § 1056, providing for a general election in new counties prior to their organization, and section 1057, providing that the organization commissioners and the clerk shall perform all duties in connection

with such election imposed by law on county commissioners and county clerks in organized counties, and that such elections shall be conducted as in organized counties, except that the commissioners shall canvass the returns and declare the result, there should not be two ballots prepared for such election, one by the provisional clerk containing the names of candidates for county and precinct offices and one by the clerk of the old county for all other offices, but merely one ballot containing the names of candidates for all offices, to be prepared and distributed by the provisional clerk.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 140; Dec. Dig. § 166.*]

4. ELECTIONS (§ 126*)—UNORGANIZED COUNTIES—ELECTIONS.

Under Primary Law (Laws 1911, c. 23) § 2, defining a primary election as an election by all political parties at the same time and place as provided by the general election laws, for the nomination of candidates, the organization commissioners in a county not yet organized should designate voting precincts in which to hold such primary election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

5. ELECTIONS (§ 121*)—UNORGANIZED COUNTIES—FILING NOMINATION PAPERS—"COUNTY."

Under Primary Law (Laws 1911, c. 23) § 8, providing that nomination papers for offices to be voted for wholly within a county shall be filed with the county clerk of the proper county, the word "county" means a county, whether organized or not, if in a process of organization, which acts as a county for the purposes of general elections; and hence a candidate for precinct committeeman of a political party where the precinct is wholly within a county in process of organization declared by Comp. St. 1910, § 1059, to be segregated from the original county for purposes of general elections prior to its organization, should file his nomination papers with the provisional clerk of the new county performing the duties of a county clerk.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 115; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1659-1660; vol. 8, p. 7621.]

6. ELECTIONS (§ 126*)—UNORGANIZED COUNTIES.

Primary Law (Laws 1911, c. 23) § 28, providing for the canvass of the votes at a primary election by the county clerk and two justices of the peace, has no application to counties in process of organization in which there is no justice of the peace, and hence under section 17, providing that, except as otherwise provided, a primary election shall be conducted as required for general elections and Comp. St. 1910, § 1057, providing for the canvass of votes at general elections in such counties by the organization commissioners, the votes at the primary election in an unorganized county should be canvassed by such commissioners.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

7. ELECTIONS (§ 145*)—NOMINATIONS BY ELECTORS—FILING NOMINATION PAPERS—"STATE OFFICER."

Under Primary Law (Laws 1911, c. 23) § 8, providing for the filing of nomination papers of candidates to be voted for wholly within a county in the office of the county clerk, and of candidates for state offices in the office of the Secretary of State, the nomination papers of members of the Legislature who are "state officers" should be filed with the Secre-

tary of State, such office not being one to be voted for wholly within the county, although Const. art. 3, § 3, declares that each county constitutes a senatorial and representative district, since new counties when created and the county from which created are represented jointly until a new apportionment is made.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 127; Dec. Dig. § 145.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6635-6638; vol. 8, p. 7804.]

8. ELECTIONS (§ 147*)—UNORGANIZED COUNTIES—NOMINATION BY ELECTORS—FILLING VACANCIES.

Under Primary Law (Laws 1911, c. 23) § 33, recognizing and continuing party committees until new committeemen are chosen, and section 35, authorizing the filling of vacancies before the printing of the primary election ballots by the party committee, a vacancy as to the office of senator or representative to jointly represent a county in process of organization and the county from which it was taken can be filled by the party committee of the old county; there being no committee in existence in the new county.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 122; Dec. Dig. § 147.*]

9. ELECTIONS (§ 145*)—NOMINATIONS—CERTIFICATES—FILING.

Under the provisions of the primary law (Laws 1911, c. 23) that nominations may be made by parties casting less than 10 per cent. of the total votes for representative in Congress at the preceding general election under existing laws for conventions, and section 46, authorizing nominations by petition, the nomination papers of candidates so nominated should be filed as provided by existing laws other than the primary law.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 127; Dec. Dig. § 145.*]

Error to District Court, Laramie County; Carroll H. Parmelee, Judge.

Mandamus by the State, on the relation of M. R. Merrill, against William H. Dillman, as County Clerk of the County of Laramie. Judgment was rendered overruling a demurrer to the alternative writ and granting the relief asked for, and defendant brings error. Reversed and remanded, with directions.

O. L. Rigdon and S. G. Hopkins, both of Cheyenne, for plaintiff in error. Ray E. Lee and Clark & Clark, all of Cheyenne, for defendant in error.

POTTER, J. This case involves generally the question whether the primary election for the nomination of candidates of political parties for offices to be filled at the general election to be held November next should be under the control and supervision of the old county as to the nomination of candidates for an office to be voted for at such general election in a county yet unorganized, but in process of organization, created out of a part of the territory of such old county, or whether as to the nomination of such candidates the primary election is to be conducted under the control and supervision of the commissioners and clerk appointed for the purpose of organizing such new

county. The particular question to be decided is whether the nomination papers of a candidate for precinct committeeman of a political party, where the whole of the precinct is within such new unorganized county, should be filed with the county clerk of the old county or the clerk of the board appointed to organize the new county. A determination of that question necessarily involves a consideration of the general question above stated. On June 4, 1912, the petition in this case was filed in the district court in Laramie county, setting forth that the defendant therein named is county clerk of the county of Laramie; that the relator, M. R. Merrill, is a member of the Democratic party; and a resident and qualified elector of precinct No. 1 in election district No. 4 in said county; that the whole of said precinct is included in that part of the territory of said county which constitutes the unorganized county of Platte; that heretofore, at a special election duly called and held in said unorganized county of Platte under the control of the commissioners for organization purposes appointed by the Governor, a majority of the persons voting voted in favor of the creation and organization of said county of Platte; that the relator desires to become a candidate for the position of a member of the Democratic county central committee from said precinct to be voted for at the primary election to be held August 20, 1912, and on June 3, 1912, he caused a nomination paper to be properly signed and verified nominating the relator as a candidate for said position; that on June 4, 1912, he caused said nomination paper, together with a statement signed by him to the effect that he would qualify as such officer if nominated and elected, to be offered to the said county clerk at his office for filing; and that defendant refused to accept the said nomination paper and declaration, and refused to file them. Upon these facts a writ of mandamus was prayed to require the defendant, as county clerk of said county of Laramie, to accept the said nomination paper and declaration and file the same in his office. An alternative writ was issued, and the cause was heard in the district court upon a general demurrer to the petition, and thereupon it was ordered that the demurrer be overruled, and, the defendant having elected to stand upon his demurrer and refused to further plead, that the said defendant accept and file in his office the nominating paper and declaration aforesaid. The defendant has brought the case here on error.

In the argument our attention was called to the fact that at the last session of the Legislature, the same session at which the primary election law was passed, several new counties were created by defining the boundaries thereof and giving a name there-to respectively, and that in each of said new

counties organization commissioners had been appointed, and a special election had been held at which was submitted to the qualified electors of the territory proposed to be cut off the question of division, in compliance with the provision of the Constitution that no county shall be divided unless a majority of the qualified electors of the territory proposed to be cut off voting on the proposition shall vote in favor of the division, and in compliance with the statute providing for such election, and also the question of the location of the county seat for such new county, and that at such special election so held in each of said new counties the vote was in favor of said division and had been so declared, and the county seat had been located; also, that at least two of such new unorganized counties are respectively composed of territory taken from two or more counties, and that all the territory embraced in each of the new counties of Platte and Goshen was taken from Laramie county. It was also suggested that a determination of the particular question here presented will necessarily determine the extent and manner of the operation of the primary election law in each of such new unorganized counties, affecting as well as other offices the nomination of candidates for the office of senator and member of the House of Representatives in the state Legislature to be voted for at such primary election; and it is argued that if such election in an unorganized county, which is in process of organization as aforesaid, is to be conducted under the control and supervision of the organization commissioners and clerk, it will be impossible by reason of certain provisions of the primary election law, and the acts creating the new counties, for party candidates for the Legislature to be nominated as required by the primary law, and voted for at the primary election in the new counties. It is also argued that if the election is to be conducted by the officers of the old counties, respectively, from which the new counties are taken, there will be much difficulty, if it will not be impossible, for the candidates for office in the new counties to be nominated as required by the primary election law, at least in such new counties as are respectively composed of territory taken from two or more counties, and that these matters should be considered in construing the various provisions of the primary law, in order that they may be so construed as to operate uniformly and in harmony with the laws controlling the general election to be held in November. The question thus presented is, therefore, not only an important one, but it is not free from difficulty, for it is conceded that the primary election law is ambiguous respecting the matters to be considered, because of some of the language employed therein, and the omission of any reference to unorganized counties, and that one provision which is similar in each of

the acts creating a new county adds to the uncertainty of the application of such primary law to the election in such unorganized counties.

It is necessary to first consider the provisions controlling the general election in November in the new counties, bearing in mind that the main object of the primary law is to provide for the nomination of candidates to be voted for at the November election. The Constitution provides that in several enumerated cases the Legislature shall not pass local or special laws, and that in all other cases where a general law can be made applicable no special law shall be enacted. Article 3, § 27. And that the Legislature shall provide by general law for organizing new counties. Const. art. 12, § 2. A general law for such purpose was enacted in 1895. Laws 1895, c. 59; Rev. Stat. 1899, §§ 1002-1012; Comp. Stat. §§ 1049-1060. By that act it was provided, and it continues to be so provided, that whenever a petition of a prescribed number of the electors and taxpayers residing within the limits of an unorganized county shall be presented to the Governor for the organization of such county, under certain conditions named in the act, it shall be the duty of the Governor, upon being satisfied that the county is one entitled to be organized under the provisions of the Constitution and statutes, to appoint the three persons named in such petition as commissioners to organize such county and notify them of their appointment; also, that such commissioners shall, as soon as practicable after receiving notice of their appointment meet at some practicable place, within such unorganized county, to be selected by them, and that each shall take and subscribe an oath to the effect that he will faithfully and impartially discharge the duties of his office as prescribed by law, and also the oath required to be taken by county commissioners; that such commissioners shall then appoint a clerk who shall take an oath to the effect that he will faithfully and impartially discharge the duties of his office as prescribed by law, and also the oath required of the county clerk, and that the commissioners shall at the same time designate a place for the transaction of their official duties. Laws 1895, c. 59, § 5; Rev. Stat. 1899, §§ 1006, 1007; Laws 1909, c. 75, § 1; Comp. Stat. 1910, §§ 1053, 1054. In the original act aforesaid it was provided that at the next general election after the appointment of such commissioners an election shall be held in such county in the same manner as if it was organized, and that, in addition to voting for a member of Congress and such state and district officers as may be provided for by law, the electors of such county shall at such election elect the members of the Senate and House of Representatives of the state to which such county is entitled, and also the county and precinct

officers provided for by law, and that at the same time they shall choose a county seat in the same manner in which county officers are elected. Laws 1895, c. 59, § 6; Rev. Stat. 1899, § 1008. Section 1007, Revised Statutes of 1899, contained that part of section 5 of the act of 1895 which provided for the appointment of a clerk of the organization commissioners, his oath, and the designation of a place by the commissioners for the transaction of their official duties. There was no provision in the act of 1895 nor in any other act until 1909 for the submission to the electors in the unorganized county of the question of division. But by an act approved February 24, 1909, such a provision was made by amending section 1007 aforesaid. The section as amended contains without change the provisions last above mentioned and the following added after the provision for designating a place for the transaction of official duties: "And shall, immediately, in the manner now prescribed by the laws of Wyoming for holding special elections for county and precinct officers, call and arrange for a special election for the purpose of submitting to the qualified electors of the territory proposed to be cut off, the question of whether said qualified electors are in favor of division. At the same time said electors shall in like manner choose a location for a county seat for said new county. Provided, however, That said commissioners may call and arrange for such special election coincident with any general election." And by section 2 of said act of 1909 it was provided as follows: "Any and all expenses for such special election shall be borne by the proposed new county, and the county commissioners of the old county shall be empowered to make a special levy upon the taxable property within the boundaries of the proposed new county for the purpose of defraying the expenses of said election, and paying the salaries of the first board of county commissioners of the said new county, appointed by the Governor, and the salary of the first county clerk thereof, also to defray any and all expenses incident to the said special election. The county commissioners and the county clerk first appointed in the proposed new county shall receive a salary of \$50.00 each." Laws 1909, c. 75; Comp. Stat. 1910, §§ 1054, 1055. Section 1008, originally section 6 of the act of 1895, was also amended by the said act of 1909 to read as follows: "If a majority of the qualified electors residing in the territory proposed to be cut off vote in favor of division, then said new county shall be organized, and at the next general election, or in case said special election was called coincident with the general election, then at such general election said qualified electors residing in said new county shall in the manner provided by law, vote for a member of Congress, state and district of-

ficers, and shall at such election elect the members of the senate and house of representatives of the state to which said county is entitled; and also the county and precinct officers provided for by law." Comp. Stat. 1910, § 1056. By section 7 of the act of 1895 (Rev. Stat. 1899, § 1009; Comp. Stat. 1910, § 1057), it was provided that the commissioners and said clerk appointed as aforesaid "shall respectively at the time and in the manner provided by law, perform all and singular the duties preparatory to, respecting or incident to such election, which are imposed by law upon county commissioners and county clerks respectively in organized counties; and such election shall be held, conducted, and all matters preparatory or incident thereto, or connected therewith, shall be done and performed as in elections held in organized counties, except that the returns thereof shall be canvassed and the result declared by the commissioners appointed by the Governor." Section 8 of the act of 1895 (Rev. Stat. 1899, § 1010), provided, and it continues to be so provided (Comp. Stat. 1910, § 1058), that on the first Monday in January next following, or as soon thereafter as may be possible, the county and precinct officers elected in such county shall respectively qualify and enter upon their respective duties as is provided by law in organized counties; and, when a majority of the county commissioners so elected shall have qualified and entered upon their duties, such county shall be deemed and held to be organized, and shall be vested with all the powers of organized counties under the laws of this state. It was and is also provided, by the statute that the commissioners appointed by the Governor shall approve the bonds of the county commissioners of the new county elected at such first election. Laws 1895, c. 59, § 9; Comp. Stat. 1910, § 1059. And that "for the purpose of such election any such unorganized county shall be deemed to be segregated from the original county or counties from which the same is taken." Laws 1895, c. 59, § 10; Comp. Stat. 1910, § 1060.

At this point we will consider the contention of counsel for the relator that the provisions of section 1057, Compiled Statutes, originally section 7 of the act of 1895, respecting the conduct of the election, and the duties of the organization commissioners and clerk respectively concerning the same, applies only to the special election held for the purpose of taking the vote of the electors in the territory embraced in the proposed new county on the question of division, and that the power and duties of such commissioners and clerk extends no further than holding such special election and ascertaining the result thereof. It is clear we think that such contention cannot be sustained. In the act of 1895 the provisions referred to immediately followed a section which plainly

provided for an election in the proposed new county at the next general election after the appointment of the commissioners, at which the electors therein should vote for a member of Congress, state, and district officers, members of the Senate and House of Representatives, and the county and precinct officers of such new county. The duties preparatory to, respecting, or incident to that election were the duties required to be performed by the organization commissioners and clerk; and it was that election which the statute required should be held and conducted, and all matters preparatory or incident thereto, or connected with, done and performed, as in elections held in organized counties, except that the returns should be canvassed and the result declared by the organization commissioners. The amendment of 1909 made no material change in that respect. Section 1008, Revised Statutes of 1899, which was section 6 of the act of 1895, as amended in 1909, merely adds the provision, so far as this question is concerned, that, in case the special election on the question of division is called coincident with a general election, then at the same general election the qualified electors in the proposed new county shall vote for and elect the several officers named. The election referred to in the section as amended is the general election to be held following the appointment of the commissioners, at which state and district and other officers are to be elected, including the county officers. To prevent a construction that would postpone the election of officers of the new county for two years, or until another general election, in case the special election on the question of division should be called coincident with a general election, it was provided that such county officers should be selected at the same general election at which such question of division should be so submitted. Big Horn county was organized under this general statute, and its officers were elected at the general election in November, 1896, which was conducted for all the purposes of that election by the provisional officers of said county. See *Taylor v. Commissioners*, 11 Wyo. 106, 70 Pac. 835. Unless, therefore, there is some other statute to the contrary, the organization commissioners and clerk of a new county, where the question of division has been settled by a vote favorable thereto, will be required at the general election in November to perform all the duties preparatory to, respecting, or incident to, such election, which are imposed by law upon county commissioners and county clerks respectively in organized counties, and that election in the unorganized county is required to be held and conducted, and all matters preparatory or incident thereto, or connected therewith, to be done and performed as in elections held in organized counties, except that the returns are to be canvassed by the organization commissioners, and the results

declared by them, so far as such results are to be declared by county canvassers. Such commissioners are appointed for the purpose of organizing the county; and the county will not be fully organized until its officers, at least its county commissioners, are elected. And such commissioners and clerk are also required, as above stated, to perform all the duties imposed by law upon county commissioners and county clerks, respectively, with reference to the general election at which the new county officers are required to be elected. And they are required further to approve the bonds of the newly elected county commissioners. It is plain that these powers and duties do not cease until the county is organized in case a special election has been held and the vote has been in favor of division.

[1] We are not here required to determine the manner of conducting the general election in a proposed new county where the special election on the question of division is called coincident with such general election. In such case complications might possibly arise owing to the uncertainty of the result of the special election, and the seemingly apparent necessity on account of that uncertainty of conducting a general election in the territory embraced in the proposed new county not only for the officers thereof, but also for officers of the old county, notwithstanding that if division carries the vote in the proposed new county for officers of the old county may be nugatory, or in the event that it does not carry the vote for officers of the new county would have no effect. If we are right in assuming that such a condition might arise, the provision allowing the vote on the question of division to be taken at the general election and the new county officers to be voted for at the same election would seem to be an unfortunate one if an attempt should be made to follow it.

[2] This brings us to a consideration of a provision found in the several acts of 1911 creating the new counties referred to which seems in a large measure to have caused this controversy. The several acts are in effect the same except as to the name of the county, and the description of boundaries. The act creating Platte county provides in section 3 as follows: "Until such time as the said county of Platte shall have selected officers as provided by law, and the same shall have duly qualified as such, all such portions of said Platte county, as at the time of the passage of this act belong to or are a part of some other county for judicial, revenue and elective purposes, shall be attached to the county from which said Platte county is taken, except as hereinafter provided by law." Laws 1911, c. 7. The only provisions of the act following that section at all qualifying it are those found in sections 4 and 5 to the effect that, until a reapportionment law may be passed fixing the legislative representation for said county of Platte, the

portion of the county from which it is formed shall constitute a portion of Laramie county (the old county) for the purpose of legislative representation, and that for all purposes for which a county exists in this state, after its organization, and the qualification of its elective and appointive officers, as provided by law, said county of Platte shall be deemed and held to be one of the counties of the state "from and after the passage of this act." Similar provisions are found in each of the other acts. Hot Springs county was taken from parts of three counties. Section 4 of the act creating that county provides that, until a census shall be taken upon which a reapportionment law may be based, a portion of the respective counties from which the county of Hot Springs is formed shall be continued to be a part of Big Horn, Fremont, and Part counties, respectively, for the purpose of legislative representation. Laws 1911, c. 9. Campbell county was taken partly from Crook county and partly from Weston county, and the act creating it contains a provision to the effect that, until the new county shall be entitled to a separate representation in the Legislature under a duly enacted apportionment act, it shall be and remain a part of the counties of Crook and Weston, respectively, for the purpose of legislative representation.

It is argued that, if the general law aforesaid for the organization of new counties could at any time have been construed as vesting authority in the organization commissioners and clerk to conduct a general election in a new county prior to its organization, it has been rendered inapplicable in that respect to the new county of Platte, and the other new counties in the same situation, by the provision above mentioned contained in the act creating the new county that, until its organization, such new county shall be attached to the county or counties from which the same is taken for election purposes. We do not so construe that provision, nor can it, we think, be reasonably so construed. The natural and reasonable construction of the provision aforesaid is that it continues the new county as a part of the original county or counties until its organization for election purposes only as to such elections conducted by the old county that would be participated in by the electors within the territory of the new county if no provision had been made for the creation of the new county. This is made clear by a reference to the former legislation on the subject. Practically the same provisions as those found in the new county acts and the general law for organizing counties are to be found in all the legislation relative to new counties since Wyoming was organized as a territory. In the act of December 10, 1875, which defined the boundaries of Crook and Pease counties (the name of Pease county being afterwards changed to Johnson), and provided for the organization thereof, it was declared that the county embraced

within the boundaries of such counties "shall for judicial and all other purposes remain and constitute, as now, part of the counties from which the same is proposed to be taken, respectively, until organized as hereinafter provided." But in the same act it was provided that, upon the petition of a prescribed number of electors residing in either of the proposed new counties, the Governor should appoint three electors resident therein to act as commissioners in organizing the same; and that such commissioners should establish voting places, appoint judges of election, hold an election at a time to be selected by them for all county and precinct officers for such county, and canvass the vote thereof. Comp. Stat. 1876, pp. 198-201. The provision that the new county should until its organization remain a part of the county from which it was taken "as now" for judicial "and all other purposes" was certainly broad enough to include election purposes. Yet, in connection with that provision, it was also provided that the election to be held for the selection of officers in the new county should be called and conducted and the result thereof canvassed by the organization commissioners; and there seems to have been no thought that the two provisions were inconsistent. Again, in 1888, by the act in which the boundaries of the counties of Converse, Natrona, and Sheridan were defined, it was provided that, until organized, the region of country embraced within the limits of an unorganized county should remain, constitute, and be a part of the county or counties from which the unorganized county shall be taken, "for municipal, judicial and other purposes." And in that act provision was made for the appointment of commissioners to organize any such county, requiring them to call an election for county and precinct officers, establish voting places, appoint judges of election, and canvass the votes cast at such election. And in each such counties such an election was held resulting in the organization of the counties. Laws 1888, c. 90. In 1890 the act creating Big Horn county was passed. Laws 1890, c. 48. In one section it was provided that until said county shall have selected officers, as provided by law, and the same shall have qualified as such, all portions of the county which, when the act was passed, belonged to or formed a part of some other county "for judicial, revenue and election purposes," should be attached to the counties, respectively, from which such portions of said county are taken. And in other sections the act of 1888 providing the method of organizing unorganized counties was amended in certain particulars, but the authority of the organization commissioners to call and conduct the election for county and precinct officers and canvass the returns thereof was continued. Thus the two provisions existed together, apparently without it being supposed that they were inconsistent, one of

them continuing the several portions of the unorganized county as a part of the county from which they were respectively taken for election purposes, until the officers of the new county shall have been elected and shall have qualified, and the other vesting authority in the organization commissioners to call and conduct in all respects the election for county and precinct officers of the new county, when it became proper to hold such an election. If such provisions were not inconsistent when found in the same act, and it must be conceded that it would have been necessary to give them such an interpretation as would give due effect to each according to the manifest legislative intent, the provisions of the general law and the new county acts under consideration may as reasonably be read and construed together allowing that effect to each which will not operate to destroy the other. And by doing so they can and ought to be construed and enforced as above indicated.

There is another reason, even more conclusive, which requires a construction of these provisions giving full force and effect to the general law aforesaid relating to the conduct of the election at which the officers of the new county are to be elected. It is a general law enacted pursuant to the constitutional provision that the Legislature shall provide by general law for organizing new counties. And it is, therefore, beyond the power of the Legislature to enact provisions of that nature to operate and to be applicable only to a particular county named. The act creating Platte county legislates for that county alone, and the other acts creating new counties likewise contain provisions which refer only to the county therein named or the territory to be embraced therein. It would not only have been an unconstitutional exercise of power for the Legislature to have provided specially the method of organizing, or holding the election in connection with organizing the particular new county named in either act, but it is not to be presumed that the intention was to do so, especially in view of the fact that there is nothing else in either act that can be suggested as even remotely indicating such intention. Indeed, the contrary intent is manifest, for in several sections of each of the new county acts the necessity of other statutory provisions to enable the county to organize is recognized. As an illustration of this it is sufficient to refer to the act creating Platte county. Section 2 prescribes the judicial district to which the county shall belong after it "shall have been organized and shall have chosen its officers, as provided by law." Section 3, which contains the provision in question, declares that the new county shall be attached to the county from which it is taken until such time as it "shall have selected officers as provided by law." And section 4 attaches the new county to the parent county for legislative representation after it "shall have

been organized, as provided by law." These references to the organization of the county, and the selection of its officers, "as provided by law," are the more significant in this connection, in view of the omission from the act of any provision for the organization of the county. A provision postponing the operation of the general law in the case of a particular county named until after its organization would be equally as objectionable as a special provision for its organization applicable to it alone, for that would be an attempt to prevent the general statute from operating in the manner and at the time therein provided, and, in effect, to amend it by limiting its application.

Restating our conclusion respecting the provision in the acts creating the new counties which declares that the new county shall be attached for election purposes to the parent county until it shall have been organized by the selection of its officers and their qualification as such, and the effect thereof upon the provisions of the general law for organizing new counties relating to elections, it is that such provision of the new county acts applies only to such elections as would necessarily be participated in alike by the electors within the proposed new county and those within the remaining part of the old county as electors of such old county. This excludes any election pertaining to the pending or proposed organization of the new county, and requires the application of the provisions aforesaid of such general law to the general election to be held in November next in the new counties.

[3] Referring again to those provisions, we observe that at such general election the qualified electors residing in the new county are required, in the manner provided by law, to vote for a member of Congress, state, and district officers, and elect the members of the Senate and House of Representatives of the state to which said county is entitled, and also the county and precinct officers provided for by law. Comp. St. § 1056. And that at the time and in the manner provided for by law the commissioners appointed to organize the county and the clerk appointed by them shall perform all and singular the duties preparatory to, respecting, or incident to such election which are imposed by law upon county commissioners and county clerks respectively in organized counties, and that such election shall be conducted, and all matters preparatory or incident thereto, or connected therewith, shall be done and performed as in elections held in organized counties, except that the returns thereof shall be canvassed, and the result declared by said commissioners. Id. § 1057. And we observe, further, that such general law declares that for the purpose of such election any such unorganized county shall be deemed to be segregated from the original county or counties from which the same is taken. Id. § 1060. Thus, while the clerk ap-

pointed by the organization commissioners may not be in all respects, if any, technically considered, a county clerk, he is vested with authority to perform and is required to perform as to such election all and singular the duties, preparatory to, respecting or incident to the election, as are imposed by law upon county clerks in organized counties. Concerning those duties, we need only refer to that relating to the preparation and distribution of ballots. The names of all candidates for office are required to be printed upon one ballot. The county clerk is required to prepare such official ballot, cause the same to be printed, and distribute a suitable number thereof to the judges of election of each voting precinct. It is apparent that there would be much difficulty, if it would not be quite impossible to comply with the law, if ballots were to be prepared for use in the new county by the county clerk of the parent county containing the names of candidates for all officers other than county and precinct officers, and another ballot by the clerk in the new county containing the names of candidates for county offices, for we do not think that such a procedure is contemplated by any provision of the statute, and certainly it is not provided for. We think there must be but one ballot containing the names of candidates, and that in the unorganized county, whose officers are to be selected at the election, the ballot is to be prepared, and the proper number distributed by the provisional clerk in that county. In other words, his office is equivalent to that of county clerk, and, within the meaning and operation of the general election laws, he is the county clerk, with whom all papers must be filed that are required by the general election law to be filed with the county clerk, by whom all papers and returns are to be certified that are required by that law to be certified by the county clerk, and to whom all notices are to be sent and papers certified that are required by that law to be sent or certified to the county clerk. For the purpose of holding and conducting such general election in the territory embraced within the new county in process of organization, including the voting for all candidates for office that are to be voted for therein, and upon all questions submitted to the electors at large, the election is to be held and conducted therein the same as if the county was organized, except that the organization commissioners constitute the canvassing board. This seems to us to be the proper construction of the statutes aforesaid; and we doubt if, under any different construction, the provisions of the general election law, and the law controlling the organization of new counties, could be complied with in the territory embraced within a new county in process of organization.

Thus far we have not considered the primary election law, and have not intended by anything that has been said with reference

to the general election law to determine the extent and manner of the operation of the primary law. The object of the primary law is to provide for the nomination of candidates to be voted for at the general election, and having concluded that such general election in a new county about to be organized as aforesaid is to be held and conducted therein under the control of the provisional officers in the same manner as in an organized county, with the exception that the organization commissioners constitute the county canvassing board, we are prepared to consider the provisions of the primary law and determine their application to the election in the new county. Such provisions should, if possible, be construed so that they may operate throughout the state uniformly, and permit the nomination and election of officers in accordance with the evident purpose of the act. Before doing so, it seems desirable to refer to certain provisions of the statutes concerning the nomination of candidates as they stood when the primary law was enacted, that we may observe the principal changes made by that law. The general election law regulating the nomination of candidates and requiring the votes of electors to be expressed upon an official ballot was first enacted in 1890, a few months prior to the admission of Wyoming as a state. By that act, and until the enactment of the primary law in 1911, nominations might be made by conventions of political parties or by petition. And it was provided in section 87 that certificates of nominations for officers to be filled by the electors of the entire state or of any division or district greater than a county shall be filed with the Secretary of State; that certificates of nomination for county and precinct officers, "including members of either branch of the Legislature," shall be filed with the clerks of the respective counties wherein the officers are to be elected; and "that the certificate of nomination for joint member of either branch of the legislative assembly shall be filed in the office of the county clerk of each county to be represented by such joint member." Provision was also made as to municipal elections. The Secretary of State was required to certify to the respective county clerks the names and description of persons nominated in the certificates of nomination filed in his office. The names of the candidates whose respective certificates of nomination were duly filed and certified were required to be printed in a prescribed manner upon the official ballot prepared and distributed by the respective county clerks.

When the act of 1890 was passed, not only might it happen that a new county should remain attached to the original county for the purpose of legislative representation, but two or more original counties might be expressly given joint representation in addition to separate representation, and that

occurred in at least one instance. That condition was provided for in that act as shown above. Upon the supposition, probably, that the provision for the nomination of joint legislative candidates had become obsolete on account of the constitutional provision that each county shall constitute a senatorial and representative district, it was omitted from the Revision of 1890, and consequently from the later compilation of the statutes. But it has not been expressly repealed or amended by the Legislature, nor by implication except so far as it may be affected by the primary law of 1911. And we believe that it was followed in the case of new counties organized after the Constitution became effective, while they remained a part of the original county for the purpose of legislative representation, on the theory that such provision for nominating a joint member was operative in such case, as the only statutory provision governing the matter. The Constitution, it is true, declares that each county shall constitute a senatorial and representative district. Article 3, § 3. But it also provides for a reapportionment for senators and representatives only at the session of the Legislature next following an enumeration of the inhabitants of the state in the year 1895 and every tenth year thereafter, and the session next following an enumeration made by the United States. Article 3, subtitle "Appointment," § 2. By section 4 of the same article and subtitle an apportionment was made of senators and representatives among the existing organized counties. Subsequently other counties were organized, but before a reapportionment act was passed. Concerning such counties as to their representation in the Legislature, it was said in the concurring opinion of the writer in *State ex rel. v. Schultzer*, 16 Wyo. 479, 538, 95 Pac. 698, 714: "Although each county is expressly constituted a separate senatorial and representative district by the Constitution itself, that provision would necessarily be read in connection with the section making a specific apportionment, which, for that purpose, mentioned the counties as they existed when the Constitution was framed. To prevent the nonrepresentation of the territory and people included in the newly organized counties, they would necessarily be regarded as parts of the original counties respectively, for the purposes of legislative elections and representation. And that course was in fact followed in the election of the first Legislature that convened in November, 1890, and the second that convened in January, 1893." The several county acts in question, as above shown, continued the new counties as parts of the original counties, respectively, for such purposes until an act should be passed giving them separate county representation. By the above-quoted remarks that the new county remained a part of the original county for

the purposes of legislative elections and representation, it was not meant that such elections were conducted or controlled by the original county, for clearly, the new county having been organized, it held and conducted its own election, and, under the law then in force for nominating and certifying the nomination of candidates, there was no difficulty in relation to that matter. The fact should be mentioned that the result of general elections for members of the Legislature are not declared by the county canvassing board in any case, but an abstract of the canvass made by such board of the votes for members of the Legislature was and is required to be sent to the Secretary of State, to be canvassed and the result declared by the state canvassing board. It appears, therefore, that as the law stood at the time of the last general election, and the elections preceding it since the present method of voting by official ballot has been in operation, there would have been no trouble in applying the general election law, together with the general law for the conduct of the general election in new counties about to be organized by electing their officers at such election, for, under the last-mentioned law, the provisional clerk is required to perform all the duties of county clerk with reference to the election. The primary law calls for an election before the general election for the purpose of determining thereby the nominations to be made of certain candidates to be voted for at the general election. Such primary election must, of course, require the performance of official duties preceding and following it, and, as to a candidate required to be nominated at the primary election, the nominating petition is for the purpose of getting his name upon the primary election ballot, instead of the official ballot as under the old law. It should be borne in mind, however, that the primary election is a matter preparatory and incident to, and connected with, the general election. In considering the act providing for such primary election, we shall refer, as we proceed, to only those provisions that may seem pertinent to the questions necessary to be considered in determining the questions here presented.

The act provides for preparing, circulating, signing, and filing nomination papers nominating candidates to be voted for at the primary election. It is provided in section 8 of the act concerning such nomination papers as follows: "All nomination papers herein required shall be filed as follows: (1) For state officers, judges of the Supreme Court and district courts, senators in the Congress of the United States, and representatives in Congress, in the office of the Secretary of State, at least thirty days before the date of the primary election next ensuing. * * * (2) For offices to be voted for wholly within one county, and for off-

cers not herein otherwise provided for, in the office of the county clerk of the proper county at least twenty days before the date of the primary election next ensuing. (3) For city or town officers. When the election of such city or town officers is at a different time and place from the election of county officers, in the office of the city or town clerk, at least ten days before the primary election next ensuing." Laws 1911, c. 23.

It is conceded that the nomination paper of the relator is required to be filed in the office of the county clerk, but on one side it is contended that it should be filed with the provisional clerk of the new county of Platte, and, on the other hand, that it should be filed with the county clerk of Laramie county, the county from which Platte county is taken. If no other question than this was to be considered, it might easily be disposed of, after having determined as above that the election is to be held in the new county in the same manner as in an organized county, except as to the canvass of the votes. But it is said that this would also require the nomination paper of a candidate for either branch of the Legislature as a representative from Laramie county to be filed with the provisional clerk in the new county, which would make the primary law inoperative in that particular for the reason that there is no provision of law for a final canvass by a single board of the votes cast at the primary election in two or more voting counties for legislative candidates, and, further, that a similar difficulty would occur if such papers should be filed only in the office of the clerk of the original county, and the election should be conducted in the new county by its organization officers, since there is then no provision for getting the names of the legislative candidates upon the primary ballot in the new county or counties. It is considered, therefore, that the question relating to legislative candidates for nomination is directly involved in any construction of the primary law for the purpose of determining the place for filing the relator's nomination paper. And we are urged to remove the doubt that has arisen concerning the nomination at the primary election of candidates for the Legislature. We are of the opinion that there is reasonable ground for doubt in relation to that matter until it is settled by this court, and that the question must come here for determination sooner or later, if it is not here now, and that it would not be improper for us to express our views concerning it, even if its determination is not imperative for the purpose of disposing of the particular question before us.

[4] The primary law provides generally that the candidates of political parties for all offices which under the general law are filled by the direct vote of the people at the general election in November, and candidates for the office of United States senator shall be nominated, and party committeemen shall

be elected at primary elections at the times and in the manner therein provided; and that no names of candidates of any political party required or permitted under the act to make nominations shall be placed upon the official election ballot unless such candidates shall have been chosen and nominated in accordance with the act. Laws 1911, c. 23, § 1. Such primary election "shall consist of an election by all political parties, at the same time and place in the various voting precincts designated as provided by the general election laws of the state, on the first Tuesday after the third Monday in August in every year in which occurs a general election, for the nomination of candidates for such offices as are to be filled at the general election in November next ensuing, and for the election of party committeemen." Section 2. Can it be doubted that by the general election laws, including the general law construed as aforesaid relating to the general election in November in the new unorganized counties above mentioned, the various voting precincts in such new counties are required to be designated by the organization commissioners? That is an act preparatory to, respecting, and incident to the general election, and the duty of county commissioners in respect thereto is imposed upon the officers appointed to organize the county. In those precincts so designated the primary election is to be held, as well as in voting precincts as designated by county commissioners in organized counties.

[5] Coming to section 8, above quoted, which prescribes where nomination papers shall be filed, we observe that those for state officers are required to be filed with the Secretary of State, and those for offices to be voted for wholly within one county, and for officers not otherwise provided for, in the office of the county clerk of the proper county. What officers are to be regarded, within the meaning of this section, as those to be voted for wholly within one county? Unquestionably county and precinct officers are such officers. A party committeeman is such an officer, for the committeemen to be elected at the primary are to become the members of the county committee, composed of at least one committeeman from each election precinct. Section 36. But in what sense is the word "county" employed in the provision referred to? As the Legislature must have had in mind, considering the purpose of the act, the ballot to be prepared for the primary election, and were providing a method of nomination to enable the names of candidates therefor to be placed upon the ballot, the provision is to be reasonably held, we think, to refer to a separate subdivision in which as a county the election will be held; that is to say, a county, whether organized or not, if in process of organization, which acts as a county for the purposes of the general election. The new county is declared by the general law to be segregated

ed from the original county for the purpose of such election. Though unorganized and not a county for the time being for any other purpose for which counties are organized, it is to be regarded as a county for election purposes, or, more accurately, perhaps, the territory embraced within it has been set apart by law and endowed through its organization commissioners and clerk with all the powers, of a county for the purpose of providing for, holding, and conducting the election, and as an "unorganized county" it is mentioned in the statute declaring it to be segregated from the original county or counties for the purpose of the election. There is nothing forced or illogical, therefore, in a construction that will bring such new county within the meaning of the word "county" as found in the section under consideration. And this is especially true in view of the provision of the primary law which declares that it shall be liberally construed, so as to insure full opportunity to become candidates and for voters to express their choice. Section 50. There is a further and very good reason leading to such construction when the election of party committeemen is considered. At the ensuing primary election party committeemen are to be elected who will constitute the county committee for the term of two years from the date of their first meeting; that meeting being required to be held within five days, if possible, after the candidates of the respective political parties shall have been declared nominated by the proper canvassing board. With the election of the new county officers in November, and their qualification in January next, the county will become fully organized, and upon the county committee therein to be elected may devolve thereafter important duties under the primary law. Such committee, moreover, is required to elect a member of the state committee of its party, and is authorized to fill vacancies occurring among the candidates of its party nominated within the territory over which it has jurisdiction by the primary elections. Section 37. In view of the election of county officers to occur in the new county, and the nomination of candidates therefor at the primary election, the county committee of the new county elected at such primary will thereafter be vested with the authority conferred upon county committees, for the scheme of the act in this particular is plainly that there shall be a county committee in each county where county officers are to be elected, the members of which shall themselves be elected in the manner provided therein.

Construing the word "county" as employed in section 8 to mean a county, whether organized or unorganized, wherein an election is to be held in November for county and precinct officers of that particular county, it would follow that the nomination paper of the relator is required to be filed with the

clerk appointed by the organization commissioners of the new county of Platte, unless there are other provisions of the act preventing that conclusion.

[6] In this connection our attention is called to section 28 of the act, which provides that the county board of canvassers shall consist of the county clerk and two justices of the peace of the county called in by the clerk, which justices shall be of different political parties if possible, and requiring the canvass of the returns of the primary election to be canvassed by that board. And it is argued that, as there are no justices of the peace of Platte county, no way is provided by the act for canvassing the returns of the primary election if the election is conducted in the new county separate and apart from the original county. As to the general election, that is the very difficulty intended to be provided for by declaring that the organization commissioners shall constitute the canvassing board. It may be conceded that section 28 refers only to organized counties, and that, upon a strict and technical construction, this might affect the construction of the entire act. But it is possible that a county may be mentioned or referred to in one section in the sense of a county fully organized, and in another in a broader sense, including an unorganized as well as an organized county. That construction should be given to a particular section, not abortive of the purpose of the act, or conflicting with other provisions, which would be proper or required if it stood alone to enable it to operate as intended, if such a construction be possible. It is clear that section 28, so far as it declares who shall constitute the county canvassing board, cannot apply to an unorganized county. There then appears to be no provision in the act itself for the canvass of the returns of the primary election in such a county. But the act was clearly intended to apply throughout the state, and in every county wherein the election in November is required to be held. To guard against possible omissions in the act, it is provided in section 17 that, "except as herein otherwise provided, all primary elections shall be conducted as required for general elections under the general election laws, as far as the provisions thereof may be applicable." The word "conducted" is here used, we think, as inclusive of everything necessary to the holding of the election, which involves not only the casting of the votes of the elector, and preliminary provision therefor, but also the canvass of the returns and declaration of the result, for otherwise the election would be unavailing. *Blake v. Walker*, 23 S. C. 517; *Brass v. State*, 45 Fla. 1, 34 South. 307. The act might have declared that the returns should be canvassed by the canvassing board provided for by the general election laws. It has done so in effect as to organized counties, for in such counties the county clerk and two justices

of the peace constitute the canvassing board at general elections, so that no change is made in this respect in the case of primary elections. But in the case of an unorganized county the other general statute intervenes which declares that the commissioners appointed to organize the county shall be the county canvassing board. This is a part of the general election law, for it applies to a general election held in an unorganized county at which its officers are to be elected. The provision of section 28 designating the members of the county canvassing board clearly refers only to a county which has justices of the peace. It does not provide for the canvass in an unorganized county in which the general election is to be held for the purposes aforesaid. Section 17 therefore controls the matter, whereby the general laws become applicable; and it follows that the duties of the county canvassing board prescribed in section 28 of the primary law will devolve upon the organization commissioners in the new county.

[7] These conclusions will not interfere with the nomination at the primary election of candidates for the Legislature, nor with the proper operation of any other provision of the primary law, so far as we have been able to discover. The argument that a construction of the statute vesting authority in the new counties, respectively, to conduct the primary election therein will prevent the nominating thereof of legislative candidates, is based upon the theory that the nomination papers of such candidates are required to be filed with the county clerk, and that, since the new county remains attached to the parent county for legislative representation, it is necessary to file such papers with the clerk of the parent county. But that theory is, we think, erroneous. It is true that, by the general election law the certificates nominating members of either branch of the Legislature were required, expressly to be filed with the "clerks of the respective counties" wherein they are to be elected. This entitled such candidates to have their names placed upon the official ballot for the general election, and, without the provision as to joint representatives, might perhaps be held to authorize the filing of such certificates with the clerk of each voting county—that is to say, each county separately, conducting an election—but with the provision for filing the certificates nominating a joint member in the office of the clerk of each county to be so represented, which remains in the statute, notwithstanding its omission from the subsequent revision and compilation, that matter is made very clear; for the new county, even after its organization as a county, until a new apportionment, will remain attached to the old county for representation in the Legislature, and the new and old counties will therefore be jointly represented during that time.

In no section of the primary law are mem-

bers of the Legislature specifically mentioned. To ascertain where nominating papers for candidates for the Legislature to be voted for at the primary election are to be filed, we must examine the provisions of section 8, and determine what clause or description of officers therein contained includes such candidates. Having construed that part of the section requiring the filing of a nominating paper with the county clerk where the office is one to be voted for wholly within one county, as referring to a county for election purposes, it necessarily follows that the office of senator or representative is not one necessarily to be voted for wholly within one county. Nor is it an office not otherwise therein provided for, for in the first part of the section nomination papers for state officers are required to be filed in the office of the Secretary of State; and members of the Legislature are, in a strict legal sense, state officers. They are clearly not county or precinct officers. They are members of a body which constitutes a separate and distinct department of the state government. They are paid by the state. They receive, respectively, their certificates of election, after the general election, from the Secretary of State. They perform duties, and exercise powers, relating to the state at large. "In general it may be said that a state officer is one whose duties and powers are coextensive with the state, while a county officer is one whose duties and powers are coextensive with the county." *People v. Evans*, 247 Ill. 547, 93 N. E. 388. "State officers are those whose duties concern the state at large, or the general public, although exercised within definite limits, and to whom are delegated the exercise of a portion of the sovereign power of the state. They are in a general sense those whose duties and powers are coextensive with the state, or are not limited to any political subdivision of the state, and are thus distinguished from municipal officers, strictly, whose functions relate exclusively to the particular municipality, and from county, city, town, and school district officers." 36 Cyc. 852-853. In *Morrill v. Haines*, 2 N. H. 246, it was held that within the meaning of a statute providing the method of balloting for state officers a representative in the state Legislature was a state officer. Though members of the Legislature are thus held to be state officers within the meaning of section 8, they are to be regarded, within the meaning of section 7 regulating the number of signers to a nominating petition, as officers to be voted for within a district, which may consist of one county or more. In the absence, therefore, of any specific provision controlling their nomination, we think it clear that the nomination paper of a candidate for the office of state senator or representative in the state Legislature to be voted for at the primary election must be filed in the manner required in the case of state officers;

that is, with the Secretary of State. So construing the statute, it is rendered uniformly operative and free from any difficulty as to senators and representatives, for it is made the duty of the Secretary of State to transmit to each county clerk at least 25 days before the primary election a certified list containing the name and post office address of each person for whom a nomination paper has been filed in his office, in accordance with the provisions of the act, and entitled to be voted for at such primary election by the voters of such county, together with the designation of the office for which he is a candidate, and the party from which he seeks a nomination. And it is made the duty of the county canvassing board to certify and file the abstracts made by such board in the office of the county clerk, and to make a separate abstract of the canvass as to all state officers, United States senator, representative in Congress, and judges of the Supreme and district courts, and certify the same and forthwith forward it to the Secretary of State. Upon the abstracts received from the several counties by the Secretary of State, the Secretary, Auditor, and Treasurer of the state are required to meet as a canvassing board, make an abstract of its canvass in a manner prescribed by the act, and, when the canvass is concluded, to deliver the original abstract returns to the Secretary of State to be filed and recorded in his office, and thereupon within a time specified the Secretary of State is required to certify to the clerk of each county, under separate cover party headings, the name of each person nominated as shown by the official canvass made by the said canvassing board, as well as those certified to him by the proper persons when any person has been nominated by a convention or party committee, his place of residence, the office for which he was nominated, and the order in which the tickets of the several political parties shall appear on the official ballot. Remembering that the clerk appointed by the organization commissioners in a new county is for all the purposes of the election the county clerk of such county, such certificate and all other certificates pertaining to the matter required to be transmitted by the Secretary of State to the county clerk will be transmitted to the proper clerk in the new counties, whereupon the official primary election ballot can be prepared at the proper time and in the manner required by the primary election law, and the official ballot for the election can likewise be prepared in each new county conducting the election as well as in organized counties. In the case of a new county, like Hot Springs and Campbell counties, wherein a part of its territory votes with one of the old counties for members of the Legislature, and a part with another county, the names of the candidates for the Leg-

islature to represent each of such old counties, whose nomination papers have been filed with the Secretary of State, will be transmitted to the clerk of such new county, as well as after the canvass of the abstracts of the primary election the names of, and other required information concerning the candidates nominated at such election. And, since it will be the duty of the organization commissioners in such counties to arrange the voting precincts so as to enable the electors to properly vote at the primary and also at the general election for candidates for the Legislature, the clerk can have no difficulty in properly preparing and distributing the ballots containing the names of such candidates to be voted for in the several precincts, any more than in the case of precinct officers.

[8] A question arises under section 35 of the primary law affecting the relation between the old and new counties respecting the primary election in one particular. That section provides for the filling of vacancies occurring or existing in any office or position for which nominations are made under the act before the printing of the primary election ballots, and confers authority to fill such vacancy upon the regularly constituted committee of the party to which the vacancy belongs. It seems clear that, if a vacancy so authorized to be filled occurs in the office of senator or representative in the Legislature, the proper committee to exercise the power granted by the section will be the county committee of the old county, for that is the only committee recognized by the primary law (section 38) until the primary election shall have been held. And it seems, also, that such committee will be the only one, if any, authorized to fill vacancies covered by the section in any office which is to be voted for in the new county alone; for section 38 declares that the various political committees "now in existence" are recognized, and that they and their officers shall exercise the powers and perform the duties "herein prescribed" until committeemen are chosen in accordance "with the provisions of this act." There may be difficulty, perhaps insurmountable in the case of a new county taken from two or more counties, in acting under section 35 as to an office to be voted for only in the new county. But that need not interfere with the operation of the law in other respects. For another provision of the act (section 37) authorizes the proper committee, after the primary election, to make nominations to fill vacancies occurring among the candidates nominated within the territory over which it has jurisdiction by the primary nominating election; and a county committee will presumably be elected in the new county at such primary election. And the act also permits the nomination of candidates by petition to be voted for at the general election (section 46), so that

there may be candidates at the general election for all county and precinct offices in the new county, even if there should occur a failure to nominate any or the allowed number at the primary election. The manner of the operation of section 35 is not directly before us at this time, and, while we do not perceive that any except the committee of the old county can act under it for the ensuing primary election, we do not care to decisively so hold as to county and precinct officers of the new county. But, as to the office of senator or representative in the Legislature, the power of the committee of the old county is we think plain, for the new county remains attached to the old county for legislative representation, and the vacancy nominations as to such an office can easily be so made as to be placed upon the primary election ballot.

[8] The primary law expressly permits, as above stated, the nominating of candidates, as provided in the general election law, by petition, and provides, also, that any political organization which at the last preceding general election cast less than ten (10) per cent. of the total votes cast for representative in Congress may nominate candidates in the manner provided by existing laws for conventions, provided that all such conventions shall be held on the same days as the primary election provided for in the act. Such petitions and conventions will, of course, be governed by existing laws therefor other than the primary law, except as stated in that law, and certificates nominating candidates for the Legislature in that manner will necessarily be filed as required by such other existing laws.

All the questions suggested have thus been considered. The nominating papers of the relator should be filed with the clerk appointed by the organization commissioners in the new county of Platte. The judgment of the district court will, therefore, be reversed, and the cause will be remanded, with directions to enter judgment denying the writ of mandamus prayed for, and dismissing the petition.

BEARD, C. J., and SCOTT, J., concur.

(30 Wyo. 456)

PULLMAN CO. v. FINLEY.

(Supreme Court of Wyoming. July 1, 1912.)

1. PLEADING (§ 236*)—AMENDMENT—TIME—DISCRETION OF COURT.

The granting of an application by plaintiff to amend her complaint, made three days before the date set by agreement for trial, was within the discretion of the court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

2. CONTINUANCE (§ 14*)—AMENDMENT OF PLEADINGS—NEW ISSUES.

In an action for carrying a passenger past her destination, the issues presented by the original and amended petition were that

plaintiff was ill and with her nurse was received by defendant sleeping car company on its car attached to a passenger train, that plaintiff was so ill as to necessitate her being carried into the car, and that she required assistance to alight to defendant's knowledge, that such assistance was not provided, but defendant carried her ten miles beyond her destination, there transferring her to a baggage car of a train returning thereto, to her injury. The amended petition also alleged that defendant's conductor, before the arrival of the train, specially promised to see that plaintiff was carried off the car, and requested her to remain therein until he sent the porter to carry her off. Held, that since defendant's obligation as to plaintiff's alighting from the car was as broad as her necessities, and only ended on her being safely set down at her destination, such obligation was neither lessened nor increased by the conductor's promise, and hence such allegation was not new matter entitling defendant to a continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 25, 99-112; Dec. Dig. § 14.*]

3. PLEADING (§ 345*)—MOTIONS—JUDGMENT ON PLEADINGS.

In an action against a sleeping car company for failing to set plaintiff down at her destination, defendant charged that plaintiff's failure to alight, and any injuries sustained therefrom, was due to her own negligence in failing to make proper arrangements for her reception and assistance at destination; she being ill at the time and on her way to a hospital. Held, that, the relation of carrier and passenger having been established, defendant was bound to see that she was put off the train in safety at her destination, which duty was not affected by her failure to make proper arrangements for her reception and assistance on arrival, so that plaintiff's failure to reply to the plea of contributory negligence did not entitle defendant to judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

4. NEGLIGENCE (§ 118*)—CONTRIBUTORY NEGLIGENCE—PLEADING.

The rule that contributory negligence is an affirmative defense, and must be controverted by a reply, notwithstanding such negligence is negatived in the petition, comprehends only such matter as is shown by the allegation to have contributed to and constituted a part of the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 108, 199; Dec. Dig. § 118.*]

5. EVIDENCE (§ 505*)—NONEXPERTS—OPINION.

Where a professional nurse, who accompanied plaintiff to a hospital when she was injured by being carried by her destination, testified as to plaintiff's condition from personal observation of what actually occurred, and what came to her knowledge through the medium of her own senses, a question calling for the witness' statement as to what plaintiff's condition was when she arrived at the station to which she was carried, and how long it would have been before she would have been in a condition to have been operated on, how long the operation was delayed, was not objectionable as calling for an expert opinion from a nonexpert witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2808; Dec. Dig. § 505.*]

6. WITNESSES (§ 372*)—CROSS-EXAMINATION—SCOPE—BUSINESS RELATIONS WITH PARTY.

Where an employe of a sleeping car company testified in its behalf, it was proper for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes.

plaintiff on cross-examination to prove by him that he received from defendant \$25 a month and had to board himself, as bearing on the weight of his testimony as a whole.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

7. APPEAL AND ERROR (§ 1053*)—RECEPTION OF EVIDENCE—PREJUDICE.

Where, in an action against a sleeping car company for carrying a passenger past her destination, the court clearly charged that defendant was liable only in case the jury found that its negligence was the proximate cause of the injury, defendant could not have been prejudiced by the erroneous admission of a conversation between the train conductor and plaintiff's nurse, in which the conductor observed that the sleeping car company, and not the railroad company, was responsible for the default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

8. TRIAL (§ 365*)—SPECIAL INTERROGATORIES—ANSWER.

A jury's answer, "We don't know," to a special interrogatory submitted, is a special finding against the party having the burden of proof of the issue submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 871-874; Dec. Dig. § 365.*]

9. CARRIERS (§ 415*)—SLEEPING CAR COMPANIES—ASSISTING SICK PASSENGER TO ALIGHT.

Where the servants of a sleeping car company accepted a sick person as a passenger on her way to a hospital, it was their duty to see that she was properly taken from the car at her destination to the depot, and therefore special interrogatories finding that she failed to provide proper assistance at destination did not affect the company's duty, and were therefore insufficient to overcome a general verdict in her favor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. § 415.*]

10. CARRIERS (§ 411*)—SLEEPING CAR COMPANIES—ARRANGEMENTS AT DESTINATION.

Where a sleeping car company accepted plaintiff, an ill passenger, for transportation to a place where she was to enter a hospital, evidence that the sleeping car conductor agreed to make certain arrangements by telegraph for her removal from the station to hospital in an ambulance and to notify her friends constituted him her agent for that purpose.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1579, 1581; Dec. Dig. § 411.*]

11. CARRIERS (§ 411*)—SLEEPING CAR COMPANIES—PASSENGERS—ASSISTANCE TO ALIGHT—WAIVER.

The primary duty of a sleeping car company to assist a sick passenger to alight at destination, and to see that she was properly conveyed from the car to the depot, was not waived by the fact that the conductor telegraphed for an ambulance and to plaintiff's friends to meet her.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1579, 1581; Dec. Dig. § 411.*]

12. CARRIERS (§ 411*)—SLEEPING CAR COMPANIES—SICK PASSENGER—ALIGHTING AT DESTINATION—NEGLIGENCE.

Where defendant sleeping car company accepted plaintiff while ill as a passenger on her way to a hospital and carried her by her destination to her injury, the company's failure to notify the train conductor of plaintiff's

condition and the necessity of assisting her to disembark was actionable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1579, 1581; Dec. Dig. § 411.*]

13. CARRIERS (§ 415*)—SLEEPING CAR COMPANIES—PASSENGERS—CARRYING PAST DESTINATION—EVIDENCE.

In an action for injuries to a sick sleeping car passenger by carrying her past her destination, evidence held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1590-1600; Dec. Dig. § 415.*]

14. TRIAL (§ 344*)—VERDICT—VACATION—JURORS' AFFIDAVITS.

That a verdict was invalid because procured by the quotient method could not be established by jurors' affidavits.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 818; Dec. Dig. § 344.*]

15. TRIAL (§ 116*)—MISCONDUCT OF COUNSEL—EVIDENCE.

In an action against a sleeping car company for carrying a passenger past her destination, plaintiff's counsel brought into court certain suit cases belonging to plaintiff so that the color might be known, and, on objection, stated that they were brought in solely because defendant's counsel had previously requested that it be done, and stated that they were the suit cases referred to in plaintiff's testimony in the case. Held, that the statement of plaintiff's reasons for introducing the suit cases did not constitute misconduct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 288; Dec. Dig. § 116.*]

16. APPEAL AND ERROR (§ 972*)—MATTERS OF DISCRETION—MISCONDUCT OF COUNSEL.

A judgment will not be reversed for misconduct of counsel in argument, unless it affirmatively appears from the record that there has been an abuse of the trial court's discretion in ruling on objections to such remarks.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3847; Dec. Dig. § 972.*]

17. TRIAL (§ 114*)—ARGUMENT OF COUNSEL—MISCONDUCT.

In an action against a sleeping car company for injuries to a passenger by carrying her past her destination, plaintiff's counsel stated in argument that people patronized sleeping cars and paid exorbitant prices that they might be treated fairly and a little better, and, on objection thereto, remarked that the railway commission in some states had reduced the rates. In referring to a conflict in the testimony between plaintiff and her nurse and defendant's conductor, he stated that it was for the jury to judge whether plaintiff's witnesses or the conductor committed perjury, and added, "He has got to hold his job." In closing he further stated, "We will get something out of that bloated corporation with its millions," but, on objection, the court directed that the jury should decide the case on the evidence, and not on the remarks of counsel. Counsel further, in referring to defendant, called the jury's attention to its power of eminent domain, and, on objection, the court said that the jury should not take into consideration anything outside the evidence in the case. Held, that such remarks were not misconduct for which the verdict should be set aside.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 275-278, 296; Dec. Dig. § 114.*]

18. TRIAL (§ 115*)—ARGUMENT OF COUNSEL—REFERENCE TO SPECIAL INTERROGATORIES.

Plaintiff's counsel in argument, referring to special interrogatories which were submitted to the jury, stated that it would be well

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

for the jury to go over the instructions of the court thoroughly, and then study the questions thoroughly, "because they catch." *Held*, that such statement did not indicate that it was intended as a reflection on the court, but was rather a method of arousing the jury's mind to the necessity of care in answering the questions, and was therefore not misconduct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 279-283, 295, 298; Dec. Dig. § 115.*]

19. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for injuries to a sick passenger by being carried past her destination, her evidence showed that she suffered inconvenience, distress, anguish of mind, pain, delay, and expense by the carrier's negligence, while defendant produced a witness who testified that she was in good spirits and joked while she was riding in a baggage car on return to her destination. *Held*, that the evidence of such witness did not render an instruction that it was not denied that plaintiff suffered inconvenience, distress, anguish of mind, pain, delay, and expense in being carried past her destination, but, before the jury could render a verdict in her favor, they should find that such matters were directly attributable to some neglect or wrongful act on defendant's part, erroneous as unsupported by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by Anna Finley against the Pullman Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles W. Burdick, of Cheyenne, and Burgess & Kutcher, of Sheridan, for plaintiff in error. J. L. Stotts, of Sheridan, and H. S. Ridgely, of Cheyenne, for defendant in error.

SCOTT, J. The defendant in error, plaintiff below, recovered judgment against the plaintiff in error, defendant below, for damages for alleged injuries and brings error.

[1] 1. The original petition was filed on August 6, 1910; alleging the injuries to have been sustained on June 3, 1910, in consequence of the negligence of the defendant as she alleges in carrying her past her destination while traveling on said date in defendant's car from Billings, Mont., to Minneapolis, Minn. On January 6, 1911, the defendant filed its answer, in which as a first defense, after admitting its corporate business, it denied each and every other allegation set forth in plaintiff's petition, and as a second defense the defendant alleged contributory negligence on the part of the plaintiff. On February 7th following by agreement of the parties the court set the case for trial on February 23, 1911, at 10 o'clock a. m. On February 20th the plaintiff made application to and was permitted by the court over defendant's objection to file an amended petition and to which the defendant was required to file its answer thereto on or before February 21st at 2 o'clock p. m. The allow-

ance of the amendment was within the sound discretion of the court.

[2] It was followed by a motion for a continuance supported by affidavit that the defendant had prepared his defense on the issues made by the original pleadings, that the witnesses were nonresidents; and it is contended that the amended petition changed the original cause of action, and required evidence if obtainable at all from witnesses who resided in Minnesota, and whose presence could not be obtained or depositions could not be taken in time for the trial. The issues presented by the original and the amended petition were to the effect that the plaintiff was ill, and that she and her nurse were received by the company on its car attached to the Northern Pacific passenger train at Billings, Mont., as prepaid passengers from thence to Minneapolis, Minn., on June 2, 1910, and arrived at Minneapolis on the next day; that she was so ill as to necessitate her being carried into the Pullman car at Billings, and required assistance to get off the car at her destination, all of which was known to the company and its employees; that such assistance was not provided, but that the company and its employees failed to furnish such assistance, and carried her to St. Paul, 10 miles beyond her destination, there transferred her to the baggage car of a train going from St. Paul back to Minneapolis.

It is contended that the amended petition contained new and additional allegations not contained in the original petition to the effect that, before the arrival of the train, the Pullman car conductor, upon request of plaintiff, expressly promised to see that plaintiff was carried off said car, and requested the plaintiff to remain in the drawing room of the car until he sent the porter to carry her off. The latter allegation it is contended was such new matter as entitled the defendant to a continuance. We do not think so. The obligation and duties assumed by the defendant with reference to her alighting from the car were as broad as the necessities of the plaintiff required, and ended only upon her safe alighting from the car at her destination. The obligation so assumed was not in any wise lessened or increased by the fact alleged. The denial of the application for a continuance is not shown to have deprived the defendant of any evidence to which it was entitled, and the conductor was present and testified at the trial. It is urged that the defendant should have been granted additional time to ascertain if there were passengers who overheard the conversation, as to which there was some conflict in the testimony between the conductor and the plaintiff, and, if so, to obtain their evidence. Considerable time has elapsed since the trial of the case, and no motion for a new trial on the ground of newly discovered evidence has been made.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We see no prejudicial error in overruling the motion for a continuance.

[3] 2. It is urged that the court erred in denying defendant's motion for judgment on the pleadings. It is contended that, inasmuch as there was no reply, the plea of contributory negligence as pleaded in the answer stands confessed, and for that reason the judgment should be reversed. It was alleged in the petition that all the matters complained of were caused by the negligence and carelessness of the defendant, its agents, and servants, and without any fault or negligence of the plaintiff. In the second defense it is pleaded that plaintiff's failure to disembark from defendant's car at Minneapolis on the 3d day of June, 1910, as alleged in her petition and any injury suffered by her in consequence thereof, if any injury was suffered as she alleges, was not due to any fault or negligence of this defendant, but was due to the fault or negligence of the plaintiff in failing and neglecting to make proper and necessary arrangements for her reception and assistance at Minneapolis upon her arrival at said destination. The allegations of the petition, if true, established the relation of carrier and passenger from the time she was received on the defendant's car at Billings, Mont. (6 Cyc. 538, 541), and the duties and obligations of the defendant as such carrier to the plaintiff did not end until she safely disembarked at her destination. Assuming that it was her duty as a wise precaution to make proper and necessary arrangements for her reception and assistance at Minneapolis upon her arrival, that did not relieve the company from the performance of its duty to her as a common carrier which was to see her safely disembarked at her destination. Had she safely disembarked from the car, the company's duty would have then ceased, but not before, and the company could not escape liability for a failure to perform this duty by reason of her failure to have her friends meet her with proper conveyances to properly take care of her after the company had performed its duty. Her failure or neglect so to do was not a contributory factor in the company's wrongful act in carrying her beyond her destination. Had her friends been there to meet her, the primary duty would have still rested upon the company to have lifted and safely carried her from the car to a place which, under the circumstances, was reasonably safe.

[4] The question as one of pleading does not come within the rule that, when contributory negligence is pleaded, it constitutes an affirmative defense, and must be controverted by a reply, notwithstanding that negligence of the plaintiff is negated in the petition (C. B. & Q. R. R. Co. v. Cook, 18 Wyo. 43, 102 Pac. 657), for that rule comprehends only such matter as is shown by the allegations to have contributed to and constituted a part of the proximate cause of the

injury complained of. We think there was no error in denying the motion for judgment on the pleadings.

[5] 3. The nurse who accompanied the plaintiff on her journey was called as a witness, and testified in her behalf. After testifying that she had been a professional nurse for two years, that plaintiff was afflicted with peritonitis, and was on her way to a hospital at Minneapolis for surgical treatment, she was asked and permitted to answer the following questions, viz.: "Q. How long was this operation deferred? I will ask you what was her condition when she arrived at St. Paul. You say her condition when she arrived at St. Paul was about the same as it was when she was operated on? How long was it, how long would it have been if she had been taken out of the car when she first arrived there? How long would it have been before she would have been in a condition to be operated on; that is, be in the condition she was in? (The defendant objects to the question for the reason that it calls for an expert opinion, and this witness is not qualified to testify as an expert upon such matters; objection overruled; defendant excepts.) A. About a week." It appears from the evidence that more than four weeks elapsed after her arrival at Minneapolis before the operation was performed. It was material upon the issue for the plaintiff to show the injury, if any, resulting from the alleged negligence of the defendant and the damage resulting therefrom. Her apparent condition upon her first arrival at Minneapolis as compared with what it was upon her second arrival at that place needed no expert testimony. The witness had testified to this, and in order to properly understand the question, the meaning of which is somewhat obscured, other testimony given by her should be considered. She testified with reference to her answer to the question as follows: "Q. What do you judge this from? From that she was, in when she first arrived, and the condition she was in when she was operated on? A. Yes; I judge from that. * * * Q. What was her condition at the time she was operated upon compared with her condition when she first arrived at Minneapolis? A. It was just about the same, except from the fact that she was somewhat fatigued from her trip. Q. What was her condition when she arrived back from Minneapolis, from St. Paul, compared with the time she first left Minneapolis going to St. Paul? A. The second time she reached Minneapolis? Q. Yea. A. Her condition was very much worse. Q. How much did that worse— How long did that worse condition last, continue? A. About four weeks. Q. Up to about the time she was operated on? A. Well, up to about three or four days before she was operated upon." While the question propounded was, standing alone, objectionable, yet, in connection with other evidence as to facts within her

knowledge, it was stripped of its hypothetical character. Her evidence was predicated, not upon the assumption of proof of any particular fact, but upon her personal observation of what actually occurred and which came to her knowledge through the medium of her own senses. In speaking upon the subject of qualification of witnesses to testify upon a particular subject of testimony and as to whether the general or ordinary experience of a layman is sufficient, Dr. Wigmore says (section 559, Wig. on Ev.): "The witness is not the juror. He does not decide the issues. He merely furnishes a small contribution to the material for decision. He should not be required to qualify as if he were a final arbiter of facts." The learned author again says at section 568, Id.: "When does the ordinary experience suffice? The key to the various questions that here arise seems to be this: While on matters strictly involving medical science, as such, some special skill is needed, yet there are numerous matters involving health and bodily soundness, upon which the experience of every day life is entirely sufficient. The line may sometimes be difficult to draw; but there can be no difficulty in determining that a layman may be received to state (for example) that a person was or was not apparently ill. Great liberality should be shown by the courts in applying this principle, so that the cause of justice may not be obstructed by narrow and finical rulings." If a layman may testify as to whether a person is at a particular time apparently ill, and we think he can, then we see no reason why he should not be permitted to state the apparent degree of illness of such person as compared with his or her state of usual health at or about that time. We are of the opinion that the question as asked in view of other evidence given by her and which qualified her to answer it as a layman but not as an expert was not prejudicial.

[6] 4. The court over objection permitted the plaintiff to cross-examine Joe Lewis, a witness who was called by and testified on behalf of the defendant and who was shown to be in its employ, as follows, viz.: "Q. How much does the company pay you a month? (The defendant objects as immaterial and not proper cross-examination; objection overruled and defendant excepts.) A. Twenty-five dollars. Q. And do they board you, or do you board yourself? (The defendant objects as immaterial and not proper cross-examination; objection overruled; defendant excepts.) A. I board myself. Q. At \$25 per month? A. They give us a flat rate." It is contended that the court erred in permitting this cross-examination over defendant's objection. It is always proper within reasonable limits to permit a witness to be cross-examined as to his business relations with the party for whom he testifies as a witness. Such relation when shown may have a material bearing upon the

weight to which the jury may give the witnesses' testimony as a whole. The evidence was competent and proper to be considered by the jury in weighing the testimony.

[7] 5. The plaintiff testified, among other things, to her trip from St. Paul back to Minneapolis. The court overruled defendant's objection to the following question propounded to her, viz.: "Q. Did you hear the conversation between him (meaning the conductor of the train) and your nurse, Miss Hubbard, wherein Miss Hubbard said, 'the railroad company will have to pay for this damage,' and he said, 'No; not the railroad company,' that 'the Pullman Company will have to pay for this damage'?" (The defendant objects as incompetent, irrelevant, and immaterial; objection overruled; defendant excepts.) A. Yes; I heard that conversation." This conversation was wholly immaterial to any issue in this case. The conductor of a Northern Pacific train could not bind the Pullman Company by this admission. The instructions to the jury, however, made it clear to them that the Pullman Company was liable for damages only in case that the jury found that the company was guilty of negligence, and that such negligence was the sole proximate cause of the injury. We are unable to understand how upon the record the defendant could have been prejudiced by this evidence.

6. The jury found generally for the plaintiff, and also answered special interrogatories submitted to it by the court. It is here urged that the special verdict or findings are inconsistent with the general verdict, and that the court erred in denying defendant's motion for judgment on the findings. These assignments may be considered together. By answers to the interrogatories the jury found the following facts, viz.: (1) That it was necessary to have a stretcher or some other suitable means in order to assist the plaintiff at Minneapolis. (2) At the time the train arrived at the station of Minneapolis, there were no friends or other persons with means to assist the plaintiff. (3) The plaintiff informed the conductor on the trip that she had telegraphed friends to meet and assist her. (4) She endeavored to provide means and assistance to disembark before her arrival at Minneapolis. (5) The parties notified to meet and assist her appeared at the station in time to assist her. (6) The said parties so notified to assist her did not reach the train upon its arrival and offer assistance, but did so before the train left. To interrogatory No. 6, as to whether the conductor and porter of the defendant were willing to assist the plaintiff at Minneapolis if they had had suitable means with which to do so, the jury answered: "We don't know." The same answer was given by the jury to interrogatory No. 8, as to whether the plaintiff would have been carried past the station if proper means with

which to assist her had been provided at the train upon its arrival there.

[8] With regard to the answers so returned by the jury to interrogatories numbered 6 and 8 as above set forth, the rule we think is correctly stated by defendant in its brief as follows: "That where the question covers a material point, upon which evidence exists, such an answer as 'We don't know' is equivalent to a special finding in favor of the defendant upon the question." *Atchison, etc., Ry. Co. v. Swarts*, 58 Kan. 235, 48 Pac. 953; *Kalina & Cizal v. U. P. Ry. Co.*, 69 Kan. 172, 76 Pac. 438; *Kan. Pac. Ry. Co. v. Peavey*, 34 Kan. 472, 8 Pac. 780; *Mechanics' Bank of D. v. Barnes*, 86 Mich. 632, 49 N. W. 475; *Flannery v. Railroad Co.*, 23 Mo. App. 120. It is but another way of stating the proposition that a failure of proof by him upon whom the burden of proof rests must accrue to the benefit of him who negates the issue.

[9] Assuming the rule of law as stated to be correct, in applying it here the question first arises: Did these interrogatories relate to a material matter? The gravamen of the charge was the failure of the Pullman conductor and porter, employes of the defendant, to assist plaintiff from the train when she arrived at her destination. The obligations assumed by their principal did not end until she had safely disembarked from the car, and it was the duty of the company, by and through its employes, to assist her from the car to a place clear of trackage or passing trains, or, in other words, to the depot. The willingness of the conductor and porter to perform that duty was not sufficient. They did not do so. They had knowledge of her physical infirmity, and it was utterly immaterial whether the conductor and porter were willing to assist the plaintiff or not. It was their duty to do so unless relieved therefrom by the act and conduct of the plaintiff, and it was the failure to perform such duty that constituted the proximate cause of the injury to her health and resultant damages sustained thereby. The Pullman conductor and porter were charged with and had knowledge of her illness from the time plaintiff was received on the car as a passenger at Billings, Mont., or more than 24 hours before she reached her destination, and that she would require assistance to disembark at her destination. The plaintiff testified that, before starting on her trip, she sent a telegram to her friends in Minneapolis to meet her upon the arrival of the train. She was interrogated on direct examination, and answered as follows: "Q. Now, do you recollect of any arrangement having been made for your reception at Minneapolis before you arrived there, any arrangement through the conductor, the Pullman conductor there? Were you present when any arrangements were made? A. Yes; he was in the drawing room all of

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the time that the arrangements were made, and we wanted to send telegrams to our friends, and we wanted to send telegrams to see about an ambulance being there, that an ambulance of our own would be there at our own request. And we wanted to pay for the telegrams, and he said— Q. What did he say about that? A. He said he would send the telegrams, and, when we offered to pay it, he said the company would pay for it. Q. What did you say about your friends? Were they telegraphed to at that time? A. No; our friends were not telegraphed to at that time. He said he would just make the arrangements about the ambulance, and that would be sufficient without anybody meeting us. Q. Without anybody meeting you? A. Yes; without anybody meeting us. Because we were not sure about anybody meeting us. We had telegraphed, but we had not received any reply. Q. Who did you telegraph to when you speak of telegraphing to friends? Were they ladies? A. Yes, sir. Q. How many? A. Two." This evidence was corroborated by the nurse in charge of the plaintiff, who further testified that, after such conversation, the conductor informed her that the arrangements had been made, and that she and her patient need not worry about it any further.

[10] The effect of this evidence was to make the conductor her agent. She, and not the company, was acting through him in the matter of obtaining an ambulance; nor could he bind his principal in the matter of telegraphing to her friends, for such telegraphing is not shown to have been within the scope of his agency or employment, nor was the company obligated by its contract as a carrier to furnish an ambulance, or to procure her friends to meet her.

[11] This evidence, though practically undisputed, does not even tend to show a waiver by the plaintiff of the primary duty of the company to assist her out of and from the car to the depot at her destination. We are therefore of the opinion that the failure of the jury to specifically answer these questions, and even though such failure be construed as a special finding in favor of the defendant, yet it would not defeat the recovery for the failure to perform, without her fault, a duty owing to her by the company was shown, and it is immaterial whether such failure be one of omission or of commission.

[12] 7. When the train arrived at Minneapolis, it stopped for five minutes, the porter assisted the other passengers from the car, and the conductor went to look for the friends of the plaintiff and the ambulance. He found neither, but procured an invalid chair at the depot to be brought by the depot porter and went back to the car. In the meantime a Great Northern passenger train had pulled into the depot on a track between the one to which the Pullman car was attached and the gateway of the depot.

The invalid chair was carried around the end of that train a further distance, and more time was consumed in getting it to the train by reason of such obstruction. When the depot porter got around the end of the Great Northern train with the chair, the train to which the Pullman was attached, having made its usual stop, was starting. The defendant introduced evidence tending to show that the porter of the Pullman car then pulled the bell cord, but the engineer failed to stop the train. The jury evidently did not attach much weight to this testimony, for by their answer to the fourth interrogatory they found that after the train started neither the Pullman conductor nor the porter attempted to stop the train by pulling the signal cord or otherwise. Interrogatory No. 14 was as follows: "After plaintiff got on the train at Billings, did the conductor of the Northern Pacific Railway Company's train have knowledge that plaintiff was on the train in a sick and helpless condition?" To this question the jury answered "No." Returning to question No. 2, the jury by its answer found that, considering the condition of plaintiff's health, it was necessary to have a stretcher or some other suitable means in order to assist plaintiff to disembark safely and without danger to her health. It is true that the Pullman conductor did not find a stretcher at the depot in Minneapolis, but an invalid chair was produced. No effort was made to hold the train as found by the jury so that plaintiff could safely disembark, nor, as the jury found, was the conductor of the train notified of plaintiff's predicament. Had he been so notified, we think upon principles of humanity he would have delayed the train three or four minutes, and the jury found that would have been sufficient, by their answer to Interrogatory No. 17, to have enabled the porter to have carried her out of the car and deposited her in the invalid chair. The failure to so inform the conductor of plaintiff's condition and the necessity of assisting her to disembark was evidence of negligence for which the company was liable. We see no conflict in the special findings and the general verdict, or inconsistency in the findings themselves. The trial court did not err in overruling defendant's motion for a new trial on this ground, nor in denying defendant's motion for judgment on the special findings.

[13] 8. It is assigned as error that the verdict and special findings are not supported by the evidence. We are of the opinion that this assignment cannot be sustained, and that the discussion of the other questions sufficiently disclose our reasons therefor without going specifically or more fully into this question.

[14] 9. The defendant alleged misconduct on the part of the jury in the method of arriving at the amount of their verdict, and relies upon the affidavits of E. H. Campbell

and J. F. Mills, two of the jurors, in support of its contention, and who deposed that "it was agreed among the jurors that each jurymen should set down the amount of plaintiff's recovery, and that the amounts so set down by the respective jurors should be added together and the sum divided by twelve, and the result or quotient should represent the amount of plaintiff's recovery in said cause," and that, acting in pursuance of this agreement, the said jurors set down the amounts they respectively found for plaintiff, and then added these respective amounts together, and divided the sum by 12, and the result or quotient was thereafter voted as the amount of plaintiff's recovery, and so found by their verdict. No counter affidavits were filed. The question as to whether or not the verdict was a quotient verdict, and, if so, whether a new trial should be granted for that reason, is not properly presented by this record. We have no statute like that of California and some other states (*Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, 35 Am. St. Rep. 181), permitting misconduct of a jury to be shown by a juror's affidavit. In Colorado a statute provided that certain misconduct of jurors may be shown by their affidavits, and in *Pawnee Ditch, etc., Co. v. Adams*, 1 Colo. App. 250, 252, 28 Pac. 662, 663, in discussing the question, the court say: "The difficulties which juries experience in arriving at a conclusion in cases where the damages to be assessed are unliquidated, and to be measured by what may be gathered from the varying opinions of witnesses, have led the courts to permit these verdicts to stand whenever the proof has satisfied them that the finding has subsequently been voted on and accepted by the jury as the legitimate expression of their deliberations. In most cases very little proof in this direction has been required." This seems to be the general rule, and was reaffirmed and applied by the Supreme Court of that state in *Greeley Irr. Co. v. Von Trotha*, 48 Colo. 12, 108 Pac. 985, 989. In the case here it appears by the affidavits that the result or quotient after having been found was voted on by the jurors and ratified as the amount of plaintiff's recovery and so returned by their verdict. But, as we have no statute like the one above referred to, it is unnecessary to determine what the correct rule in such case would be. It was expressly held by this court in *Bunce v. McMahon*, 6 Wyo. 24, 41, 42 Pac. 23, that the affidavit of jurors cannot be received to impeach their verdict. It was in effect, so held in *Gustavenson v. State*, 10 Wyo. 300, 68 Pac. 1006. That being the settled rule in this state, the affidavit of the jurors relied upon by the defendant could not be received and considered by the trial court to impeach their verdict on the ground of their misconduct. They were not competent proof of the facts therein deposed to, and the court prop-

erly refused to grant a new trial upon this ground.

[16] 10. There are several assignments of error predicated upon the alleged misconduct of plaintiff's counsel.

First. After the evidence was all given and the case closed, and the court was about to instruct the jury, the plaintiff's counsel brought into court two suit cases, one a black leather suit case, and the other a light red suit case, and exhibited them to the jury, and stated in the presence and hearing of the jury that said suit cases were the suit cases referred to in plaintiff's testimony in said case. Upon exception being taken to such alleged misconduct, it is recited in the bill as follows: "By Mr. Stotts: The plaintiff states in reply to what has been noted above that when we closed the proceedings in this case last Saturday evening, and while the court was in session and the jury impaneled and sitting in the box, and while one of the witnesses for plaintiff was being examined, counsel for the plaintiff stated to the attorney for the defendant that he would produce the suit cases so that the color of them might be known, and that counsel for the defendant requested that that be done. And for that reason, and that reason only, they were produced in court at this time. And, before the court entered upon the instructions to the jury in this case, counsel for plaintiff offered to prove by plaintiff that these were the suit cases, referred to. By Mr. Kutcher: Counsel for defendant still excepts to the misconduct of counsel aforesaid, and further excepts to the misconduct of counsel in the statement made at this time. By the Court: The suit cases are not in evidence, and will not be considered by the jury."

Second. During the opening argument of plaintiff's argument to the jury he used the following language: "Why do we enter—why do we enter—gentlemen, a sleeping car, and pay those exorbitant prices, if it is not that we will be treated fairly and a little better?" Whereupon the defendant's counsel at the time excepted to said language, as follows: "Defendant excepts to the remarks of counsel in stating that people are compelled to pay exorbitant prices for this service." Plaintiff's counsel then said: "Well, they are, and they have been compelled by the railway commission in some states to reduce their rates." To which last remark exception was reserved and the court refused upon request to instruct the jury to disregard it.

Third. During his opening address, the plaintiff's counsel used the following language to which exception was taken, and also to the refusal of the court upon request to instruct the jury to disregard the same, viz.: "It is for you, gentlemen, to judge—it is for you, gentlemen, to judge, whether those (referring to plaintiff and the witness Miss

Hubbard) are committing perjury, or whether he is (referring to defendant's conductor). He has got to hold his job."

Fourth. During the closing argument plaintiff's counsel used the following language to the jury, viz.: "Charley says we are not entitled to anything. We will get something out of that bloated corporation with its millions, we will get something out of it." This language was excepted to, and the court was requested to instruct the jury to disregard it. The court then stated as follows: "The jury will decide the case on the evidence, and not on the remarks of counsel." The bill of exceptions recites that "to the omission of the court to instruct the jury to disregard such remarks, and to restrain counsel in the use of such language the defendant duly excepted."

Fifth. During the closing argument counsel for plaintiff used the following language: "They [referring to the defendant] have the right to go over your land. They can move your house out of their way, and do it, of course, by paying the damages. They have their rights. They don't care for the people. They go where they want to." Objection was made and exception taken to these remarks, and the court was requested to instruct the jury to disregard them, whereupon the court stated: "The jury shall not take into consideration anything outside of the evidence in this case." It is also recited in the bill that "to the omission of the court to restrain counsel in the use of such language the defendant duly excepted."

Sixth. Referring to the special interrogations which were submitted to the jury, counsel said in his closing remarks to the jury: "And it would be well for you to go over the instructions of the court thoroughly, and then study these questions thoroughly, because they catch." Objection was made and exception taken to this language. The court made no ruling or statement to the jury in respect thereto, and to its refusal so to do, or to restrain counsel and instruct the jury to disregard such remarks an exception was reserved.

Without discussing at length the first alleged misconduct of plaintiff's counsel in bringing the valises into the courtroom and giving his reasons for so doing in the presence of the jury, we are of the opinion that he had a right to have his reasons for bringing them there made a matter of record in answer to defendant's objection, and to show that he intended no misconduct. They were brought into the courtroom with the assent and at the request of the defendant's attorney so that the color might be known, and in that state of the record the defendant is not in a position to urge prejudicial misconduct in producing them for inspection, or in the offer to prove that they were the same valises referred to in the evidence of a former witness. Furthermore, the court said in the

presence of the jury that the suit cases were not in evidence, and would not be considered by them. We are of the opinion that the prejudice, if any, which might have arisen from bringing the suit cases into court, was removed by the court's direction to the jury. The abuse of the right of argument by counsel to the jury has been the subject of much litigation. It is said at section 958, *Thompson Trials* (2d Ed.), that "all courts agree that it is the duty of the presiding judge, either of his own motion, or upon the request of the opposing party, or his counsel, to interpose and check the party or his counsel in an improper or prejudicial line of argument." If the court when requested fails or refuses to interfere and administer the proper rebuke or correction, then such failure or refusal may be made the ground for a new trial.

[16] The question as to whether the counsel should be so checked and cautioned is one resting largely in the sound discretion of the trial court (section 958, *Thompson Trials*); and, unless it affirmatively appears from the record that there has been an abuse of discretion in that respect, this court would not be justified in awarding a new trial.

[17] It will be observed with reference to the remarks objected to under the fourth ground of complaint that the court said: "The jury will decide the case on the evidence and not on the remarks of counsel." And in response to the objection to the language objected to under the fifth ground of complaint the court again said to the jury as follows: "The jury shall not take into consideration anything outside of the evidence in this case." The effect of this language we think was to convey to the minds of the jury that they were limited in considering the case and arriving at their verdict to the evidence and to exclude the remarks objected to. The jury was also told in the charge that it should decide the issues alone upon the law as given by the court and the facts proven upon the trial.

The second alleged ground of complaint we think is without merit. The counsel for plaintiff certainly had a right to comment on the reason for the payment for Pullman car accommodations. That the price exacted for the same was denounced as exorbitant was not prejudicial. It was the expression of an opinion, and grew out of the evidence as to the treatment of plaintiff as a paid passenger. We think it was within the legitimate scope of argument, and that the objection was without merit, and would in the heat of argument have a tendency to draw forth the further remark in answer thereto to which objection was made and exception taken.

The third alleged ground of complaint is likewise without merit. The remarks were with reference to a conflict of the evidence given by two witnesses, and which of them the jury would believe. While the language

might have been couched in softer terms and the same meaning conveyed, yet we do not think the language exceeded the rights of argument.

[18] The comment upon the interrogatories was not prejudicial. As shown by the record, they were submitted to the court in part by each of the parties through and by their respective attorneys, and by the court submitted to the jury. It is a well-known fact that attorneys in their zeal to win a case often draw up such questions so skillfully that jurors without the perception or skilled mind of the attorney are unaware of the importance of exercising great care in answering the questions without caution as to the effect of the answer returned to each. This is a legitimate subject of comment to the jury based upon the evidence and the theory deducible therefrom. We do not think as here contended that the comment complained of was to the effect that the jury should answer the questions so as to harmonize with the general verdict regardless of the evidence, but to so answer the questions upon the evidence that there should be no conflict. In effect counsel told the jury to carefully read the instructions given by the court and then study the questions carefully. We cannot believe that the words "because they catch" were intended as a reflection upon the court. It does not so affirmatively appear, but rather as a method of arousing in the minds of the jury the necessity for that degree of care which might preserve their verdict.

It may be said generally as to misconduct of counsel such as here complained of that they are questions which must be preserved by exception and motion for new trial in the court wherein the alleged misconduct occurred. It was so done in this case, but the judge who presided at the trial, having had the parties before him, was better able to say whether the party complaining was prejudiced or not. The conclusion reached by him in denying a motion for a new trial was based in part at least on his personal observation. At the time of the alleged misconduct, he told the jury not to consider anything outside of the evidence, and to decide the case upon the evidence, and not on the remarks of the counsel. This we think was not only specific, but general, in its application, and it does not appear that the counsel persisted in repeating or enlarging upon any specific remarks or continued any line of argument after objection except as to the exorbitant charges of the Pullman Company which as we have already stated was in response to an objection which was unnecessary and without merit.

[19] 11. The court said to the jury in its charge: "It is not denied that the plaintiff did suffer inconvenience, distress, anguish of mind, pain, delay, and expense by being carried past her destination, but, before you can render a verdict in her favor, you must

and that these matters are directly attributable to some neglect or wrongful act on the part of the defendant company, its agents, or employes." This instruction was based upon the evidence, and not on the issues as made by the pleadings, for in an earlier part of the instructions the jury were told what the issues were as made by the pleadings. The plaintiff's evidence showed that she did suffer inconvenience, distress, anguish of mind, pain, delay, and expense by being carried beyond her destination. As opposed to this evidence, John Davis, witness for defendant, testified that she was in good spirits, and even joked about riding in a baggage car on her return trip from St. Paul to Minneapolis. Assuming that she did so joke, that fact of itself did not negative inconvenience, delay, and expense by reason of being carried past her destination, and as to distress, anguish of mind, and pain the negation by Davis' testimony was so slight that in our judgment it would not warrant this court in holding the above statement of the court to be erroneous and prejudicial. We have examined the entire charge, and think it fairly stated the law of the case to the jury. We perceive no prejudicial error. The judgment will be affirmed.

Affirmed.

BEARD, C. J., and POTTER, J., concur.

PLEASANT GROVE CITY v. LINDSAY.

(Supreme Court of Utah. April 11, 1912. On Application for Rehearing, June 10, 1912.)

1. INTOXICATING LIQUORS (§ 11*)—REGULATION—ORDINANCES.

Laws 1911, c. 106, § 68, providing that nothing therein shall prevent any city from enacting restrictions upon the traffic in intoxicating liquors in addition to, but not in conflict with, the provisions of the act, applies to future enactments only, and does not operate to keep alive existing ordinances not in conflict with the act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.*]

2. INTOXICATING LIQUORS (§ 11*)—REGULATION—REPEAL OF ORDINANCES—"TRAFFIC."

Laws 1911, c. 106, comprehensively regulating the liquor traffic, repealed by implication all municipal ordinances relating to the sale of intoxicating liquors existing on May 9, 1911, when it went into effect, regardless whether the municipality was "wet" or "dry" territory; the word "traffic" as used in the statute applying to illegal as well as legal sales.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7055-7056.]

3. INTOXICATING LIQUORS (§ 6*)—LEGISLATIVE CONTROL.

The Legislature has power to regulate or prohibit the liquor traffic in municipalities and to take control of such traffic away from municipalities.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.*]

4. INTOXICATING LIQUORS (§ 11*)—ORDINANCE—PROSECUTION—REPEAL OF ORDINANCE.

Where a municipal ordinance relating to the liquor traffic was repealed by statute pending an appeal from a conviction for its violation, the prosecution was thereby terminated and the defendant was entitled to a dismissal.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.*]

5. CRIMINAL LAW (§ 15*)—REPEAL OF ORDINANCE—PENDING PROSECUTION.

Comp. Laws 1907, § 2492, providing that the repeal of a statute will not affect any action or proceeding commenced under or by virtue of the statute repealed, has no application to municipal ordinances or any proceedings instituted under them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1, 16-20; Dec. Dig. § 15.*]

Straup, J., dissenting.

Appeal from District Court, Utah County; J. E. Booth, Judge.

Joseph Lindsay was convicted of selling intoxicating liquors in violation of city ordinance, and he appeals. Reversed and remanded, with directions to dismiss.

M. E. Wilson, of Salt Lake, for appellant.
A. E. Moreton, of Salt Lake, for respondent.

FRICK, C. J. Appellant, on the 13th day of April, 1911, was charged with having violated the provisions of a certain ordinance of Pleasant Grove City, Utah county, Utah, passed and in force after October 4, 1909. In the complaint it is charged that the offense was committed on April 3, 1911, and, upon a trial in the justice court in and for said city, appellant was convicted and sentenced under said ordinance. He appealed to the district court of Utah county, where he was again convicted and sentenced.

The ordinance in question, so far as material here, reads as follows: "It shall be unlawful for any person to manufacture, sell, give away, barter, deal out, or otherwise dispose of any malt, spirituous, vinous, fermented or other intoxicating liquors within the limits of Pleasant Grove City. Any person who shall violate any of the provisions of this ordinance * * * upon conviction thereof shall be punished by a fine of not less than fifty nor more than one hundred dollars, or by imprisonment in the city jail for no more than one hundred days or by both fine and imprisonment."

The district court in effect instructed the jury that said ordinance was valid and in full force and effect. Appellant excepted to said charge and appeals to this court upon the sole ground that said ordinance, at the time of the trial in the district court, was not a valid and enforceable ordinance. The invalidity of the ordinance is urged upon various grounds, but, for reasons unnecessary to be stated, we shall consider only one ground, namely, that, when this case was tried in the district court, said ordinance had been repealed by chapter 106, p. 162,

Laws of Utah 1911, which went into effect May 9, 1911, and has been in effect throughout this state ever since. Chapter 106 aforesaid is a very comprehensive and most sweeping regulation of the manufacture, sale, barter, giving away, or otherwise dealing in or disposing of intoxicating liquors within the state of Utah. The act authorizes that the traffic may be licensed in the cities and incorporated towns of this state until the qualified electors thereof, as provided in the act, shall direct otherwise; and, in all other places outside of the cities and towns aforesaid, the traffic in intoxicating liquors is absolutely prohibited unless the qualified electors shall authorize the traffic under the terms and conditions imposed by the act. Every city and incorporated town, and every county district outside of any city or town, is, for the purpose of holding elections under the act, made a voting unit within which a majority of the qualified electors voting at any election may determine the status of such city, town, or county district with regard to whether liquors shall be sold therein or not. The act provides for search and seizure, and also provides in what manner and by what courts or tribunals licenses shall be issued, and fixes the qualifications of the persons to whom they may be granted. It also provides the penalties for violations of any of the provisions of the act, and expressly provides that, in all cases upon a second conviction, the penalty must be increased, and certain other consequences must also be imposed by the court wherein conviction is had. The validity of chapter 106 is not assailed nor questioned, and, for the purposes of this decision, we shall assume that the ordinance in question was duly passed and published as required by law. The only questions that we shall consider, therefore, are: (1) Was chapter 106 in force and effect when appellant was tried and convicted in the district court; and (2) if so, did said chapter by implication repeal the ordinance in question?

Section 25 of article 6 of the Constitution of this state, so far as material here, provides: "All acts shall be officially published, and no act shall take effect until so published, nor until sixty days after the adjournment of the session at which it was passed."

The Secretary of State certifies under his hand and the great seal of the state of Utah that chapter 106 was officially published on April 26, 1911, and that the session of the Legislature at which the act was passed adjourned without date on March 9, 1911. Under the constitutional provision, the act, therefore, went into effect, unless otherwise provided therein, 60 days after March 9, 1911. By referring to the act itself, it is disclosed that all other provisions with regard to the regulation of the liquor traffic passed prior thereto and in force in this state are expressly repealed thereby. Nor

is there any saving clause in the act whatever with regard to pending actions, or that prosecutions may be continued and penalties imposed except as in the act provided.

[1] All that is found in the act in that regard is found in section 68 thereof, which reads: "Nothing in this act contained shall prevent or prohibit any city council, board of trustees or board of county commissioners from enacting restrictions upon and regulations of the traffic in intoxicating liquors *in addition to but not in conflict with the provisions of this act.*" (Italics ours.) A careful reading of this section shows that the Legislature had reference only to future enactments, and not to existing ordinances or past acts. The language of the act is that the authorities referred to therein shall not be prohibited from "enacting restrictions." This has reference to future enactments only. If the Legislature had intended to recognize existing ordinances or past acts, it could easily have indicated that intention by the use of proper language in the very section we have quoted. Not having done so, and, further, by clearly indicating by the language used that it was the intention to authorize only future enactments upon the subject, we are not authorized to interfere with the intention of the Legislature when such intention is once ascertained.

[2] The act also contains conditions which require elections to be held in the cities, towns, and county districts outside of such cities and towns in the counties at large to determine whether the traffic in intoxicating liquors shall be regulated by licensing the same or whether it shall be entirely prohibited. It is therefore provided that all licenses which were granted under the existing law, which, by their terms, shall be in force on the 1st day of October following such election, shall terminate on that day, and that the unearned portion of the license money shall be refunded to the licensees, and their right to sell intoxicating liquors shall thereupon cease under the old law. The act also provides that elections may be held in any voting unit where authority to sell liquor exists, and, if a majority of the qualified electors of such voting unit vote "against sale," the traffic in intoxicating liquors in said unit must cease on the 30th day of September following such election. The act provides that all elections held under it must be held in the month of June in the year in which they are held. Such elections may be held once in two years in any voting unit whenever a certain per cent. of the qualified electors thereof petition the authorities to call an election to determine the question of whether intoxicating liquors shall or shall not be sold within the voting unit aforesaid. It is apparent, therefore, that the right to sell may be terminated in any voting unit at any election, and thus the act makes provisions that those who are engaged in the traffic may have sometime aft-

er the election to adjust their business so as to comply with the law.

Let us assume that in Pleasant Grove City the sale of intoxicating liquors was prohibited, as appears from the ordinance in question, and that the electors in that city at an election held in June, 1911, voted to continue that policy in force, and that in June, 1913, those same electors shall again vote, and in doing so shall change the policy from that of "against sale" to "for sale," will any one seriously contend that, under such circumstances, the provisions of the act were not in force in said city until the policy was changed as aforesaid? It must not be assumed that it is the result of the elections which are provided for in the act that puts the provisions of the act as a whole in force or effect. The only effect the elections have, where a change is made thereby, is that the provisions of the act which are especially intended to meet such changes then become effective in accordance with the changed conditions produced by the elections. The act as a law is, however, in force in any city or town in any event. The mere fact that chapter 106 provides for changes in certain cities or towns, and that, in case such changes take place, it is stated or repeated in the act itself that the provisions thereof shall be in full force and effect after such changes take effect, does not prevent the act from having become effective before such changes were made. Indeed, the whole purport of the language of the act is to the contrary.

[3] Nor can there be any doubt that the Legislature had full power to take the matter of regulating or prohibiting the liquor traffic from the control of the municipalities of this state. *Woolen & Thornton*, in their work entitled, "The Law of Intoxicating Liquors," in volume 1, § 117, state the law in this regard in the following language: "Municipalities—cities and towns—are simply smaller divisions of a state for its better government. They are the creatures of the Legislature—may be created or may be legally annihilated. To them the Legislature may confide its police powers for the regulation of local affairs and concerns, and, when given, it may be taken away without any cause whatever."

By adopting chapter 106, the Legislature of this state simply provided methods for the entire regulation of the liquor traffic, and all cities and towns are prohibited from interfering with or permitting the traffic except upon the terms and conditions provided for in the act. The situation in this state, therefore, is much the same as it was in the state of Michigan when, in the year 1887, the Legislature of that state passed a law for the regulation of the liquor traffic. The Supreme Court of Michigan in *People v. Furman*, 85 Mich. 110, 48 N. W. 169, held that, in view that there was no saving clause in the act, all city ordinances relating to the

liquor traffic existing in the cities were repealed by implication by said act. While the Michigan act was perhaps less sweeping in its provisions, and while it did not provide for elections as does chapter 106, yet, so far as the effect of existing ordinances is concerned, no distinction in principle is perceived between the Michigan act and our own. The Michigan case is therefore squarely in point upon the question of the repeal by implication of all ordinances regulating or prohibiting the sale of intoxicating liquors which were in force when chapter 106 took effect. The same rule is announced in *Naylor v. Galesburgh*, 56 Ill. 285; *City v. Clark*, 68 Mo. 588; *Barton v. Gadsden*, 79 Ala. 495; *Rutherford v. Swink*, 96 Tenn. 564, 35 S. W. 554; and 1 *Lewis' Sutherland Stat. Const.* § 286. See, also, *State v. McCulla*, 16 R. I. 196, 14 Atl. 81.

[4] If, therefore, the ordinance in question was repealed by implication by chapter 106, appellant's conviction under that ordinance must fall because it had ceased to exist before the judgment in the district court was entered.

If, however, chapter 106 had not gone into effect until after judgment was entered in the district court, this court could not reverse upon the sole ground that the ordinance was repealed by chapter 106, for the reason that the district court would then have been the court of last resort, and, the ordinance being in effect when the judgment was entered, the judgment could not be assailed because the ordinance was repealed after judgment. In 1 *Lewis' Sutherland Stat. Const.* (2d Ed.) § 286, the rule is stated thus: "If a penal statute is repealed pending an appeal and before the final action of the appellate court, it will prevent an affirmance of the conviction, and the prosecution must be dismissed or the judgment reversed. A final judgment before repeal is not affected by it."

If, for the purposes of this case, therefore, we treat the district court of Utah county as the final court of appeal, then it follows that because chapter 106, which repealed the ordinance in question, went into effect long before the case was tried and determined in the district court, the case, under the rule above stated, should have been dismissed by that court and appellant discharged. The reason for holding the district court the court of last resort, for the purposes of this case, arises out of the fact that the objection we have discussed, namely, that the ordinance was repealed by chapter 106, could only be raised in this court if such repeal took effect before the judgment appealed from was entered, as stated by Mr. Lewis in the section we have quoted from. If the ordinance was in force when the judgment was entered, the judgment could not be assailed, for the reasons here-in discussed, although it was repealed there-

after; but, if the ordinance was not in force at that time, then the judgment is not based on a valid ordinance which was in force when the judgment was entered, and hence the judgment must fall.

[6] Nor is the judgment in this case saved by Comp. Laws 1907, § 2492, which provides: "The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, nor any action or proceeding commenced under or by virtue of the statute repealed." Similar, if not identical, provisions are found in many of the states of the Union, and, so far as we have been able to learn, it has universally been held by the courts that such provisions were not intended to have, and do not have, any application to municipal ordinances, or to any proceeding instituted under them. The courts universally hold that, in case an ordinance is repealed, either expressly or by implication, as in the case at bar, all prosecutions based on such ordinances are terminated. This precise question was before the several courts and is passed on by them in all of the cases we have heretofore cited, and to which we refer. We are of the opinion, therefore, that, in adopting chapter 106, it was the intention of the Legislature to supersede all legislation with regard to the liquor traffic, whether local or general. Nor can we perceive any reason why such a course was not both proper and practical. The question of the power of the cities and towns of this state to prosecute offenders under the act, or to what extent such cities and towns may pass ordinances prohibiting or regulating the traffic in intoxicating liquors and prosecute violators thereof, is not now before us, and we express no opinion with regard thereto.

In view that the conclusion reached results in a dismissal of the prosecution, it is not necessary for us to pass upon the other questions raised by appellant. Nor would it subserve any useful purpose if we undertook to discuss them.

The judgment is reversed, and the case is remanded to the district court of Utah county, with directions to dismiss the action and to discharge the appellant.

MCCARTY and SHAUP, JJ., concur.

On Application for Rehearing.

FRICK, C. J. Counsel for respondent have filed a petition for a rehearing in which the result declared by this court is vigorously assailed. Upon a careful reading of the petition and argument in support thereof, we have been forced to the conclusion that the decision is criticised more for what counsel assume is "indicated" than for what we said or decided. The burden of the argument is directed to the proposition that we erred in holding that, in adopting chapter 106 without a savings clause, the Legislature intended to and did repeal all ordinances

relating to the sale or traffic of intoxicating liquors, and that no convictions based upon the old ordinances which occurred since chapter 106 went into effect are legal. Counsel contended that such may be the legal effect of said chapter in what they are pleased to call "wet territory"—that is, in those cities and towns where the sale of liquor was permitted when said chapter went into effect—but that such is not the case in "dry territory"—that is, in those cities and towns where the local laws or ordinances prohibited the sale of such liquors under the old law. We cannot follow counsel in their reasoning. The repealing clause of chapter 106 is couched in general language, and hence, prima facie at least, applies to all cities, towns, and voting units referred to therein, and not only to some of them. Moreover, chapter 106 must have gone into effect in Pleasant Grove City, the respondent, or no election could have been held therein as was done under the mandatory provisions of section 51 of said chapter on the 27th day of June, 1911, to determine the question of whether the electors of said city should vote for or against sale. What was true of Pleasant Grove City was likewise true of every other city and town in the state of Utah.

From a consideration of all of the provisions of chapter 106, one thing is made clear, and that is that the regulation or prohibition of the liquor traffic was to be placed into the hands of the voters of each locality by dividing the state into voting units so that the question of sale or no sale could be determined by a majority of the voters in each voting unit. In connection therewith it is also clear it was intended that the provisions of chapter 106 should govern and control the traffic in intoxicating liquors with the right of cities and towns to pass and enforce ordinances in accordance with the provisions of said chapter 106. This is in effect conceded by counsel, but, as we understand them, they now contend that there was no liquor "traffic" in dry territory, hence the repealing clause in chapter 106 does not apply to such territory. The legal effect to be given chapter 106 would thus be made to depend upon one word, namely, "traffic." We cannot assent to such a rule of construction. But, even though it depended upon the word "traffic," there may be, and often is, an illegal or forbidden traffic, as well as a legal or authorized one. Traffic in one sense means no more than sales, and we think all will yield ready assent to the proposition that there may be illegal as well as legal sales of liquor. Indeed, the whole purpose of chapter 106 is to provide ways and means whereby the voters through the proper officers can either authorize or forbid the sale (traffic) of intoxicating liquors in their respective voting units. All the provisions of chapter 106, therefore, were intended to be in full force and effect whether the voting unit

was "wet" or was "dry" territory. That such was the purpose of the Legislature is, we think, clearly established, not alone from what is said in the opinion, but also from the fact that, on the same day on which chapter 106 was approved, amendments to all of the city and town charters were also approved.

By referring to section 206x41, Laws Utah 1911, p. 212, c. 126, it will be seen that the provisions of that section were modified so as to make them conform to the provisions of chapter 106 so far as cities of the first, second, and third classes were concerned, and by reference to section 302x6, Laws of Utah 1911, p. 220, c. 123, it is made apparent that the same thing was done in so far as incorporated towns are concerned. If the Legislature had merely modified sections 206x41 and 302x6, and had re-enacted them as modified, then ordinances that were passed under those sections before they were modified would not have been repealed except so far as they were repugnant to those sections, and, if nothing more had been done, we should not have held them repealed. The Legislature, however, did much more than that. It adopted an entirely new method or system of dealing with the liquor traffic, both as to its regulation and as to its prohibition. In doing so, all laws upon the subject were repealed, and thus an intention was manifested to include the old ordinances within such repeal. It seems to us that no fair-minded person can arrive at any other conclusion.

But it is contended that it may be inferred from what is said in the opinion that the cities and towns of this state are shorn of their power to pass ordinances to regulate or to prohibit the traffic in intoxicating liquors and to impose penalties for the violation thereof. Even though we had not in express terms negatived the intention to so hold, the contention would, nevertheless, be without any basis. We had a right to assume, as we now assume, that the authorities of the cities and towns, as well as those of the counties, will enforce the laws enacted by the Legislature so far as is within their power to do so. We also assumed that all the authorities would have recourse to chapter 106 and also to sections 206x41 and 302x6 as amended, and would consider the provisions of all of them as in pari materia, and, after harmonizing those provisions, as must be done, would adopt and enforce ordinances upon the liquor question as contemplated by the provisions aforesaid. The legislative intent that the provisions of chapter 106 be rigorously enforced is made apparent on every page of the act, and it is made especially so by what is said in section 68 thereof, when considered in connection with sections 206x41 and 302x6. It is also made apparent that the Legislature intended that, where the sale is permitted, the traffic

should be strictly regulated, and, where it is prohibited, the law should be enforced by both the city and county officials whose duty it is to enforce the laws.

We desire to add that we did not refrain from expressing an opinion upon the foregoing questions because, as counsel seem to think, we entertained a doubt as to whether the city and town authorities could pass any ordinances upon the subject of regulating or prohibiting the traffic in intoxicating liquors within their respective cities and towns; but the reason we refrained was because the question was not involved. From what is said and intimated by counsel in their argument in support of the petition for a rehearing, they seem to think that, from what is said or left unsaid in the original opinion, we entertain some doubt respecting the authority of the city and town authorities to pass and enforce any ordinances with regard to the regulation or prohibition of the liquor traffic. In view of this, we deemed it our duty to say a few words upon the subject to dispel the doubt. The question is not whether cities and towns may adopt and enforce any ordinances, but the question is whether there are not some penalties and consequences provided for in chapter 106 that local courts cannot enforce because of lack of jurisdiction. That question will be passed upon when it comes to this court in the regular way.

The petition for a rehearing is denied.

McCARTY, J., concurs.

STRAUP, J. (dissenting). I think a rehearing should be granted. The only point decided by us is that the ordinance under consideration was repealed by implication by chapter 106, Sess. Laws 1911, and hence was not in existence when the defendant was tried and convicted in the district court. I am persuaded that our holding in that regard is erroneous, and that our opinion should be reconsidered and the presented questions of the invalidity of the ordinance on other grounds determined.

Prior to the Session Laws of 1911, the sale of and traffic in intoxicating liquors in this state were under a license system and under regulations and restrictions prescribed by statute and ordinances. Municipalities were given express authority to license, regulate, or prohibit the sale of intoxicating liquors. In pursuance of that authority, the ordinance in question was passed in 1909, prohibiting the sale of such liquors within the municipal limits. In March, 1911, the Legislature adopted what is known as a local option system. It provided that each city, town, and county unit, as defined in the act, "shall constitute a separate and independent local option unit for the determination for itself, whether the sale of intoxicating liquors shall be permitted or prohibited within

such town, city, or county unit"; county unit being all that part of any county outside of cities and towns. It further provided for an election to be held in June, 1911, which was mandatory to determine whether the sale of intoxicating liquors should be permitted or prohibited within any city, town, or county unit. It also provided that the question could again be submitted to the electors every two years thereafter on petition for another election. Numerous provisions are made for the sale, regulation, and restriction of intoxicating liquors, and the granting of licenses in city, town, and county units, where the electors have declared for the sale of such liquors. It also provided that "nothing in this act contained shall prevent or prohibit any city council, board of trustees, or board of county commissioners from enacting restrictions upon and regulations of the traffic in intoxicating liquors in addition to, but not in conflict with, the provisions of this act."

The laws of 1911 also provide that municipalities shall have the power "to license and regulate, or prohibit, the manufacturing, selling, giving away, or disposition in any manner, of any intoxicating liquor; provided no license for such purpose shall be issued by the city council of any city where the qualified electors of such city have voted 'against sale' of intoxicating liquors, and where the qualified electors have voted 'against sale' of intoxicating liquors, the city council of such city shall prohibit the manufacturing, selling, giving away, or disposition in any manner, of any intoxicating liquors, except the manufacture thereof as provided by law, and in any city where the qualified electors have voted 'for sale' of intoxicating liquors, such city council shall have the right to determine the amount to be paid for liquor licenses, as provided by law, and said licenses shall be subject to the same regulations as are required by the general laws of the state, and to provide such other reasonable regulations as such city council may deem advisable." Chapter 120, § 206x41.

The sections of the statute relating to the sale and regulation of intoxicating liquors, and the granting of licenses, were repealed, but the laws of 1911 expressly preserved the power of municipalities to enact restrictions upon and regulations of the traffic in intoxicating liquors in addition to, but not in conflict with, the provisions of that act, of course, in those cities and towns where the electors declared for the sale of and traffic in intoxicating liquors. It also preserved the power of municipalities to prohibit the sale of and traffic in such liquors in cities and towns where the electors declared "against sale," and in such case expressly made it the duty of the municipalities to prohibit the sale, etc., of intoxicating liquors within the municipal limits. Of this there can be no doubt.

Now the effect of our holding in the original opinion is that all existing ordinances of municipalities were ipso facto repealed, not in express terms, but by necessary implication, by the act of 1911. I think that holding too broad.

There being no express terms of repeal or annulment of existing ordinances, I think only such ordinances as are repugnant to or inconsistent with the provisions of the act of 1911 were rendered ineffectual and void by that act. The act of 1911 expressly preserving to and giving municipalities power to enact ordinances regulating and restricting the sale of intoxicating liquors, not in conflict with the provisions of that act, in municipalities where the electors have declared for sale of intoxicating liquors, and to prohibit the sale of such liquors where the electors declared against sale, I do not see how an existing ordinance is rendered ineffectual or void by that act, unless the ordinance is inconsistent with the provisions of the act, or the result of the electors as declared by them at an election held in pursuance thereof. The election in June, 1911, was mandatory. I therefore assume that an election was then held in the municipality, at which time the question was submitted to the qualified electors thereof, of whether the sale of intoxicating liquors should be permitted or prohibited within the limits of the municipality. The record does not show what the result of that election was. If the election of the municipality declared for sale, of course the ordinance in question prohibiting the sale of such liquors was rendered ineffectual. If, on the other hand, such electors declared against sale, then I do not see wherein the ordinance prohibiting the sale is, in such regard, annulled or affected. I, as a reviewing court, may do what perhaps the local court may have done—take judicial notice of the result of such election, and hence judicially know that the result was a declaration against sale. But I need not resort to that. The validity of the ordinance is assailed by the defendant, and I think it devolved upon him to show that the result was for sale, if such was the fact, and, in the absence of proof, should resolve the fact against him. I therefore assume the electors of the municipality declared against sale, and hence the existing ordinance prohibiting the sale was not in such particular annulled or affected. In such case it cannot well be said that the ordinance is repugnant to or inconsistent with the laws of 1911, for the Legislature expressly provided that, where the qualified electors have voted "against sale" of intoxicating liquors, the municipality shall prohibit the sale, giving away, or other disposition of intoxicating liquors. And, if the municipality has an ordinance covering the subject and one complying with the command of the Legislature, I do not see the necessity of declaring another. To say that the ordinance was repealed or annulled by the act

of 1911, but that the municipality after the act went into effect could redeclare or reenact the same ordinance, if the qualified electors voted against sale as I assume that fact to be, is, I think, inconsistent.

I therefore am of the opinion that a rehearing should be granted.

AMERICAN FORK CITY v. NICHOLS.

(Supreme Court of Utah. April 11, 1912. Application for Rehearing Denied June 10, 1912.)

Appeal from District Court, Utah County; J. E. Booth, Judge.

Theodore Nichols was convicted of selling intoxicating liquors contrary to an ordinance of American Fork City, and appeals. Reversed and remanded, with directions.

M. E. Wilson and E. A. Walton, for appellant. George P. Parker and E. E. Corfman, both of Provo, for respondent.

FRICK, C. J. Appellant was charged and convicted of the offense of having sold intoxicating liquors contrary to provisions of the ordinances of American Fork City, respondent herein. This case involves precisely the same questions which we have just decided in the case of Pleasant Grove City v. Lindsay, 125 Pac. 389, and upon the authority of that case the judgment must be reversed.

The judgment is therefore reversed, and the cause remanded to the district court of Utah county, with directions to dismiss the action and to discharge the appellant.

McCARTY and STRAUP, JJ., concur.

Application for Rehearing.

FRICK, C. J. For the reasons stated in the opinion on petition for rehearing in Pleasant Grove v. Lindsay, the petition for rehearing in this case is denied.

McCARTY, J., concurs.

STRAUP, J. I think it should be granted for the reasons stated by me on the petition for a rehearing in Pleasant Grove v. Lindsay.

STUART v. PEDERSON.

(Supreme Court of Utah. May 11, 1912. Rehearing Denied June 21, 1912.)

1. PLEADING (§ 214*) — DEMURRER — ADMITTING TRUTH — TRUTH OF FACTS PLEADED.

The allegations of a complaint must be taken as true for the purposes of demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

2. ASSIGNMENTS (§ 11*) — RIGHTS ASSIGNABLE — FUTURE PROFITS OR INTEREST.

Under a statute providing that all real and personal property of any person dying intestate without issue shall descend to his surviving widow, the surviving widow of a decedent owning a part interest in the proceeds of a patent and in the royalties to be paid thereon had an assignable interest in the decedent's rights at the time of his death.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 19-23; Dec. Dig. § 11.*]

3. PATENTS (§ 185*) — ASSIGNMENT — CONTRACT — CONSIDERATION.

An agreement between defendant and plaintiff's deceased husband that on her as-

signment to a purchaser of all her rights in a patent owned by decedent defendant would pay her one-fourth of the proceeds of sale and one-fourth the royalties to be received was supported by a good consideration.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 272-274; Dec. Dig. § 195.*]

4. STATUTES (§ 289*) — EVIDENCE OF FOREIGN STATUTES.

Under Comp. Laws 1907, § 3379, which provides that statutes or codes purporting to be published under the authority of another state proved to be commonly admitted in the tribunals of such state are admissible in this state as evidence of such law, proof that Mills' Annotated Code of Colorado, properly identified and in evidence, was used by lawyers in that state and used and cited by the Supreme Court, held to show that it was commonly admitted in the courts of Colorado as evidence of the written law of that state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 389, 390; Dec. Dig. § 289.*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by Nelle Bennett Stuart against John Douglas Pederson. Judgment for plaintiff, and defendant appeals. Affirmed.

In the year 1901 the defendant Pederson, having invented a repeating shotgun containing patentable improvements, and being then engaged in perfecting such improvements and the drawings therefor, entered into an agreement with one A. L. Bennett, who was a gun expert and a traveling salesman of sporting goods. The agreement was that, in consideration of A. L. Bennett undertaking to pay one-third of the expense of perfecting models, obtaining patents, and disposing of them to some manufacturer of guns, he should have a one-fourth interest in the gun and in the proceeds arising from the sale of the gun or the patents. It is admitted that Bennett put \$257.75 into the enterprise. It also appears that he wrote to various parties and gun firms who were engaged in the manufacture and sale of firearms with the view of getting some manufacturer of guns to take hold of the invention, manufacture the gun, and place it on the market. From some of these parties and firms he received favorable replies to his letters, one of which was the Remington Arms Company of New York. On November 2, 1902, Bennett died. His widow, plaintiff herein, thereafter (December 30, 1902) sent defendant, at his request, \$40 to help defray the expense of obtaining a patent for the gun. Some time prior to August 31, 1903, she again sent defendant \$60. On February 3, 1903, defendant obtained a patent. At that time he had pending in the Patent Office an application for another patent. He went to New York and continued the negotiations with the Remington Arms Company that Bennett, during his lifetime, had entered into with that company for the manufacture and sale of the gun. On August 3, 1903, the defendant and the Remington Arms Company entered into an agreement in which the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

arms company, in consideration of defendant agreeing to assign and transfer to it "any and all improvements which he has theretofore made and which he may thereafter make on the firearms shown and described" in the patent obtained, and in the pending application for patent, agreed to pay defendant \$6,000 cash and a royalty of 35 cents on each gun manufactured and sold. On the same day that this agreement was entered into, defendant assigned all his interest in the invention described in the patent obtained and all his right to the invention described in his application for patent then pending. The Remington Arms Company, knowing of Bennett's interest, insisted, as a condition precedent to the final execution of the contract above mentioned, that a confirmation of the contract be obtained from Bennett's widow, plaintiff herein. Thereupon correspondence immediately ensued between the company, defendant, and Mrs. Bennett regarding the desired confirmation of the contract. After considerable correspondence between the parties, some of which we shall hereafter refer to, a document confirming the contract was obtained from the widow, plaintiff herein, duly signed and acknowledged by her. This document, which was forwarded to the plaintiff by the defendant for her signature, and which, when signed, was by her returned to defendant, was so far as material here, as follows: "Whereas A. L. Bennett, deceased, * * * rendered John Douglas Pederson, of Denver, Col., certain financial and other assistances in developing a firearm covered by a certain patent to said Pederson, No. 719,955, and other pending applications, for which assistance said Pederson did agree to convey to said Bennett an undivided fourth part of said patents and profits accruing out of said patents, but which conveyances have never in fact, been made and the legal title is in said Pederson, and whereas, said Pederson has conveyed certain interests in said patents to the Remington Arms Company, of Ilion, N. Y., and made a certain contract with the Remington Arms Company * * * which contract is dated August 19th, 1903: * * * Now, in consideration of the premises and of one dollar, to me in hand paid by the Remington Arms Co., and said Pederson, I, Nellie Bennett, widow and sole heir of said A. L. Bennett, deceased, do hereby sanction and approve of all said transactions and look to said Pederson solely for whatever beneficial interest I may have in the premises. Dated August 31st, 1903. [Signed] Nellie Bennett."

In the course of the correspondence carried on between defendant and plaintiff leading up to the execution by plaintiff of the foregoing assignment, the defendant in a letter bearing date of July 20, 1903, said: "The Remingtons know nothing about the contract. You see if you do say that no legal written agreement exists you would be perfectly correct and will save much time and trouble;

also money. In this case I would be able to wind up the formal part of it at once, receive our money and make a proper division with you. Your saying that no written legal agreement exists does not mean that such an agreement is no longer binding, because it is as binding as ever. But you know that it is not necessary for any contracts between us two. We understood that in case of the sale of the gun you are to receive the whole of Mr. Bennett's share, which was to be one-fourth of the proceeds resulting from the sale of the gun; also one-fourth of the royalties. Now, you see, if I am left to settle this matter I can do so at once and give you all Mr. Bennett's share and you could divide it with whom you chose or keep it as you see fit. * * * What I would advise and like to have you do is this: Answer all their questions, but tell them that our agreement is merely a verbal one. Also send them a paper duly signed and witnessed giving me full power to act for your interests in this matter. Sign all papers, receive money for you, etc. You will appreciate the fact that we are partners in this matter * * * and that we must stand together in this deal. * * * The price agreed upon is six thousand dollars down in cash and a royalty of \$0.35 (35¢) per gun for each gun manufactured under my patents. The cash down isn't very much, but will keep us until the gun is on the market, then we ought to be all right." The defendant in another letter to plaintiff bearing date of July 24, 1903, said: "To-day both Remingtons and myself are writing you a third letter to Denver. * * * The only thing to wait for now in the sale of the gun to the Remington Arms Co. is the drawing up of the contract or assignment. I have intimated to them some time ago that there was no legal written agreement between us and that I had verbally full power to act for you in all matters pertaining to the disposal of the gun. * * * If this understanding had not been interrupted the deal would have been finished by the first week in July. * * * You know that between us no legal agreement is necessary, for we understand that in case of a sale you are to receive one-fourth (of the proceeds and royalties). Your saying that no contract exists does not make it invalid, as it would hold between us just the same. But as I said before and I know you will agree, that between us a written contract is entirely unnecessary." Again, on August 27th, four days prior to the execution of the assignment by plaintiff, the defendant wrote to plaintiff in part as follows: "Just received yours of August 25, refusing to sign the paper sent you. * * * I'll state the plain facts in a business way. The Remington Arms Co. refused to deposit any money to your or anybody else's order but my own. They say they are buying patents of John Douglas Pederson, the inventor, and are not acting as agents for Mrs. Bennett or any-

body else. * * * 'We merely want Mrs. Bennett's acquiescence in this matter as a satisfactory finish to the deal.' * * * Now, when Mr. Bennett became interested in the gun it was with the understanding that whatever I got out of it I was to divide with him. He to get one-fourth of the amount. The patents were taken out and developed by myself alone and I have sole power of assigning them. Thus this is, as the Remington Arms Co. says, a personal matter between Mr. Bennett and myself, with which they have no business. * * * The agreement between Mr. Bennett and myself was, that he was to bear one-third of the total cost of building a model and placing the gun on the market and disposing of it. He was also, as an influential man among shooters and gun firms, to use his influence and aid in the disposal of the gun. * * * Now, this agreement between us was for the sale of the patents which we were applying for at the time. Since then, while I've been here, I invented several improvements on the gun, so it is not now the same gun it was in Mr. Bennett's time. So he would legally have claim on only part of the gun which I am selling to the Remington Arms Co. I believe that you trusted me fully and I had decided to let all these go, and divide as you thought, giving you one-fourth of all money and royalties both on the old gun and on the new improvements. You see if the gun is a success they will be paying royalties on the new improvement patents after the original patents have expired. This was one of the conditions I fought for in the contract. Also in the contract with the Remingtons. As part of the consideration I am to assign them all the improvements I may in the future invent on this gun. So the royalties will last longer than seventeen years if the gun runs that long. * * * You see the royalties are to be paid to me, my heirs (in case of death) or assigns. So you have a full claim on your share of the royalties, no matter whether I die or not. The Remington Arms Co. do not stop payment of royalties if I should die, do they? And just so long as they are payable you share in them. Now, Nellie, I think you will see that if I wanted to be unfair to you I could have done so long ago and legally I would have been unassailable. But I was priding myself on doing the thing and then settling your share on you when it was done. Though my intentions are the same as formerly, I am very much hurt to think that you have recalled what confidence in me you had and at the last minute want to block the deal."

The Remington Arms Company paid defendant \$6,000 cash, and on September 4, 1903, defendant wrote to plaintiff inclosing New York draft for \$1,500, one-fourth of the cash payment. In this letter he said: "We will now have to wait until the gun is on the market before we get any more. Of course, if it isn't a success, we won't get much more,

but if it is we will never need to work any more. * * * But rest assured that you shall receive every dollar due you as the royalties became payable and I shall use all means to make that gun a success." The gun, as first designed and constructed proved to be a commercial failure, and none were sold. What was done in order to make the gun a successful commercial product is detailed by Frank Lawrence, who was, at the time, chief accountant for the Remington Arms Company, in his deposition which was taken on behalf of defendant and by him offered in evidence. In his deposition Lawrence says: "The Remington Arms Company after that got up another model, and made three guns alike, embodying the same fundamental principles of the other gun. * * * The company made these three models at the same time, three alike. These models were designed by our designers. Mr. Pederson did part of it. There were features embodied in that gun which were undoubtedly not designed by Mr. Pederson, although it was the same old Pederson gun which he brought with him with some alteration, a gun which could be manufactured on a commercial basis. * * * The expense to the Remington Arms Company for the three guns aforesaid was \$9,410.21. * * * It included special tools for making models, but not the equipment for making a commercial product. After this, the company went ahead and manufactured the gun and are manufacturing it to-day. * * * Mr. Pederson got his pay for his patent, and drew his royalties as the guns were sold."

The evidence shows that the company began paying defendant royalties July 11, 1908. Defendant failed and refused to pay plaintiff any portion of the royalties received by him from the sales of the gun, hence plaintiff brought this action to compel defendant to account for and pay to her a sum of money equal to one-fourth of all royalties received by him under the contracts mentioned. In her complaint plaintiff sets forth in general terms the substance of the contract, herein referred to, between defendant and A. L. Bennett; that Bennett died on November 4, 1902, in the state of Colorado intestate without issue, leaving surviving him as his only heir at law the plaintiff herein; that at the time of his death Bennett was a citizen and resident of Colorado. After setting forth the contract between defendant and the Remington Arms Company hereinbefore mentioned, plaintiff alleges: "Whereafter, at the request of the Remington Arms Company, and in order to perfect its rights to manufacture, place upon the market for sale, and to sell the firearms containing such patented improvements, the said John Douglas Pederson procured the plaintiff herein to make, execute, and deliver to the said Remington Arms Company an instrument in writing confirming and approving the aforesaid agreement and assignments; * * * and, in consider-

ation of the execution and delivery of said written confirmation and approval so executed and delivered by the plaintiff, the said defendant then and there undertook, covenanted, and promised that he would pay to said plaintiff one-fourth of the \$6,000 down payment, * * * that he would render, account, and pay to her one-fourth of all royalties thereafter received by him from the manufacture and sale of firearms containing any such patented improvements, or any others that he might thereafter apply for, and that might thereafter be used with said patented improvements in firearms manufactured and sold by the Remington Arms Company under and by virtue of the aforesaid agreements and assignments." In the prayer of her complaint plaintiff, among other things, asked for general relief. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant answered. A trial was had, and the court found on the issues in favor of plaintiff. The defendant was required to account to her for all royalties received by him. The defendant subsequently filed his account, which was settled by the court, and he was required to pay to plaintiff her share of the royalties received by him from the Remington Arms Company under the contracts mentioned.

To reverse the judgment defendant has appealed to this court.

S. T. Corn and J. N. Kimball, both of Ogden, for appellant. Halverson & Pratt, of Ogden, for respondent.

McCARTY, J. (after stating the facts as above). [1-3] The first error assigned relates to the order of the court overruling appellant's demurrer. It is contended on behalf of appellant that the action is founded upon the contract entered into between appellant and A. L. Bennett, and that, as the consideration for that contract was certain financial aid and other services rendered appellant by A. L. Bennett in the development and invention of the firearm mentioned, the contract was therefore an asset of Bennett's estate, and can only be enforced by a suit of an administrator of his estate. We do not so construe the complaint. The agreement between appellant and Bennett was pleaded as a matter of inducement only. It tended to explain the circumstances leading up to and surrounding the making of the contract upon which the action is in fact based. This contract is to be found in the correspondence carried on between appellant and respondent, and to which we have referred in the foregoing statement of facts. The consideration for the contract was the assignment by respondent of all her right, title, and interest in the gun mentioned and patented improvements thereon to the Remington Arms Company. This assignment was made by respondent at the special instance and request

of appellant and in pursuance of the promises made by him that he would pay her one-fourth of the \$6,000 down payment to be made on the gun by the Remington Arms Company and one-fourth of all royalties received from sales made by the Remington Arms Company of the gun.

It is alleged in the complaint, and it is admitted, that "A. L. Bennett died in the state of Colorado intestate and without issue, leaving surviving him as his only heir at law the plaintiff, who was and is his widow. It is further alleged that at the time of his death the said A. L. Bennett was a citizen and resident * * * of Colorado, the laws of which state at the time of his death provided in substance that all property, real and personal, of any person dying intestate, shall, at his death, descend to his surviving widow if he have no issue." Under these allegations of the complaint which, for the purposes of the demurrer, must be taken to be true, the respondent had an assignable interest in the estate of her deceased husband, and this interest included any right, title, or interest that A. L. Bennett may have had in the gun and patents mentioned at the time of his death. 2 A. & E. Ency. L. (2d Ed.) 1029; 4 Cyc. 15; Burrill on Assignments, p. 110. We are therefore clearly of the opinion that the assignment was a good and sufficient consideration for the contract upon which this action is based, and that the court did not err in overruling the demurrer.

[4] Appellant also assigns as error the admission in evidence of the statute of Colorado in reference to the law of succession, which, so far as material here, provides: "Whenever any person having title to * * * property having the nature or legal character of real estate, or personal estate, undisposed of or not otherwise limited by marriage settlement shall die intestate as to such estate, it shall descend and be distributed * * * in the following course and manner, namely: * * * If such intestate leave a husband or wife, and no child or descendants of any child, then the whole of the estate of such intestate, real and personal, shall descend to and vest in such surviving husband or wife as his or her absolute estate, subject to the payment of debts," etc. Mills' Ann. St. § 1524. The statute thus offered and admitted in evidence was in a book purporting to be "Mills' Annotated Code of Colorado." The fourth printed page of that book contains, among other things, the following:

"An act to make 'Mills' Annotated Statutes of the State of Colorado' prima facie evidence of the originals in all courts and proceedings in this state. * * *

"Be it enacted by the General Assembly of the state of Colorado:

"Section 1. From and after the passage of this act, the General Statutes of the state

of Colorado published in the year A. D. eighteen hundred and ninety-one entitled 'Mills' Annotated Statutes of the State of Colorado,' edited and annotated by J. Warner Mills, Esq., shall be received in all courts and proceedings, and by all officers of this state as prima facie evidence of the original."

The book was properly identified, and the evidence showed that was what it purported to be, namely, "Mills' Annotated Statutes of Colorado." The contention made, however, is that the proof was insufficient to show that the book was published by authority of the state of Colorado, and that therefore it was improperly admitted in evidence. Comp. Laws Utah 1907, § 3379, provides: "Books purporting to be printed or published under the authority of another state or territory, or foreign country, and to contain the statutes, code or other written law of said state, territory, or country, or *proved to be commonly admitted in the tribunals* of such state, territory, or country as evidence of the written law thereof, are admissible in this state as evidence of such law." (Italics ours.) Appellant urges that the evidence failed to show that the book was published by authority of the state of Colorado, and that, therefore, it was improperly admitted in evidence. We think the excerpts taken from the fourth page of the book show that it purported to be published under the authority of the state of Colorado. Independent, however, of what the book itself shows regarding the authority under which it purports to be published, there is evidence in the record which we think fully meets the requirements of section 3379, supra. One Volney C. Gunnel, an attorney at law, was called as a witness, and testified that he is, and for 21 years has been, practicing law in this state; that prior to coming to Utah he practiced law in the Supreme and other courts of record in the state of Colorado. Replying to the question, "And you have estates pending and in the course of administration in the state of Colorado at this time?" he answered: "Yes, sir; more or less interested all the time." The witness further testified: "I am doing a good deal of business relative to Colorado matters all the time." The following was then propounded: "State what knowledge you have as to whether 'Mills' Annotated Statutes of Colorado' are commonly admitted in the tribunals of that state as evidence of the written law thereof." The witness answered: "The personal knowledge I have I suppose. I notice that the lawyers use the book there. I have not been in court myself and used it, but I know it is in use in the courts there." The witness further testified: "I only know that from the fact that the work is cited by the Supreme Court of that state."

" * * * It seems to be in general use in the courts of that state, and is recognized by the Supreme Court of that state." We think the only fair inference of which this evidence is susceptible is that "Mills' Annotated Statutes of the State of Colorado" is "commonly admitted in the tribunals" of that state "as evidence of the written law thereof." This assignment of error is therefore overruled.

In his assignments of error appellant assigns the decision rendered by the court on the merits on the ground that the decision is not supported by evidence. These assignments are without merit. We therefore deem it unnecessary to review or discuss them. We remark, however, that a decision contrary to or materially different from the one rendered by the court would not in the face of the undisputed evidence in this case be permissible.

The judgment is affirmed, with costs to respondent.

FRICK, C. J., and STRAUP, J., concur.

TELLURIDE POWER CO. v. BRUNEAU.

(Supreme Court of Utah. April 18, 1912.)

1. TRIAL (§ 96*)—EVIDENCE—MOTION TO STRIKE.

In a proceeding to condemn a strip of land on which to erect poles bearing wires heavily charged with electricity, a witness, after expressing his opinion on direct examination as to the depreciation in the value of defendant's farm by reason of the erection of such poles, stated on cross-examination that in arriving at this opinion he considered the danger of falling poles and wires. Plaintiff then moved to strike out so much of his testimony as referred to the depreciation of the part of the land not taken because based on considerations too remote and speculative. Held that, conceding that plaintiff's contention was sound, the motion was properly denied because too broad; the testimony being admissible as affecting the value of the land actually taken by plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.*]

2. APPEAL AND ERROR (§ 1047*)—REVIEW—HARMLESS ERROR.

As the granting of such motion would have merely resulted in striking out the reasons given by the witness, leaving his opinion in evidence, its denial, if erroneous, was harmless, especially where the court charged that the measure of damages was the diminution in market value of defendant's land, that damages from plaintiff's possible negligence in constructing and maintaining the line or from trespasses by it were not recoverable, and that the danger from falling wires should not be considered, unless such danger affected the market value.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.*]

3. EMINENT DOMAIN (§ 203*)—COMPENSATION—MEASURE AND AMOUNT.

In a proceeding to condemn a strip of land on which to erect poles bearing wires heavily charged with electricity, if the presence of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

wires would expose persons and live stock on the land of defendant not taken to danger, and thus depreciate the market value of such land, defendant was entitled to show such fact.¹

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 542; Dec. Dig. § 203.*]

4. TRIAL (§ 136*)—QUESTIONS OF LAW OR FACT.

Whether wires heavily charged with electricity are dangerous to persons or live stock in the vicinity is a question of fact.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 318, 320, 321, 323–329; Dec. Dig. § 136.*]

5. APPEAL AND ERROR (§ 1058*)—REVIEW—HARMLESS ERROR.

In a condemnation proceeding, the refusal to permit a witness on direct examination to testify to particular sales of similar property as bearing on the question of value, if error, was harmless, where the witness was permitted to testify that he had bought and sold lands, knew of sales of similar lands, and knew the market value of such lands and of defendant's land, and to state his opinion of the depreciation in the value of defendant's land.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200–4204, 4206; Dec. Dig. § 1058.*]

Appeal from District Court, Tooele County; M. L. Ritchie, Judge.

Condemnation proceeding by the Telluride Power Company against Moses Bruneau. From a judgment assessing defendant's damages, plaintiff appeals. Affirmed.

E. C. Lackner, of Salt Lake City, L. W. Allen, of Telluride, Colo., and B. A. Cummings, of Salt Lake City, for appellant. L. L. Baker, of Tooele, and Street & Bramel, of Salt Lake City, for respondent.

STRAUP, J. This is an action to condemn a strip of land 20 feet wide over the lands of the defendant for an electric power line extending from Bingham to the Garfield smelter. The defendant owns about 280 acres inclosed by fence. His land is about five miles from Tooele City. There is evidence to show that about 175 acres is under cultivation upon which lucerne and grain have been raised. The defendant also kept and pastured on his land from 100 to 200 head of cattle each year. The land is adaptable to the raising of general farm products, fruit, potatoes, and other vegetables. The power line extends over his lands for a distance of about 3,200 feet. The poles on which the wires are strung are 300 feet apart. About 10 or 11 poles are placed on the strip in question. The poles are of cedar timber, from 35 to 50 feet in length. Each pole has cross-arms upon which are strung three wires to conduct electricity for electrical power and energy. The lowest wire suspended on the poles is 23 or 24 feet above the ground. The wires carry a voltage of 44,000 volts. The case was tried to the court and a jury. The only question submitted to the jury was that of compensation

for the land taken and injured. A verdict was returned for the defendant assessing his damage in the sum of \$1,030. The plaintiff appeals.

No question is raised with respect to sufficiency of the evidence to support the verdict. The questions presented for review relate to the admission and exclusion of evidence, and to the charge.

A witness for the defendant, an electrical engineer, after having qualified as an expert, was asked by counsel for the defendant whether persons and animals on the ground and within 10 feet of a transmission line of wires carrying a voltage of 44,000 volts, and constructed and operated as was the line of the plaintiff, would be exposed to danger from the wires. He answered that they would be if the wires were bare. This testimony was objected to by the plaintiff as referring to a danger or element which was too remote and merely speculative.

Other witnesses for the defendant, after having qualified and shown to have knowledge of the market value of the land in question, testified, some of them, that the market value of the defendant's land before the construction of the transmission line was \$35,000, and after the construction \$32,000; others, \$30,000 before, and \$27,000 or \$28,000 after, the construction of the line; and still others, \$25,000 before and \$23,500 after the construction. On cross-examination they were asked by plaintiff on what they based the difference between the market value before and after the construction of the line. Among other things stated, and reasons given, by them, they stated that they considered the danger to which persons and live stock were exposed by the highly charged wires, and the breaking and falling of wires and poles. These things were all brought out on cross-examination. No motion was made to strike the testimony of these witnesses except one who had testified to such things after others had testified to them. This particular witness, on his cross-examination, among other reasons given by him which in his opinion tended to show a depreciation of the market value of the land, stated that: "In arriving at the elements of damage, I consider the distance that them poles would fall either way, which would mean a 64-foot dangerous strip of ground, and, rather than take any chances of that danger, I would fence it with a good fence that nothing could get in there for that distance of the right of way. I consider the damage from the danger of the poles falling at \$950. I can't say what proportion of this \$1,450 (the amount which he stated was the difference between the market value before and after the construction of the line) I would assess by reason of the danger of the falling of the poles and wires. In estimating the damages, I did not consider future damages which might result from a falling of the

¹ *Morris v. Railroad*, 38 Utah, 14, 102 Pac. 629; *O'Neill v. San Pedro, L. A. & S. L. R. Co.*, 38 Utah, 475, 114 Pac. 127.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

poles upon this land. * * * With the poles and wires charged with electricity, there is danger which I would want to eliminate as much as possible. From that danger I place the depreciation at \$950. If I were the owner, I believe \$950 ought to be allowed for that danger in the selling price if I were trying to sell the land. That leaves \$500. I would take that \$500 as a general damage that would result from a continuous right of way for myself and every one else, one field into another," because of the inconvenience in farming the land. "The right to farm this strip and to pass through it is a detriment to" the defendant. "If it were mine, I would rather not cultivate" the strip. "I would fence up that right of way because of that danger of falling wires and breaking of poles. In my estimation of this \$500 I consider the inconvenience it would put me to with my farm, either in tilling it, pasturing it, irrigating it, and everything for that inconvenience I would be put to in farming my place, maintaining a fence, if I had one, along the pole line, or gates, either to enter it at either end or in the center of it." At the conclusion of his cross-examination, counsel for plaintiff stated: "I believe it is apparent from the testimony of this witness that he has based his valuation of the depreciation upon an element which is not a proper consideration of damage, which is the breaking of these wires and falling of these poles upon the property, for in case such an event happened the defendant would be entitled to recover whatever damages might accrue in another action, and it is something which is too remote and too speculative to place before the jury, and, in order for them to arrive at any fair estimation at all, *I move that so much of the testimony of this witness as refers to the depreciation of the part not taken be stricken out.*" The motion was denied. The court, in several different paragraphs, instructed the jury that the measure of damages and the amount of their verdict should be the diminution, if any, of the market value of the defendant's land by reason of the location of the electrical line upon it; that they, upon the evidence, should determine the fair market value of the land at the time of the commencement of the action without the line upon it, and then the market value of the land with the line upon it, and that the difference between the two, with interest, should be the amount of their verdict; and that in determining the damages they could only consider the actual depreciation, if any, in the market value caused by the construction and operation of the line in the manner contemplated by the plaintiff. The court further charged them that the damages to be assessed must be on the basis that the transmission line will be maintained in a skillful and proper manner, and that damages resulting from negligence in constructing and maintaining the line

could be recovered in a proper action, and that no damages could be awarded on the theory that such negligence might happen, nor that trespasses might thereafter be committed by the plaintiff or its agents. The court also charged them that the danger from the overhead wires heavily charged with electricity could only be considered by them as bearing upon the depreciation of the market value of the land, and that such fact could not be considered by them on any other theory; and in several different paragraphs admonished them that they must not base their verdict upon mere speculation and conjecture as to what might happen, and expressly charged them that "you are to disregard any testimony based merely upon speculative and contingent possibilities, and confine yourselves to the actual damage of the property." The court then further instructed the jury, and as requested by the plaintiff, that "you are instructed that you should not consider in the assessment of damages such remote contingencies as danger to persons or stock or crops from the possible breaking or falling of the wires or other parts of plaintiff's transmission line," but added to such request, "unless upon consideration of the evidence you find by the preponderance thereof that that will injure the market value of the land."

[1, 2] The rulings refusing plaintiff's request and giving it as modified, admitting the testimony of the defendant's expert, and refusing to strike the testimony of the witness referred to, are complained of. The last will be considered first, the testimony of the witness who stated that in estimating the difference between the market value of the defendant's farm before and after the construction of the power line he considered, among other things, the danger from the wires and of their breaking and falling. It is here contended that such an element was remote and speculative, and for that reason could not properly be considered by the witness in estimating the depreciation of value, and therefore the statement made by him that he did consider such element ought to have been stricken on plaintiff's motion. The motion itself is indefinite and uncertain. If counsel thought the answer and opinion of the witness as to the market value after the construction of the power line or the depreciation of such value because of such construction was based on something not proper to be considered by the witness and not tending to affect value, a motion to strike such answer ought to have been made. No such motion was made. All that is claimed for the motion is that some of the reasons which the witness gave or some of the things testified to by him—the danger from the wires and of their breaking and falling—which were taken into consideration by him in arriving at his opinion as to the amount of the depreciation of the market value of the land ought to have been stricken

en. But the motion was not restricted nor directed to such things. The motion was: "I move that so much of the testimony of this witness as refers to the depreciation of the part (of the land) not taken be stricken out." Manifestly this motion could not properly have been granted, even though plaintiff's position is sound, for the motion is broad enough to include, not only the things now complained of as being too remote and speculative, but everything else testified to by the witness in respect of the depreciation of the value of the land not taken. From the motion it would seem that counsel thought that all that the witness had testified to in respect of the depreciation of the value of the land not taken ought to have been stricken, but all that he had testified to, including the testimony that he considered the danger from the wires and of their breaking and falling, was competent and admissible as affecting the value of the strip occupied by the plaintiff, or that portion of it actually taken and occupied by it. Furthermore, plaintiff's contention is rather strange. Here is a witness who on direct examination testified that the difference between the market value of the defendant's land before and after the construction of the line was \$1,450. When on cross-examination he is asked by plaintiff's counsel on what that is based, the witness, among other things, gives a reason, and states something which appellant thinks is remote and speculative and which does not tend to affect value, and then asks, not to have the answer or opinion of the witness as to value stricken, but urges under the motion which was made that the court ought to have stricken that portion of the testimony of the witness showing that his opinion was partly based on something too remote and speculative. Thus, according to plaintiff's contention, the very thing which it claims affected the opinion or rendered it valueless, plaintiff sought to have stricken and taken from the jury, leaving the opinion before them. It would seem the more the plaintiff was able to show on cross-examination that the value which the witness had fixed on his direct examination was based on mere speculation and conjecture, the more it had modified, cut down, and affected the weight of the testimony of the witness. And, as his opinion remained in evidence and was not asked to be stricken, it would seem more beneficial than harmful to the plaintiff to have the testimony also remain showing that the opinion was based or partly based on something claimed to be speculative and not tending to affect value. We think the plaintiff was not harmed by the ruling, and that its rights in the particular complained of were fully protected by the charge.

[3] It is further contended that the defendant was not entitled to show by its expert that the wires upon the line of poles and heavily charged with a voltage of 44,000

volts would be dangerous to persons and animals within ten feet of the transmission line, for the reason that the showing of such fact entered the field of mere speculation and conjecture. Of course, the defendant was entitled to show all the circumstances and conditions tending to depreciate his property, and all facts affecting the market value of it. If the existence of the wires exposed persons and live stock coming within 10 feet of the transmission line to danger, we do not see why the defendant was not entitled to show that fact as tending to depreciate the property and affect the market value of it.

[4] Whether the wires so charged would expose persons and live stock to danger was a question of fact, not of law. The evidence no doubt was offered and received to show an immediate presence of such a danger. We think the evidence was properly received, and that the ruling is analogous to the doctrine generally announced by the courts in proceedings to condemn lands for a right of way for railroad purposes, that in estimating the amount of recovery the jury can properly consider as an element of damages the facts of whether stock would be liable to be accidentally killed, or crops and fences and buildings destroyed by fire without fault on the part of the railroad company, in so far as such things were shown by evidence and tended to depreciate the value of the farm or tract of land through which the right of way is sought, not as independent items of damages, but as affecting the market value of the land not taken. 1. *Lewis, Em. Domain* (3d Ed.) § 740; *Leroy & W. R. Co. v. Ross*, 40 Kan. 598, 20 Pac. 197, 2 L. R. A. 217; *Beckman v. Lincoln & N. W. R. Co.*, 85 Neb. 228, 122 N. W. 994, 133 Am. St. Rep. 655; *Albway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123. And to this effect are the holdings of this court in the cases of *Morris v. Railroad*, 36 Utah, 14, 102 Pac. 629, and *O'Neill v. San Pedro, L. A. & S. L. R. Co.*, 38 Utah, 475, 114 Pac. 127.

This brings us to the ruling complained of in refusing plaintiff's request, and giving it as modified, that the danger to persons or live stock from the breaking or falling of wires could not be considered as an independent item of damage, but could be considered by the jury as bearing on the market value of the defendant's land, if they, upon a preponderance of the evidence, found that the value thereof was affected thereby. We think this charge is in harmony with the doctrine just referred to.

[5] A witness for the plaintiff on direct examination testified that he had bought and sold farm lands in the vicinity of the defendant's land; that he knew of and was familiar with sales of lands similar to that of the defendant; that he was acquainted with the defendant's land, and had examined it with a view of determining its market

value; that he knew the power line and the place it crossed his land; that the market value of the defendant's farm before the construction of the power line was not to exceed \$10,000; that the market value of the 20-foot strip without the poles upon it was \$60 and with the poles \$40; and that the balance of the farm was not injured nor the market value of it depreciated by reason of the construction and maintenance of the power line. Then, in response to further questions propounded to him on his direct examination, he further stated that he was acquainted with sales of lands similar in character to the defendant's land, and that he had knowledge of the sale of a particular tract near the defendant's land, and that he obtained such information from the agent of the parties who had purchased the tract. Thereupon the court, on its own motion, observed: "You are seeking to prove particular sales, are you? Counsel for Plaintiff: Yes, sir." The court stated: "That is not admissible under the rule on direct examination"—and observed that such things may be inquired about on cross-examination, and then on redirect, but not on the direct examination. "Counsel: Do I understand the court to rule, then, that the witness on direct examination cannot give his statement of particular values of similar property? Court: Yes; that is the uniform practice." This ruling is complained of. As stated in 1 Elliott, Ev. § 180, Jones, Ev. (2d Ed.) § 168, and 13 Ency. Ev. pp. 457-463, there is a marked conflict of opinion as to the competency of evidence on direct examination to show the sale price of other lands of general similarity in location, character, and adaptability to use of the lands sold with those the value of which is in question, and of sales made about the time the value of the latter must be established. The cases supporting the affirmative and those the negative of the proposition are there noted. Even though the conclusion should be reached that such sales may properly be shown on the direct examination, yet we are clearly of the opinion that in this instance the plaintiff was not harmed by the ruling. The witness had already stated that he had bought and sold lands; that he knew of sales of lands similar to that of the defendant; that he knew the market value of such lands and the market value of the defendant's land, and stated what that was, and the amount which in his opinion the value of the defendant's land was depreciated by reason of the construction of the power line over it. In such case the plaintiff was not prejudiced even though it be assumed that it, on the direct examination of the witness, was entitled to show sales of other lands. *Seattle & M. Ry. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 739; *Teale v. Boston*, 165 Mass. 88, 42 N. E. 506; *Sargent v. Merrimac*, 196 Mass. 171, 81 N.

E. 970, 11 L. R. A. (N. S.) 996, 124 Am. St. Rep. 528. At any rate, it is not such an error, if there be one, as requires a reversal of the judgment.

We are of the opinion that no reversible error is shown, and that the judgment of the court below ought therefore to be affirmed, with costs. It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

HOLM v. DAVIS et al.

(Supreme Court of Utah. June 12, 1912.)

1. TRIAL (§ 400*)—FINDINGS—AMENDMENT.

Comp. Laws 1907, § 3005, confers jurisdiction on the court under certain circumstances to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect on such terms with reference to costs as may be proper, etc., and section 3168 provides that, on the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within 30 days after the cause is submitted for decision, but that the court at any time before notice of appeal is served or filed, or before motion for a new trial is ruled on, may add to or modify the findings in any respect so as to make the same conform to the issues presented by the pleadings and to the evidence adduced at the trial, but that no such additions to or modifications of the findings shall be made, unless notice in writing, specifying generally the additions or modifications desired, shall have been served on the adverse party or his attorney. *Held* that, independent of such sections, the court, after the expiration of the term at which an action was tried and determined, notwithstanding the pendency of a motion to set aside costs, had no jurisdiction to modify the findings on its own motion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 949, 950; Dec. Dig. § 400.*]

2. LICENSES (§ 44*)—USE OF REAL PROPERTY—EASEMENT DISTINGUISHED.

Where intervener constructed and used a canal over plaintiff's land for a millrace and irrigation ditch to furnish water for motive power for the mill, and to irrigate certain lands, and such canal, though originally constructed by consent of plaintiff's grantor, had been used and maintained for such purposes for more than twenty years when plaintiff purchased the same, intervener's right to maintain, protect, and improve it was not a mere license, but an easement acquired by prescription.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 97-99; Dec. Dig. § 44.*]

3. WATERS AND WATER COURSES (§ 154*)—WATER CANAL—MAINTENANCE.

Where intervener had acquired a prescriptive easement to maintain a water canal over plaintiff's land, intervener was entitled to enter on the land to clean out and make necessary repairs to the canal, doing no unnecessary injury to the servient estate.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 167-179; Dec. Dig. § 154.*]

4. MASTER AND SERVANT (§ 802*)—INJURIES TO THIRD PERSONS—TRESPASS BY SERVANTS.

Where defendant, having an easement to maintain a water canal over plaintiff's land, sent workmen to clean out and repair the canal, a finding that they trespassed on ground not necessary for their work was insufficient to warrant a recovery against intervener, since in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

so trespassing the workmen acted beyond the scope of their employment, rendering themselves, and not intervenor, liable for their acts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.*]

Appeal from District Court, Utah County; J. E. Booth, Judge.

Action by Annes Holm against Warren E. Davis, in which the Spanish Fork Co-operative Institution intervened. Judgment for plaintiff, and intervenor appeals. Reversed and remanded.

A. Saxey, of Spanish Fork, for appellant. Elias Hanson, of Spanish Fork, for respondent.

FRICK, C. J. The respondent commenced this action against the defendant Davis to recover damages for trespasses that it is alleged said Davis by himself and "by his agents" had committed on respondent's land, which is specifically described in the complaint. Davis answered, justifying the alleged trespasses. His answer is, however, not material to the real questions involved here, and therefore will not be referred to hereafter. The appellant asked and was given leave to intervene in the action commenced against Davis as aforesaid, and in its complaint in intervention it in substance alleged that the fee to the land in question was in the respondent; that it was the owner, and for many years prior to the commencement of the action had been the owner, of a flouring mill which it operated by water power, which water was obtained from Spanish Fork river by means of a canal or ditch about three miles in length; that said canal or ditch passed through respondent's land, and that the same was constructed, owned, occupied, and used by appellant for the purposes of conducting water through the same to said mill for a period of 25 years without molestation or interference from any one, and for about 23 years before the respondent purchased and became the owner of the land in question; that the appellant claims the right to use, maintain, and repair said canal as an easement over said land, and that the acts complained of by respondent were committed by appellant's agents and employes by going on and along said canal or ditch for the purpose of making repairs that were necessary and required, and for that purpose removed sand and gravel that had accumulated in said canal, and which had to be removed to permit the necessary water to flow through the same to said mill; that said sand and gravel were carefully removed and deposited along the margin of the bank of said canal, and that no unnecessary thing was done or act committed in doing said work. Respondent answered the complaint, admitting the allegations therein, except that appellant had acquired a right of way or an easement

over his land. The issues were tried to the court without a jury. The court, after making a personal inspection of the canal or ditch, on the 27th day of May, 1911, made the following findings of fact and conclusions of law: "That the plaintiff is the owner of the land described in his complaint; that the defendant, the Spanish Fork Co-operative Institution, a corporation, has a millrace, which race is also used as an irrigation canal, running through the said land on a sidehill, and has maintained said canal for more than 20 years, and which was built with the consent of the then owner of the land; that it is necessary from year to year that the said canal should be cleared out and repaired; that the defendant Warren E. Davis, in May, 1910, as an employe of the said defendant corporation, with the assistance of other men, cleaned out and repaired the said ditch; that in performing the work necessary thereto no unnecessary damage or injury was done to the ground of the plaintiff, *but the workmen trespassed on ground not necessary for said work*; that neither of said defendants either made or attempted to make any arrangements with the plaintiff whereby they might go onto plaintiff's ground for the performance of said work; that the plaintiff has sustained only nominal damages. Judgment should therefore be for the plaintiff that he recover damages in the sum of \$1, and that the defendant, the Spanish Fork Co-operative Institution, a corporation, pay the said sum of \$1, and the costs of this suit." The appeal is upon the judgment roll without a bill of exceptions containing the evidence. All that we can determine, therefore, is whether the pleadings and findings of fact sustain the conclusions of law and judgment.

[1] It is not necessary to refer to the pleadings further than has been done. As we have seen, the findings constituting the decision of the court were filed on the 27th day of May, 1911, during the April term of court. Thereafter, to wit, on the 26th day of August, 1911, after the April term of court had been adjourned without date, and pending the July term, the court modified its findings of fact by inserting that portion thereof which we have italicized. Appellant at the time objected to the court's authority to make the modification in the findings, and now insists that the court exceeded its power or jurisdiction in making the modification of the findings as indicated, and that, therefore, for the purposes of this decision, said modification must be deemed as not having been made. Did the court exceed its power in making the modification complained of by appellant? It is practically conceded by respondent, at least it is not controverted by him, that the findings were made and filed in the April term, while the

modification thereof was made in the following July term. We shall assume that under the decisions of this court the district court had the power to modify its findings at any time before the adjournment of the term during which they were made and filed, and that said modification could also be made if made in accordance with the provisions of Comp. Laws 1907, § 3168, or under the provisions of section 3005. In the case at bar, the findings were, however, modified after the term, and no attempt was made to conform to the provisions of either one of the foregoing sections. The question, therefore, is, Did the court of its own motion have the power to make a modification of its findings at the time and in the manner disclosed by this record? Respondent's counsel seeks to justify the action of the court on the ground that appellant had filed a motion to retax costs during the April term which remained pending and was finally disposed of by the court on the 26th day of August and at the time the modification was made, all of which was during the July term. The motion to retax costs was based upon the findings as they then stood, and under which appellant's counsel contended his client could not be required to pay costs under our statute. The court seemed to appreciate the force of counsel's contention in that regard, and thus modified the findings so that the costs could legally be taxed against appellant. The motion to retax costs certainly was not made nor intended for the purpose of having the court modify its findings under the provisions of section 3168 or under section 3005, *supra*. Indeed, the motion was filed and intended for an entirely different purpose. The motion therefore was not and in the nature of things could not have invoked the power of the court to modify its findings within the purview of the two sections referred to. Nor, in view that the term of court at which the findings were made and filed had been finally adjourned, did the court possess inherent power to make the modification complained of. That the court cannot legally make modification of its findings after the term has expired when such modification is not made under and in conformity with the provisions of either one or the other of sections 3168 or 3005, *supra*, so as to extend the time within which to take an appeal was held by us in the case of *Atwood v. Davis* at the October, 1911, term of this court. The question having been determined on a motion to dismiss the appeal, no opinion was filed, but the appeal dismissed. We are of the opinion, therefore, that the court in making the modification of the findings as aforesaid on its own motion after the term had expired exceeded its power, and that the findings must, for the purposes of this decision, be treated as though no such modification thereof had been made.

Treating the findings, therefore, as originally made and filed by the court, do they sustain the conclusions of law and judgment entered against appellant for the sum of \$1 damages and for costs? Counsel for appellant insists that, in view that the court found that the canal or ditch in question had been constructed over appellant's land for more than a sufficient length of time to constitute said canal or ditch an easement on or over his land, therefore appellant had a legal right to enter upon and along said canal or ditch to repair and clean out the same if the work was done without unnecessary injury to respondent's land or property, and therefore appellant was not guilty of trespass, and, if this be so, the conclusion of law and judgment for damages and costs are not sustained by said findings, and cannot prevail. Counsel for respondent contends that, because the court found that the canal was originally constructed "with the consent of the then owner of the land" in question here, the canal was constructed and maintained under a license from the owner of the land, and that, where such is the case, no easement is acquired, and therefore none exists in this case. The foregoing contentions present the real question in the case.

[2] We have no means of determining what the evidence was, and the court's findings are far from specific. In view, however, that both parties have expressed an earnest desire that we should, if possible under the findings as they are, determine whether the canal in question constitutes an easement or not, we have concluded that in view of the permanent character of the canal and the purposes for and time during which it was constructed, maintained, and used, the findings are sufficient to enable us to determine that question, although the findings are somewhat meager in detail. The findings show that the canal was constructed and used for a millrace and irrigating ditch to furnish water for motive power for a mill, and to irrigate lands to make the same productive; that the canal had been constructed, maintained, and used for the purposes aforesaid for more than 20 years when respondent purchased and became the owner of the land over which the canal was constructed and maintained. If the canal during the 20 years was maintained and used adversely and under a claim of right, such use for that length of time would have ripened into a prescriptive right constituting an easement. This has been the uniform holding of this court. See *Lund v. Wilcox*, 34 Utah, 205, 97 Pac. 33, and cases there cited. Counsel for respondent in effect concede the law in this state to be so, but he contends that, because the court found that the canal was originally constructed with the consent of the owner of the land, the claim of adverse user under claim of right has no foundation either in law or fact. In this contention we think counsel is mistaken. It

does not necessarily follow that because a ditch or any other permanent structure is constructed on or over the lands of another with such other's consent the use and maintenance thereof by the person who constructed it or his assignee cannot be adverse and under a claim of right within the purview of the law governing easements acquired by prescription. The question to a large extent depends upon the character of the use or thing which is claimed as an easement, and the object or purpose for which the thing was constructed, used, and maintained. In this case the canal or ditch was constructed for a purpose which was permanent in its nature. We may well assume that no one would build a mill and construct a canal three or more miles in length for the purpose of providing water for motive power to operate the mill and irrigate the arid lands, except as a permanent thing. That such is the case is natural, and must be obvious to all, and hence needs no argument or elaboration. The fact, therefore, that the canal was on the land and was being used for the purposes aforesaid was notice to the respondent that it was a structure of a permanent character used for purposes permanent in their nature, and hence he purchased the land subject to the rights of the owner of the canal. If the right to use the same, therefore, had ripened into a prescriptive right by the lapse of time and the character of its use, respondent purchased and holds the land subject to appellant's right to maintain and use the canal for the purposes for which it was constructed, maintained, and used from its inception. This is well illustrated by the courts in the following cases: *Jewett v. Hussey*, 70 Me. 433, and *Coventon v. Seufert*, 23 Or. 548, 32 Pac. 508. In both of those cases it is held that, although the inception of a prescriptive right rests in parol by the permission of the owner of the land over which it is claimed, yet, if the right of way or ditch is used and enjoyed under a claim of right to use and enjoy it as owners of such property usually use and enjoy their own, the claimant obtains a prescriptive right to the use of the easement. In *Arbuckle v. Ward*, 29 Vt. 53, the court, in referring to this subject, says: "But the mere fact of showing that the use began by permission of the landowner is not alone sufficient to defeat the prescription." In *Coventon v. Seufert*, supra, the Supreme Court of Oregon, in passing on how a right to use an irrigating ditch over the lands of another may be acquired by use, states the law in the following language: "That the use began by permission does not affect the prescriptive right if it has been used and exercised for the requisite period under claim of right. * * * If the use of the way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed, it is a use as of right. * * *

The plaintiffs have used the ditch

as if it had been legally conveyed to them—that is, they have exercised such acts of ownership over it as a man would over his own property—and the court must presume in the absence of any evidence to the contrary that the settlement was a parol consent or transfer * * * of the right to use the ditch, and hence it was a use as of right." The court also held that, in view that the party who claimed the easement had used it for the purposes intended for a period longer than would create a prescriptive right, "the burden of proving that plaintiffs held possession by license or indulgence was cast upon the defendants." To the same effect, see *Jones on Easements*, § 182.

[3] Keeping in mind, therefore, the permanent character of the canal in question and the purposes for which it was constructed, used, and maintained, and that such use had been for a period longer than 20 years, we are forced to the conclusion that the mere fact that the court found that the canal was originally constructed "with the consent of the then owner of the land" cannot affect appellant's prescriptive right. If such were not the law, then in this state, in view of the arid character of the land embraced within its borders, but few irrigating ditches could now be maintained. This is apparent to all, for the reason that in many if not most instances such ditches were at least in part constructed over lands owned by others either with the express or implied permission or consent of the owners thereof. If the owners of lands over which ditches have been thus constructed can now claim, as is claimed by respondent, that the owners and users of those ditches have acquired no right to maintain them for the reason that the ditches or canals were in fact constructed with the consent of the original owners of the lands, and hence the ditch users are mere licensees, and their ditches, flumes, and canals are maintained and used only by the sufferance or indulgence of the landowners, then the law has proved to be a mere delusion and a snare. In settling and reclaiming the arid lands much that in early days was deemed entirely worthless has now acquired considerable value. Over such lands miles of ditches, flumes, and canals were constructed with either the express or implied consent of the owners thereof. Can such owners, after a lapse of all these years, now treat the owners of the ditches as mere trespassers? We think not. Upon the other hand, we are of the opinion that, although a canal, ditch, or flume may have been constructed by a person on or over lands owned by another with the consent or permission of such other owner, yet, if the owner of the canal, ditch, or flume, or his assignee, has used and maintained the same in the same manner as if the same were constructed over his own lands, and where such use and maintenance has continued uninterruptedly and under claim of right for

more than twenty years, in such event the owner of the ditch has acquired a right to use and maintain the same perpetually as an easement.

In view of the foregoing, what were the rights of appellant with respect to entering upon the lands of respondent to repair and clean out the ditch or canal in question? The right of the owner of an easement is admirably stated by Mr. Jones in his excellent work on Easements, § 814, in the following words: "The owner of a dominant estate having an easement has a right to enter upon the servient estate, and make repairs necessary for the reasonable and convenient use of the easement, doing no unnecessary injury to the servient estate." A large number of cases in support of the doctrine are collated by the author in a footnote to the section aforesaid to which we refer the reader. The doctrine is also well illustrated and applied to an irrigating ditch by the Supreme Court of California in *Joseph v. Ager*, 108 Cal. 517, 41 Pac. 422. The finding in the case at bar "that in performing the work necessary thereto no unnecessary damage or injury was done to the ground of the plaintiff" while not as specific as could be desired, yet, must be construed to mean just what appellant by its servants and employes had a right to do, namely, to enter upon respondent's land along the canal or ditch in question for the purpose of repairing and cleaning out the same, and, if in doing the work no unnecessary injury was done to respondent's land, appellant cannot be charged as a trespasser. Under the findings as originally made, appellant therefore was clearly within its rights in doing the acts complained of. It was only after the court thought that it was necessary to change the findings to support the judgment for nominal damages and costs that appellant's servants were charged with having trespassed on respondent's land.

[4] So far we have considered the question upon the theory that the findings as modified would make the appellant liable as a trespasser. If the amendment by the court be considered and applied literally as written, it may well be doubted whether appellant would be liable, even though the finding were proper and true in fact. If appellant's "workmen trespassed on ground not necessary for said work" willfully, unnecessarily, and when not acting within the scope of their duties or employment in repairing or cleaning out the canal, they, and not appellant, should have been held as trespassers. We, however, do not desire to base the decision upon such narrow ground. What we hold is that under the facts found by the court the ditch or canal constitutes an easement over respondent's land which appellant had a right to maintain, and for that purpose has a right to go, upon the land of re-

spondent along the ditch, and to use so much thereof on either side of the ditch as may be necessary to make all necessary repairs and to clean out said ditch at all reasonable times, and that appellant is liable only for the abuse of such right; that in this case no such abuse is shown, and hence the judgment against appellant cannot prevail.

The judgment is reversed, and the cause is remanded to the district court, with directions to strike from the findings that portion indicated in italics and inserted therein on August 26, 1911, to vacate the conclusions of law and to modify the same to conform to the law herein stated, and to enter judgment dismissing the action, and to apportion the costs as in the judgment of the court may be just and equitable. Appellant to recover costs in this court.

McCARTY and STRAUP, JJ., concur.

JOHNSON v. UTAH CONSOL. MINING CO.

(Supreme Court of Utah. June 7, 1912.)

MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—PROMISE TO REPAIR—MASTER'S LIABILITY—ASSUMED RISK.

Where a master has made a promise to repair a defect, the master and not the servant assumes the risk of injury caused thereby within such time after the promise as would be reasonably allowed for performance and within a period which would not preclude all reasonable expectation that the promise might be kept.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.*]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by Nels Johnson against the Utah Consolidated Mining Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained by him on May 28, 1900, while employed as a miner in defendant's mine in Bingham Canyon, Utah.

The complaint, in substance, alleges that defendant, a corporation, owns and operates the Highland Boy Mine in Bingham Canyon, Utah; that on the day of the injury plaintiff was employed in the capacity of a miner and machineman in a certain stope on the eight and a half level of the mine; that defendant carelessly failed and neglected to furnish plaintiff a reasonably safe place in which to perform the work required of him under his contract of employment; that plaintiff, after he began work, apprehended that the earth and rock over the point where he was at work was unsound and required timbering in order to make the place reasonably safe, notified defendant's shift boss of the condition, and told him that the place needed timbering; that the shift

boss then promised plaintiff that a timberman would be sent down into the stope, and that the place would be timbered; that the plaintiff, relying on the promise thus made by the shift boss, continued with his work; that defendant carelessly and negligently failed to have the place timbered; and that by reason of defendant's negligence in that respect the earth and rock under which plaintiff was at work fell upon and severely injured him.

Defendant answered admitting that it owned and operated the mine and that plaintiff was employed therein, but denied the allegations of negligence contained in the complaint, and also denied the allegations therein that defendant promised to timber the place where plaintiff was at work. Defendant affirmatively pleaded contributory negligence and assumption of risk on the part of plaintiff, and that his injuries, if any, resulted from carelessness of his fellow servants.

A trial was had to a jury which resulted in a verdict for defendant. From the judgment rendered on the verdict, plaintiff appeals.

The facts as disclosed by the record are about as follows: Plaintiff, at the time the accident complained of occurred, was operating a drilling machine. He had been a miner for about 9½ years, and had worked in this particular mine for about 8 years before the accident. On the evening in question plaintiff went to work on the eight and a half level of the mine at about 6 o'clock. It is admitted on the part of the defendant that the stope in which plaintiff was working was 12 feet wide and 21 feet in length. The evidence introduced by plaintiff tended to show that the stope was from 30 to 40 feet in length. The apparent discrepancy in the evidence on this point is, as we view the case, of no importance. Extending throughout the length of the stope was a car track 18 inches wide, over which ran the cars used in carrying out the ore and waste. Under this track, and at right angles with it, in the center of the stope, were laid two sills. These sills had previously supported timbers which had been blown out by blasting. From the end of the sills to the left wall was about four feet. When plaintiff first went to work in the stope on the evening in question, he went over the roof or top of the stope with a pick and bar and picked down all the loose material he could find there. He testified that the top of the stope sounded "drummy," and that he "tried to pry it down," but was unable to do so; that he "thought it might fall if it was not timbered." After sounding the roof of the stope and picking down what loose material he could find there, he set up the drilling machine, which was operated by compressed air, on the left hand side of the stope directly opposite the sills and began drilling into the left wall of the stope, which was

in solid ore. The record, as it now stands, shows that, from the time plaintiff went to work at 6 o'clock on the evening in question until the breaking loose of the material that injured him, the stope was not enlarged nor was the appearance otherwise changed.

Regarding the dangerous condition of the roof of the stope prior to the accident on the evening in question, Gus Oman, a machine and timber man who was working on the ninth level of the mine at the time of the accident, was called as a witness for plaintiff and testified in part as follows: "I know where Johnson worked that night. I was in there between 8 and 9 o'clock and saw Johnson there. * * * I saw the top of the stope where Johnson was working. * * * She looked bad. She looked to me like she needed to be timbered up there. * * * It was not such a place as could be picked down by a machineman with his bar. * * * I thought it needed timbering. The place was big enough and the ground was liable to slough down any time. It was so wide and long and kind of bad ground so it needed timbering in there."

Another witness for plaintiff testified that he was working in the stope on the evening upon which the accident occurred. He added: "I saw Johnson sound the roof with his pick. * * * He sounded the roof two or three times that night. * * * I was not in the stope when Johnson got hurt. I took a car out to the station. I came back in after he got hurt. * * * When I came in and saw Johnson lying on the track, I saw rock on the left hand side of the track on the sill. I saw where it came from. It came from above, from above the top of the sill, above the sill. * * * It was inside the sill, about two feet from the sill, and some of it was near the machine."

At about 8 o'clock that same evening defendant's shift boss came into the stope where plaintiff was at work and spoke to him. There is a sharp conflict in the evidence regarding what was said by these parties on that occasion. Plaintiff testified that the shift boss said, addressing plaintiff, "How is she going?" That he (plaintiff) said: "It ain't so bad, but this place don't look very good. We ought to have it timbered up. The sills are down but no timbers here." That the shift boss said he "would send timbermen in there." The witness further testified on this point as follows: "I told the shift boss that the place didn't look good; that it was too big a place and no timbering. I told him to have some timbers in there. It didn't sound right to me, and that is the reason I asked for the timbers. * * * The shift boss said that he would send the timbermen down. * * * The shift boss offered to send timbermen in there and fix the place. That is the reason I worked there."

Plaintiff further testified that he again examined the roof of the stope between 9

and 10 o'clock and that he "couldn't get nothing down"; that he continued drilling with the machine until about 11:40 o'clock, when a large "slab" of rock directly over the sills broke loose and fell on him breaking his arm in two places and otherwise injuring him.

The shift boss was called as a witness by the defendant and testified that he came into the stope about 8 o'clock on the evening of the accident and spoke to the plaintiff, and that he called there again at about 11:30, but denied that there was anything said the first time he called either by himself or the plaintiff about timbering the place where plaintiff was at work. On cross-examination he testified that, when he was in the stope at 11:30, he talked with the plaintiff and that "there was something said about timbering." He further testified as follows: "I said (addressing the plaintiff), 'How is she going Johnnie?' He says, 'Pretty good. Everything is all right.' 'Now,' I says, 'when we get this (referring to ore and waste material) cleared up we will start to timber this place again following the machine.' We had previously timbered it. That is the practice in mining to follow the machine as near as practicable and put square sets in. That is for the purpose of holding up the roof wherever it may be loose or likely to fall, or wherever there may be slips which may come down. * * * There were two sills there. It had been timbered before, and it (the timbers) stood on these sills. * * * I told Johnson at 11:30 that as soon as the muck was out we would start to timber, following the machine. There was lots of room where they wanted the timbers in of course. * * * The reason I told Johnson (plaintiff) we would timber it was because I thought he was concerned in it." This witness further testified that the accident occurred immediately after he left the plaintiff on the occasion last referred to, and when he was about 30 feet away; that he immediately returned to the machine and found that a large boulder of ore had fallen from the wall of the stope and about 2 feet from where the machine was standing; that it had broken loose from a point in the wall near the roof of the stope; that plaintiff was "lying down behind the column or bar of the machine close to the sill." He also testified that, if there had been timbers on the sills mentioned, they would not have been under the ore, and hence could not have prevented it from falling.

Weber & Olson, of Salt Lake City, for appellant. King & Nibley, of Salt Lake City, for respondent.

McOARTY, J. (after stating the facts as above). The important and contested questions of fact that were submitted to the jury were: (1) Did appellant on the evening of the accident notify respondent's shift boss of the extra risks to which he claimed he was

exposed because of the dangerous condition of the roof or top of the stope at the point where he was at work when injured, and did the shift boss, in pursuance of such notice, promise appellant that he would have timbers installed in the stope on the sills referred to in the foregoing statement of facts? (2) Did the ore and material that caused the injury complained of break loose and fall from a point in the roof of the stope over the sills mentioned, or did it come from a point in the roof where timbers resting on the sills would not have prevented it from falling on appellant?

[1] The court, among other things, charged the jury: "To constitute a promise to remedy dangerous conditions, no formal words of promise are necessary. Any acts or expressions by which the employer or his vice principal gives the employé to understand that the cause of the danger, if any, will be removed, constitute a sufficient promise, and, if the shift boss, Bray, made any statements to the plaintiff upon which the plaintiff had reasonable grounds to rely that the stope would be timbered, the plaintiff did not assume the risk of any danger due to lack of timbering, unless the danger was so immediate, manifest, and imminent that no man of ordinary prudence would have remained there, notwithstanding the promise." This instruction, so far as it goes, contains a correct statement of the law applicable to the facts in this case. Appellant requested the court to charge the jury that, "where the master promises that a dangerous condition will be remedied, the servant does not assume the risk of an injury caused by such dangerous condition within such period of time after the promise as would be reasonably allowed for the performance, unless the place is so manifestly and immediately dangerous that a man of ordinary prudence would have refused to work there, notwithstanding the promise. The effect of a promise by the master to remedy a dangerous condition is to relieve the servant from the assumption of the risk of the particular danger to which the promise relates, although the servant be fully aware of the same; it fastens the responsibility for any injury resulting from such dangerous condition upon the master, for a reasonable length of time during which the servant continues work in expectation that the promise will be fulfilled." The court refused to give this instruction, but instructed the jury that a promise made by Bray, respondent's shift boss, "if any is proven by the evidence to have the stope timbered, would be the promise of the defendant company." And in instruction No. 12 the court said: "The effect of such promise by the master is to relieve the servant from the assumption of the risk of the particular danger to which the promise relates, if the servant in good faith relies on the promise, although the servant be aware of the danger, and, after allowing to the master a reasonable time

to remedy the danger, makes the master responsible for the injury resulting from such dangerous condition *during such further reasonable time* that the servant continued to work in expectation that the master will remedy the defect." (Italics ours.) The giving of this instruction and the refusal of the court to charge the jury as requested by appellant is assigned as error.

The rule as declared by practically all of the authorities is that, when the master in response to a complaint made by a servant of the unsafe and dangerous condition of the place in which the servant is at work promises to eliminate the particular danger complained of by putting the premises in a reasonably safe condition, and the servant, relying on the promise, continues at work for a reasonable time thereafter, the master, and not the servant, assumes the risks of the danger complained of during such reasonable time, unless the place is so obviously dangerous that a reasonably prudent man would decline to work there, notwithstanding the promise of the master. And the weight of authority seems to be that it is not necessary that the servant, at the time of complaining of the extra hazards and dangers to which he is exposed because of the dangerous condition of the place in which he is at work, should threaten to abandon the work, nor that he should say in so many words that he apprehends danger to himself. The authorities seem to hold that it is sufficient if it appears that the servant is induced to remain at work by reason of the promise to eliminate the danger, and that he had no intention of waiving his objection to the dangerous condition of which he complained. 20 A. & E. Ency. L. (2d Ed.) 127.

In 1 Shearman & Redfield on Negligence, § 215, it is said: "There is no longer any doubt that, where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or indeed within any period which would not preclude all reasonable expectation that the promise might be kept." And further along in the same section it is said: "Nor, indeed, is any express promise or assurance from the master necessary. It is sufficient if the servant may reasonably infer that the matter will be attended to."

In 26 Cyc. 1209, the rule is tersely and, as we think, correctly stated as follows: "Where the master or some one acting in his place promises to remedy the defect complained of, the servant, by continuing in his employment for a reasonable time after such promise, does not assume the risk of injury from the defect unless the danger was so patent that no person of ordinary prudence would have continued to work." And on page 1211 of the same volume it is said: "To be sufficient, a promise by the master to

remedy defects or remove danger, must be definite and certain, and must be made with a view to the servant's safety, and as an inducement to him to continue work. The promise may, however, be implied as well as express, general as well as individual."

In 2 Cooley on Torts (3d Ed.) p. 1157, the author says: "If the master promised to repair the defect or remove the danger, he thereby assumes the risk arising therefrom, and the servant may continue for a reasonable time at the master's risk. * * * After a reasonable time has elapsed, or, if a definite time is fixed, then after that has expired, the risk is again upon the servant. Though the risk is on the master, the servant must exercise a reasonable degree of care in view of the danger to which he is exposed. If the danger is obvious and such that a reasonably prudent man would not incur it, the rule does not apply and the servant continues at his own risk." To the same effect are the following decisions: *Rothenberg v. N. W. Con. Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Illinois Steel Co. v. Mann*, 100 Ill. App. 367; *A. T. & S. F. R. Co. v. Sadler*, 38 Kan. 130, 16 Pac. 46, 5 Am. St. Rep. 729; *Yerkes v. Northern Pac. Ry. Co.*, 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961; *Pleart v. Chicago, etc., Ry. Co.*, 82 Iowa, 148, 47 N. W. 1017; *Alton Lime & Cement Co. v. Calvey*, 47 Ill. App. 843; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *T. & N. O. Ry. Co. v. Bingle*, 9 Tex. Civ. App. 322, 29 S. W. 674; *Andrecsik v. New Jersey Tube Co.*, 73 N. J. Law, 664, 63 Atl. 719, 4 L. R. A. (N. S.) 918, 9 Ann. Cas. 1006; *Foster v. Chicago, etc., R. Co.*, 127 Iowa, 84, 102 N. W. 422, 4 Ann. Cas. 150; *Morgan v. Rainier Beach Lum. Co.*, 51 Wash. 335, 98 Pac. 1120, 22 L. R. A. (N. S.) 472, and note.

The case of *Foster v. Chicago, etc., R. Co.*, supra, is also published in 127 Iowa, 84, 102 N. W. 422, 4 Ann. Cas. 150, and we invite attention to an elaborate and instructive note appended to the decision in said last-named volume in which the annotator cites numerous cases in which this question was involved. From the decisions there cited, the annotator concludes that "the reasoning supporting this rule is that, when the master has knowledge of the defect and promises to repair the same, he impliedly requests the servant to continue at work, and impliedly assumes responsibility for any accident that may result from the defect during the reasonable time within which repairs should be made."

In this case, as we have pointed out, the evidence introduced in behalf of appellant tended to show that the top or roof of the stope directly over the sills was "drummy" and appeared to be in an unsafe condition, and that it might break loose and fall at any moment; that appellant notified respondent's shift boss of the dangerous condition of the stope at that point, and stated to him that it needed timbering; that the shift

boss promised to have the place timbered; that the material which fell and caused the injury complained of came from a point in the roof of the stope directly over the sills, and that, if timbers had been installed in the stope on the sills as promised, the accident would not have occurred. Under the authorities cited, we are clearly of the opinion that appellant's request, when considered in connection with other portions of the court's charge, contains a correct statement of the law applicable to the issues of fact in this case and should have been given.

Counsel for respondent vigorously contend that the court did, in effect, charge the jury as requested by appellant. We do not think so. The court, by giving that part of the instruction on this question wherein it is said that, "after allowing to the master a reasonable time to remedy the danger, makes the master responsible for injury resulting from such dangerous condition *during such further reasonable time* that the servant continues to work," etc., in effect charged the jury that the respondent was entitled to a reasonable time in which to timber the stope after the alleged promise was made before it could be held to have assumed the risk of the particular danger of which complaint was made. In other words, the jury were told that appellant continued to assume such risk for a reasonable time after the promise, and then respondent assumed the risk "during such further reasonable time" that appellant continued to work in expectation that respondent would remedy the dangerous condition of the stope. Whatever doubt or uncertainty, if any, there might be regarding the legal effect of the language used when read and considered alone, separate and apart from the balance of the charge, is removed and the instruction is made plain and certain by reading in connection therewith instruction No. 23, which is as follows: "If the alleged conversation testified to by plaintiff occurred at about 11:30 o'clock in the evening, then your verdict must be for the defendant. In other words, if you should believe that the conversation took place between plaintiff and the witness Bray referred to by plaintiff, but that it took place just a few minutes before the accident, to plaintiff, then your verdict must be for the defendant."

This instruction, the giving of which is assigned as error, we think clearly demonstrates that the court, by giving instruction No. 12, *supra*, intended to do just what the phraseology therein used purports, namely, tell the jury that appellant continued to assume the risk of the particular danger complained of for a reasonable time after the alleged promise was made.

From what we have said it necessarily follows that the giving of instruction No. 23 was in and of itself prejudicial error. Under the facts of this case, the promise of Bray (the shift boss), if made a few mo-

ments only before the accident, had the same effect upon the contractual relations existing between appellant and respondent as it would have had if made several hours prior thereto. As we have hereinbefore stated, the rule, as declared by practically all of the authorities, is that a promise by the master to remedy a dangerous condition known to the servant is an implied assumption of the risk by the master from the time the promise is made and for a reasonable time thereafter during which the servant continues to work in expectation that the promise will be fulfilled.

The judgment is reversed and the cause remanded to the district court, with directions to grant a new trial. Appellant to recover costs.

STRAUP, J., concurs.

FRICK, C. J. I concur. I am not prepared to say, however, that the court was required to charge the jury in the exact language or form requested. The request may have been too broad in stating that the promise by the master "fastens the responsibility for any injury resulting from such dangerous condition upon the master," etc. This is not necessarily the result under all circumstances. The effect of such a promise merely shifts the risk of injury from the servant to the master, and prevents the master from successfully interposing the defense that the servant has assumed the risk. Whether the master is ultimately liable for an injury if the servant continues to perform the particular service in reliance upon the master's promise may, in a particular case, still depend upon whether the master was in fact negligent, whether the servant was free from contributory negligence, and whether the injury, if any was suffered, was the proximate cause of the master's or of the servant's negligence. The law with respect to when the risk shifts from the servant to the master was, however, correctly outlined in the request, and in my judgment the court erred in not charging the jury in that regard in substance as requested.

Nor can I agree with respondent's counsel that the charge as given by the court is a mere statement of the same principle of law in another form and is therefore, in legal effect, the same as what is contained in the request offered by appellant. Nor do I think that the court thought so, or it would not have used the phraseology used in the charge given. In view of the circumstances and of what the court said, there was no reason why the court should have adopted a different phraseology unless it desired to convey a different meaning to the jury. I am forced to the conclusion that the court intended to do just what the language used by it indicates, namely, to depart from the spirit of the charge as requested by appellant's counsel. If it did not succeed in do-

ing so, as respondent's counsel now contend, this is because the language used does not have that effect. Even if this conclusion be sound, the result reached by my Associates is still correct, because the charge as given by the court certainly left its meaning in grave doubt when it should have been clear and specific.

SMOOT v. CHECKETTS et al.

(Supreme Court of Utah. June 14, 1912.)

1. ACCORD AND SATISFACTION (§ 12*)—LABOR CLAIMS—PAYMENT OF LESS THAN THE AMOUNT DUE.

Where, on the abandonment of a building contract by the contractors, labor claimants demanded payment, and there was no agreement that they should release the owner or the contractors from liability, or that they should accept payment of one-third of their claims as a compromise or settlement, there being no dispute as to the amount due, the fact that they each received one-third of the amount due them, and in return executed a receipt to the owner for such amount "in full of all claims against" the owner for labor, was insufficient to establish an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 91, 92, 93; Dec. Dig. § 12.*]

2. ACCORD AND SATISFACTION (§ 12*)—REQUISITES.

When it is claimed that payment by the debtor of a sum less than is due to the creditor is a payment in full discharge of the entire amount due, a receipt acknowledging full payment is not controlling, but it must also appear that the payment was based on a sufficient independent consideration or on a compromise of a disputed or unliquidated claim.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 91, 92, 93; Dec. Dig. § 12.*]

3. COMPOSITIONS WITH CREDITORS (§ 5*)—WHAT CONSTITUTES—CONCLUSIVENESS.

That labor claimants received from the owner of a building one-third of their claims on the abandonment of the contract by the contractors did not release the owner from liability for the balance on the theory that such payment was in the nature of a composition agreement with creditors, in the absence of proof that the creditors agreed among themselves that each would receive the one-third payment in full payment or discharge of his entire claim.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. §§ 3-7; Dec. Dig. § 5.*]

4. MECHANICS' LIENS (§ 115*)—LABOR CLAIMANTS—LIABILITY OF OWNER—STATUTES.

Comp. Laws 1907, § 1374, provides that the owner of a building under construction by contractors shall not make any payments before they become due under the contract, and, if made, they shall be treated as if not made so far as the rights of lien claimants are concerned. *Held*, that such section was applicable to a case where the contractor abandoned his contract, and, where treating premature payments as not made, the owner had in his hands money applicable to labor claims, so that a payment made by the owner to labor claimants of one-third of the amount due to them

could not discharge his liability for the balance on the theory that, where one not the debtor, and who is not legally or morally bound to pay, pays a sum less than the whole debt, and the creditor receives the lesser sum in discharge of the greater, he cannot maintain an action for the remainder; such principle being inapplicable.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

5. MECHANICS' LIENS (§ 115*)—LABOR CLAIMS—LIABILITY OF OWNER—PAYMENT OF EXCESS OF CONTRACT PRICE.

That the owners of certain buildings under construction paid out money in excess of the contract price prior to the abandonment of the contract by the contractors was no defense to their liability for labor claims which were the proper subject of liens.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

6. MECHANICS' LIENS (§ 115*)—LABOR CLAIMS—PAYMENTS OTHER THAN IN CASH.

Comp. Laws 1907, § 1375, provides that as to all liens, except that of the contractor, the whole contract price shall be payable in money except as provided therein, and shall not be diminished by any indebtedness, offset, or counterclaim in favor of the owner and against the contractor, except when the owner has contracted to pay otherwise than in cash, in which case the owner shall post and maintain at a conspicuous place on the premises a statement of the terms and conditions of the contract, before materials are furnished or labor is performed, and when so posted shall give notice to all parties interested of the terms and conditions of the contract. *Held*, that the owner, as against labor claimants, could pay a part of the contract price in a medium other than money only on compliance with the provisions of such section, and that the burden as against such claimants was on the owner to show such compliance.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150-159; Dec. Dig. § 115.*]

7. MECHANICS' LIENS (§ 202*)—LABORER'S LIEN—ASSIGNMENT.

Under Comp. Laws 1907, § 1396, providing that all liens under the chapter relating to mechanics' and laborers' liens shall be assignable as other choses in action, and that the assignee may sue thereon in his own name, the right to perfect a laborer's lien is assignable, authorizing the assignee to take the necessary steps to establish the lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 375; Dec. Dig. § 202.*]

8. APPEAL AND ERROR (§ 1011*)—REVIEW—CONFLICTING EVIDENCE.

Findings based on conflicting evidence will not be reversed on appeal unless it is clear from the evidence that the findings are wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Straup, J., dissenting.

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by William S. Smoot against Joseph Checketts and another, doing business under the name of Checketts & Bradeson, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. G. Horn, of Ogden, for appellants. Agee & McCracken, J. N. Kimball, and R. S. Farnsworth, all of Ogden, for respondent.

FRICK, C. J. The respondent, William S. Smoot, for himself and as the assignee of other lien claimants, commenced this action to foreclose certain mechanics' liens. Ray A. Ross filed a cross-complaint, but, for the purposes of this opinion, he will be treated the same as though he were an assignee of the respondent Smoot. The district court found the issues in favor of the lien claimants and ordered that the premises against which the liens were claimed be sold.

The controlling facts, stated as briefly as possible, are: That Checketts & Bradeson, as copartners, and hereafter called contractors, in April, 1908, entered into a contract with the Inter-Mountain Fair Association, a corporation, hereafter styled association, whereby said contractors agreed to furnish the labor and material to construct and complete certain buildings, and also to remove and repair certain other buildings and structures for said association, for the agreed price of \$2,839, payable on and before the completion of the buildings and structures aforesaid. Said contractors became financially embarrassed, and some time in the latter part of July, 1908, before completing the buildings and structures aforesaid, abandoned their contract. Prior to said abandonment, said contractors had, however, contracted debts and obligations for material used in and for labor performed upon said buildings and structures. The controversy in this case is limited to the claims for labor performed as aforesaid.

[1] One of the principal questions presented for determination arose out of the following circumstances, namely: A short time after the contractors had abandoned their contract, a number of the laborers who had been employed by said contractors, and who, under such employment, had performed labor upon the buildings and structures aforesaid, met with some of the officers of the association and demanded payment for their labor, and, in case payment were not made, they threatened to file liens under the statutes of this state against said buildings and structures. After some discussion, the association paid the claimants about one-third of what was due them for labor, and took from each of them a receipt in the following form: "Ogden, Utah, July 31, 1908. Received of Inter-Mountain Fair Association ——— dollars, in full of all claims against the above association for labor." The amount that was paid to each claimant was inserted in his receipt, and each one signed a separate form. In its answer, the association pleaded the foregoing payment as an accord, satisfaction, and settlement of all claims. The claimants, however, denied such compromise or settlement. Upon that issue the court found that, when the foregoing

payments were made and the receipts executed and delivered, "there was in fact no agreement that either of said parties would release the said defendant (association), or the defendants Checketts & Bradeson (the contractors) from liability to them, and, further, that there was no dispute at the time of said payments as to the amounts then due and owing to the said plaintiff" or his assignors, including Ross. The court further found that there was no consideration to support the alleged accord and satisfaction, and further found that the payments made as aforesaid were made out of money that was due and owing by said association to said contractors. The court further found that, although said contractors had abandoned said contract, notwithstanding that fact "there was sufficient money remaining in its (the association's) hands of the contract price of the work to be performed under said contract after the payment for the completion of said work to pay the plaintiff and his assignors" together with all other claims for material. Upon these facts the court found, as a conclusion of law, that there was neither a compromise settlement nor an accord and satisfaction of said claims.

It is now insisted by the attorney for the association that the court erred in its findings as aforesaid. From the facts as found, which, in our judgment, are sustained by the evidence, the payments relied on by the association do not constitute an accord and satisfaction, nor did the transaction between the claimants and the officers of the association amount to a compromise and settlement of unliquidated or disputed claims. There was no dispute whatever between the officers of the association and the labor claimants with respect to the amount that was due to any one of them from the contractors. Neither was there any question with regard to whether the claimants, as a matter of law, were entitled to file liens against the buildings and structures of the association for the full amount of their claims. The mere fact that, under such circumstances, the claimants executed receipts in full when they had in fact received only about one-third of the amounts then due them from the contractors for labor is of slight, if any, importance. As to whether the receipt of a less sum will discharge a greater one does not depend upon the form of the receipt that is given.

[2] When it is claimed that the payment by the debtor of a sum of money less than is due and owing to the creditor is a payment in full discharge of the entire amount due, a receipt acknowledging full payment standing alone is not controlling. If such a payment is based upon a sufficient independent consideration, or upon a compromise of a disputed or an unliquidated claim, and under such circumstances the lesser sum is received as payment in discharge of the larger one, the payment is binding upon the creditor. *Barnum v. Green*, 13 Colo. App.

258, 259, 57 Pac. 757; *Johnson v. Simmons*, 76 Minn. 34, 78 N. W. 863; *Canadian Fed. Co. v. McShane*, 80 Neb. 551, 114 N. W. 594, 14 L. R. A. (N. S.) 443, 127 Am. St. Rep. 791; *Farmers' & Mechanics' Life Ass'n v. Caine*, 224 Ill. 599, 79 N. E. 956; *Prudential Ins. Co. v. Cottongham*, 103 Md. 319, 63 Atl. 359; *Ness v. Minnesota & Colo. Co.*, 87 Minn. 413, 92 N. W. 333.

In the foregoing cases, the doctrine of what constitutes a sufficient consideration for the discharge of a debt then due by the payment of an amount less than the whole debt is fully illustrated. Under the authority of every one of the cases referred to above, with many others which might be cited, the payment in the case at bar did not amount to either a compromise of a disputed claim or an accord and satisfaction.

[3] Nor is the contention of counsel for the association tenable that the payments made were in the nature of a composition agreement with creditors, and hence are binding upon the lien claimants, as constituting a part of the creditors of the contractors. It is undoubtedly the law that, where all or a part of the creditors of a particular debtor agree among themselves that each will receive from the debtor, or out of his property or funds, a certain amount or per cent. of the creditor's claim in full payment or discharge of his entire claim, such an agreement is binding upon all the creditors who are parties to the same. In order that such an agreement be binding, however, there must be an agreement or understanding to the effect just stated by the creditors among or between themselves. In other words, there must be mutuality among the creditors in order to bind any of them. In the cases of *Gage v. De Courcey*, 68 N. H. 579, 41 Atl. 183, *Bartlett v. Woodworth-Mason Co.*, 69 N. H. 316, 41 Atl. 264, and *Sage v. Valentine*, 23 Minn. 102, the principles now under consideration are clearly illustrated and applied. The facts in the case at bar do not bring it within the principles aforesaid.

[4] Counsel, however, insist that, under the facts, the case at bar falls within the doctrine that where one not the debtor, and who is not under any legal or moral obligation to pay the debt, does pay a sum less than the whole debt, and the creditor agrees and does receive the lesser sum in discharge of the greater one, the creditor is bound and cannot thereafter sustain an action for the remainder. This doctrine is clearly stated by Mr. Justice Collins in the case of *Clark v. Abbott*, 53 Minn. 88, 55 N. W. 542, 39 Am. St. Rep. 577. It is also applied in the case of *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606. The foregoing doctrine has and can have no application as between material and laboring men and the owner of buildings and structures under our mechanics' lien statute. The owner of the building and the material or laboring men are not strangers within the purview of the foregoing doctrine. Un-

der our statute (C. L. 1907, § 1374), the association had no authority to make any payments before such payments were due in accordance with the terms of the contract, and, if it made any payments, they, under the statute, had to be treated "as if not made," so far as the rights of the respondent and his assignors are concerned. The statute is applicable although, as in this case, the contractor "may thereafter abandon his contract."

As we have seen, the contract price was not payable unless and until the structures contracted to be erected were completed. We have also called attention to the fact that Checketts & Bradeson, the contractors, never completed their contract, but abandoned the structures before completing them. The provisions of section 1374, supra, therefore became applicable, and hence the court was right, as a matter of law, when it found that the association had a sufficient amount of the contract price in its hands to pay the respondent and his assignors, because, under the statute, any payments that the association may have made under the undisputed facts were by the statute "deemed as if not made," so far as the rights of lien claimants were concerned.

[5] What has been said also answers the claim that the association paid out money in excess of the contract price. If this was done, it was contrary to the spirit of our lien laws, and cannot be urged as a reason why respondent and his assignors should not receive pay for the labor they performed. So long as the right to liens existed, the association had no right whatever to prefer any claimant above another, and, if it did so before the time for filing liens had elapsed, it cannot complain because the law compels it to treat all claimants alike. Moreover, it appears in this case that the association was permitted to pay a part of the contract price in a medium other than money.

[6] This could only be done so as to affect the respondent and his assignors if the provisions of section 1375 were complied with by the association. The burden of showing that fact as against these claimants was upon the association, and there is nothing in the record to show that said section was complied with. This is important only for the purpose of showing that the excessive payments that are claimed by the association are entirely immaterial in this case under the facts as found by the court.

It is further asserted that the court erred in allowing attorney's fees. Comp. Laws 1907, § 1400, expressly provides that, in actions to foreclose mechanic's liens, the successful party shall be entitled to recover an attorney's fee to be fixed by the court not to exceed \$25. The amount allowed by the court not being in excess of the amount permitted by statute, and no other error being claimed in this regard, the assignment must be overruled.

[7] From the record it is made to appear that one Rupp was employed by the contractors, and that he performed labor upon the building and structures in question; that he did not himself make oath to his claim and file the same, but that, before the notice of lien was filed, he had assigned his claim for labor to the cross-complainant Ross. Ross, after the assignment to him, duly made oath to the claim and filed the same as required by our statute. Counsel for the association vigorously assails the ruling of the trial court in allowing and enforcing the lien thus claimed by Ross. Counsel concedes that the original claimant, after perfecting his lien under the statute, might assign the same, and that his assignee may enforce it, but it is contended that the mere claim—that is, a mere inchoate right to a lien—is not assignable. In other words, counsel contends that the original claimant must perfect the lien under the statute, and that his assignee cannot perfect the lien. A number of cases are cited which sustain counsel's contention. In 27 Cyc. 255, the law upon the subject, and which is to the contrary of counsel's citations, is stated in the following language: "In some jurisdictions it is held that an inchoate mechanic's lien may be assigned so as to invest the assignee with the right to perfect and enforce the same."

In support of the foregoing statement, cases are cited from Alabama, Colorado, Florida, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Rhode Island, and South Dakota. See, also, *Bolsot on Mechanics' Liens*, § 10; *Phillips on Mechanics' Liens*, §§ 54, 54a, 55.

We are aware that the Supreme Court of California, in *Mills v. La Verne Land Co.*, 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168, has arrived at a contrary conclusion to that stated in Cyc. The case, however, is, to some extent at least, based upon a California statute. From an examination of the cases cited by the Supreme Court of California, it develops that some of the decisions relied on by the California Supreme Court have since then been modified, if not overruled. Iowa in early cases held with California, and in a later decision (*Peatman v. Centerville Light, etc., Co.*, 105 Iowa, 1, 74 N. W. 689, 67 Am. St. Rep. 276), that court supports the text quoted from Cyc., *supra*. The question is also fully discussed by the Supreme Court of Minnesota in *Kinney v. Duluth Ore Co.*, 58 Minn. 455, 60 N. W. 23, 49 Am. St. Rep. 528. It is there held that even in the absence of a statute, in view of the general provisions of the Code with respect to permitting assignments, and in view of the liberal provisions of the lien statute and its purpose, the inchoate right to a lien is assignable. Our statute (Comp. Laws 1907, § 1396), however, specifically authorizes the assignment of liens and gives the assignee the right to enforce the same in his own name. We

think, when that section is considered in connection with all of the other provisions of our lien law, that a reasonable construction requires us to hold that the court committed no error in allowing and enforcing the lien in question. We are of the opinion that, under our statute, the right to perfect a lien is clearly assignable.

It is further asserted that the district court erred in allowing a lien for labor for which the statute does not authorize a lien. The record discloses that one of the assignors performed a few days' labor for which there may be some doubt whether the statute gives a lien or not. In view, however, that the construction of the statute in this regard is of grave importance to all lien claimants, and that counsel for neither side has thoroughly discussed the question nor cited any authorities, and for the further reason that the amount involved is small and that, in view of the finding of the court, the association is not injured by the court's ruling, we have less hesitancy than we otherwise would have in refraining from passing upon the question at this time.

[8] The contention that the findings are not sustained by the evidence cannot prevail. This contention can only prevail in cases where it is clear from the evidence that the court's findings are wrong. Such is not the case here. On most points the evidence is, to say the least, in sharp conflict, and, where such is not the case, it is not clear that the findings are not right. In cases where the evidence is conflicting, we are just as likely to be wrong as to be right by attempting to interfere with the court's findings of fact at long range. In view of the whole record, we are of the opinion that interference in this case is not justified. In this connection it should also be remembered that, although the association did pay more than the contract price, yet it paid no more than the labor and material were worth. It therefore paid only for what it actually obtained. If it was damaged in any way by reason of the excessive payments, it, under the circumstances, should look to the contractors, who alone are responsible for the predicament in which it was placed. By this we do not mean that the owner of the building or structure can be required to pay more than the contract price in case he complies with the provisions of the statute, but if he does not comply with them, and is required to pay more, he has no legal right to complain.

The assignment that one of the assignees had been paid by the contractors must likewise fail. The agreement between the contractors and the assignor amounted to no more than an agreement that the assignor should be paid in a particular manner. The agreement, however, was not fulfilled by the contractors, and the assignor received no pay for his labor. This left the question precisely the same as though the assignor had

been promised payment in cash by the contractors, but they did not redeem their promise.

The judgment is affirmed, with costs to respondent.

MCCARTY, J., concurs.

STRAUP, J. I dissent. The evidence shows: (1) The fair association made two written contracts with Checketts & Bradeson to construct and repair buildings, etc., upon an agreed price of \$2,839. It also entered into another agreement with them for extras at an agreed price of \$235.75. That made a total contract price of \$3,074.75. It paid to them and for their use and benefit \$2,935.50. It paid out \$146.69 for labor and material to finish the contract. That was a total of \$3,083.19, or more than the contract price. In addition to that it paid \$147 to the plaintiff and his assignors. (2) Checketts & Bradeson became insolvent and abandoned the work before it was completed. The plaintiff and his assignors were in their employ and had done labor for them on the work. When the contractors abandoned the work, they owed plaintiff and his assignors \$440. (3) They demanded payment from the fair association of the amounts due them, and threatened to file liens if their claims were not paid. There was no dispute as to the amounts due them from the contractors. There, however, was a controversy as to the right of plaintiff and his assignors to file a lien or to look to the fair association for payment; it contending in that regard that it did not owe the contractors anything, at least not an amount sufficient to pay the claims. It also asserted that the contractors owed other claims and demands for material and labor, the amounts of which then were uncertain and unpaid, and that the association would be to extra expense, the amount of which was then also uncertain, to complete the work according to contract, due to the contractors' default and breach. (4) After two conferences on different days between the fair association and the plaintiff and his assignors, the former agreed to pay the latter one-third of their claims if they would release it of all claims and demands and forego their right to file a lien. This was agreed to and accepted by the plaintiff and his assignors. The fair association accordingly paid them one-third of their claims, amounting in the aggregate to \$147, and took a receipt signed by each which reads, "Received of Inter-Mountain Fair Association," the amount paid to each being specified, "In full of all claims against the above association for labor." (5) Thereafter the plaintiff and his assignors filed liens for the balance of their claims which the assignors subsequently assigned to plaintiff who brought this action.

The agreement between the fair association and the plaintiff and his assignors and

the giving of the receipts were testified to by the directors and officers of the fair association. The receipts themselves were put in evidence. Their execution and delivery are undisputed. They are not assailed on the ground of fraud, misrepresentation, or mistake. While a receipt, so far as it partakes of the character of a mere receipt and not a contract, may be varied or controlled by parol evidence, nevertheless it is a written admission made by the party signing it of the fact or facts which it recites. Ordinarily one does not make an admission of facts against interest unless true. Such an admission ought not lightly to be disregarded. The receipts strongly corroborate the testimony of the officers and directors of the association, and are at war with the claim now made by the plaintiff and his assignors.

The testimony of the officers and directors is also corroborated by that of Ross, the counterclaimant, a witness for the plaintiff. He testified that he was present at the conferences between the plaintiff and his assignors and the fair association and when the receipts were signed, and the money paid by the association to himself and to the plaintiff and his assignors, and that the association claimed that it did not have money enough to pay "us in full." He further testified: "We had been talking about filing a mechanic's lien. While we were talking, they called our attention to several things in the contract which hadn't been completed. At first the association refused to pay anything, and they refused to recognize any liability on their part towards us, and we stated that we had a right to put a mechanic's lien, and if no settlement was made we would do so, and they told us, if we would make some concession and agree not to file a lien, that they would pay us some portion of our claim, and we should make them a receipt in full. We agreed to this later on. They told us no settlement would be made unless we came to that agreement, and we finally did so, accepting the money and signing the receipts, and they told us then that this settlement with the association would not release Checketts & Bradeson from the balance of our claims." He further testified that the amount so agreed upon was one-third of their claims, and that, in accordance with the agreement, that amount was paid, and the receipts given.

The only evidence to the contrary is this: One of the officers of the fair association, a witness for the defendants, on cross-examination was asked if, at the time of the giving of the receipts, he did not say to the plaintiff and his assignors that "the receipt was a mere matter of form; that he did not intend to beat them out of anything that was due them; and that it would in no way affect their claims." He denied making any such statement. On rebuttal the plaintiff and some of the assignors were called, and,

In response to leading questions put to them if such a statement was made by such officer at that time, they answered in the affirmative. But neither of them denied the agreement between the fair association and the claimants and the giving of the receipts as testified to by Ross and the directors and officers of the fair association. All they did by way of evidence was an attempt to impeach one of the officers of the association in respect of a statement made by him as to the legal effect of the receipts, that they were "a mere matter of form," etc.

I think the agreement and the payment of the money thereunder, and the giving of the receipts, constituted a settlement between the fair association and the claimants. It was so pleaded in defense. It was not assailed on the ground of fraud, misrepresentation, or mistake, or that it was not fairly entered into, nor is there any evidence to dispute the fact that the agreement was made and that the terms thereof were as testified to by Ross and the officers of the association. I also think that the agreement was founded upon a good consideration. This is not a case where one party owes another an undisputed and liquidated amount which was settled for less upon no independent or other consideration. Here the defaulting contractors were primarily liable to the claimants. The fair association was not at all liable to them. Its property upon which the work was done was secondarily and only conditionally liable. That liability was not in excess of the contract price nor beyond the moneys in the hands of the association and unpaid to the contractors.

The great weight of the evidence shows that the fair association had paid the contractors the full amount of the contract price. The work was uncompleted when the contractors abandoned their contract. At the time of the settlement, it was uncertain as to the reasonable cost to complete it. It also was then uncertain as to the amount of claims, other than those of plaintiff and his assignors, for labor and material then owing and unpaid by the contractors. Under such circumstances, the fair association agreed with the plaintiff and his assignors to pay them one-third of their claims if they would release it of all claims and demands and forego the right to claim and file a lien upon its property. They agreed to that. The amount so agreed upon was paid to them. As soon as they received it and gave their receipts in full, they ignored their agreement and filed liens. The fair association, including the amounts paid to plaintiff and his assignors, has already paid \$3,230, or \$391 more than the contract price, yet the judgment of the court below not only released the plaintiff and his assignors from the settlement made by them with the fair association, but required it to pay substan-

tially \$581.10 more to the plaintiff and his assignors, including the counterclaimant, else its property upon which the work was done to be sold in payment thereof.

I think the judgment as against the fair association wrong, and therefore dissent.

REILLY v. HATHEWAY, City Treasurer,
et al.

(Supreme Court of Montana. June 21, 1912.)

1. LICENSES (§ 6*)—VALIDITY.

A license tax imposed by a city ordinance upon grocerymen and others purely for revenue, and not for police regulation, was illegal.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.*]

2. LICENSES (§ 34*)—CLAIMS—PRESENTATION.—NECESSITY—ILLEGAL LICENSE FEE.

Where a grocerymen, under protest, paid a license fee exacted by city ordinance, he could bring action against the city to recover it back without having first filed his claim in accordance with Rev. Codes, §§ 3282, 3283.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 68; Dec. Dig. § 34.*]

3. PARTNERSHIP (§ 64*)—USE OF FIRM NAME.—ABATEMENT OF ACTION.

The failure of a plaintiff to comply with Rev. Codes, §§ 5504-5509, relating to an individual transacting business under a designation purporting to be a firm name, merely suspends the right to maintain the action until the statute has been complied with, and, where he complies with the statute before answer, the action does not abate.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87-91; Dec. Dig. § 64.*]

4. PARTNERSHIP (§ 214*)—USE OF FIRM NAME.

The defense that the plaintiff is doing business in the firm name without having complied with Rev. Codes, §§ 5504-5509, relating to an individual transacting business under a firm name, is an affirmative one and is waived unless pleaded in the answer.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 410-413; Dec. Dig. § 214.*]

5. LICENSES (§ 34*)—RECOVERY BACK—PROPER REMEDY.

An action by a grocerymen to recover back an illegal license fee exacted by city ordinance was properly brought under Rev. Codes, § 2742, giving the right to recover an illegal tax paid under protest, and he was not required to resort to the remedy given under Rev. Codes, § 2741, authorizing a suit in equity to restrain the collection of an illegal or unauthorized tax.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 68; Dec. Dig. § 34.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by P. M. Reilly against Thomas G. Hatheway, Jr., City Treasurer, and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

C. A. Spaulding, of Helena, and Floyd J. Logan, of Missoula, for appellant. Frank Woody, of Missoula, for respondents.

SMITH, J. This action was brought to test the validity of ordinance No. 85 of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

city of Missoula, imposing a license tax on nearly every business and profession carried on in the city, including the grocery business conducted by the appellant. He paid his license tax of \$20 under protest and began this action to recover the same, and also to enjoin the city authorities from demanding the tax in future. The court below tried the cause without a jury, found the issues in favor of the defendants, and entered judgment in their favor. Plaintiff has appealed.

It is alleged in the complaint that said license tax is exacted for the sole and only purpose of raising revenue to defray the general municipal expenses of the city; that plaintiff's business is a lawful one, endangering neither the health, safety, morals, or comfort of the inhabitants; and that as conducted it does not require, and is not the subject of, any police regulation whatever. The answer denies that the license tax was collected for the purpose of raising revenue, but admits that the moneys so collected were placed in the general fund of the city and that the general expenses of the city are paid from that fund. It is alleged affirmatively that the plaintiff deals in certain articles and commodities the storage and sale of which require and receive police regulation. It also alleges that all moneys received from licenses, all moneys received from general taxes, except moneys received from taxes for road and street purposes, all moneys received from all other sources, except poll taxes, are paid into the general fund of the city, and all expenses in connection with collecting and issuing licenses, the printing thereof, clerical hire in connection therewith, cost of inspection, cost of enforcing all police regulations, and all expenses of every nature and kind whatsoever, save and except expenses of grading, cleaning, and repairing streets and alleys, are paid out of the general fund. It is further alleged that ordinance No. 85 was not passed for the purpose of raising revenue, "but was passed for the purpose of police regulation, and all money received from licenses issued thereunder was and is not received for the purpose of paying the general expenses of the city, but was and is received for the purpose of defraying the cost of all necessary and proper police regulations and all necessary and proper expenses in connection therewith."

The plaintiff testified that the city did not, to his knowledge, make any inspection of the articles handled in his store; that "they never had any inspector there to inspect anything in the store"; that he spends nearly all of his time there, except evenings, and would know if any inspection "was going on along that line"; that the authorities have never at any time during the last three years made any "regulation" of his business, "excepting the fire chief would come around and tell us to clean up probably before the 4th of July or some time before a celebration, about once a year." He also testified, over

objection, that not anything carried by him in stock required or necessitated police regulation or inspection; that he did not know of anything associated with his business that required or necessitated supervision; that he did not know of anything connected with his business that would menage the safety, good order, morals, or health of the community; that, since the payment of the sum mentioned in the complaint under protest, he has continued to pay a license tax, but there has been no inspection or regulation of his business by the city subsequent to that date, except by the fire chief aforesaid; that the city has been to no expense at all in the regulation or inspection of his business; that the health officer might have walked through his store and looked around, he could not say, but no known official visit was ever made; that no representative of the city could have come into his place of business without his knowledge.

The defendant city treasurer testified for the plaintiff that the employees of the city are paid out of the general fund; that the expenses of keeping the streets clean and "everything nice for the business men" are also so paid; but, aside from such expenditures, he had no knowledge of any payments that inured to the benefit of the plaintiff that were paid out of the general fund. He also testified that he knew of no expenditure on the part of the city of Missoula "having been made for the direct purpose only of inspecting and regulating the interior of the business of the plaintiff"; that he knew of no expenditure in the past three years for the purpose of inspecting any article handled by the plaintiff in his business, or for regulating his business. He also testified that he collected the license taxes; that probably 40 days out of every 3 months were required to do so; that the business of collecting license taxes requires receipt books and license books; that the salaries of the sanitary inspector and board of health are paid out of the general fund; that the board of health has the regulation and inspection of all places of business and residences, "to see that they are kept in a sanitary and healthful condition"; that the city of Missoula does not exercise any regulatory measures toward professional men, doctors, dentists, or lawyers, regulating their business, supervising or inspecting them; that his services in collecting licenses do not cost the city anything, because he is working for the city anyway.

Samuel Bellew, the city clerk, testified that he knew of no amount having been expended by the city for any supervision, regulation, or inspection of plaintiff's business; that 100 licenses and receipts would cost about \$3; that the sanitary inspector, under the board of health, has the duty of inspecting and regulating places of business.

Defendants offered no evidence. It was admitted by the pleadings that the city of

Missoula has passed certain ordinances providing for the inspection of all meats, vegetables, milk, and butter sold or offered for sale; also ordinances limiting the quantity of coal oil, petroleum, gasoline, naphtha, and other inflammable, explosive, and dangerous liquids, and plaintiff testified that he carried coal oil, vegetables, fruit, butter, condensed milk, and smoked and dried meats in stock.

[1] 1. This court held, in *Johnson v. City of Great Falls*, 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974, that while the Legislature may not confer upon cities and towns the right to impose a license tax upon professions and occupations for the purpose of raising revenue, it may, in the absence of constitutional limitation, authorize them to impose such a tax in aid of police regulations. Ordinance No. 85 of the city of Missoula ostensibly and presumptively imposes a license tax upon the business or occupation of the appellant in the exercise of the police power of the municipality. On its face this ordinance appears to be valid. But of course the city cannot do by indirection what it is not permitted to do directly. If this license tax was in fact imposed for purely revenue purposes and not for regulation, its collection was an illegal act. The evidence heretofore quoted discloses to our minds, beyond question, that as a police regulation the ordinance is a dead letter upon the ordinance book. Apparently no attempt was made to regulate, supervise, or inspect the grocery business of the appellant. It is impossible to escape the conclusion that the tax was collected for purely revenue purposes. The money was paid into the general fund of the city and used to pay its general operating expenses. Approximately 800 licenses and receipts were issued annually at an expense for printing of about \$24. No extra expense was incurred on account of salaries of the city clerk and city treasurer. In fact, the entire expense to the city grew out of the collection of these same license taxes, and were it not for such collections the city would have been at no expense whatever. We shall not stop to inquire on whom the burden of proof rests. It may be presumed, we think, that the two city officers who were sworn as witnesses would have some knowledge as to whether the business of the plaintiff was in fact subjected to police regulation. Both declared that, so far as they knew, nothing of the kind was ever attempted. The respondents offered no evidence. Under these circumstances we are inclined to the opinion that the appellant made a prima facie showing that the tax paid by him under protest was collected for the purpose of raising revenue solely, and was therefore illegal.

[2] 2. It is contended that the judgment should be affirmed for the reason that the appellant presented to the council no claim against the city before bringing action. The provisions of sections 3282 and 3283, Revised

Codes, are invoked to support the contention. The reason underlying these statutory provisions is found in the consideration that the legislative purpose was to protect cities and towns from actions upon demands of which they had had no previous notice, and no opportunity to investigate, or to settle without litigation. The reason of the law is its life, and when the reason falls the law dies. The city of Missoula, having formally passed an ordinance requiring the appellant to pay a license fee, could only return the same to him, voluntarily, in violation of its ordinance. It would have been an idle act to demand a return of his money from the same power that advisedly exacted it from him.

[3] 3. Again, it is contended that the appellant cannot maintain this action because at the time of filing his original complaint he had not complied with the provisions of sections 5504 to 5509, Revised Codes, relating to an individual transacting business in this state under a fictitious name or style, or designation purporting to be a firm name. Appellant testified that he was doing business as an individual under the name of P. M. Reilly & Co. The record shows that he complied with the statute before filing his second amended complaint. The only answer found in the record is directed to this complaint. Without deciding whether the statutory provisions heretofore referred to apply to the plaintiff, it is sufficient to hold, on the authority of *Carson-Rand Co. v. Stern*, 129 Mo. 381, 81 S. W. 772, 32 L. R. A. 420, and *Nicholson v. Auburn Gold Min. & M. Co.*, 6 Cal. App. 547, 92 Pac. 651, that it is not the right to begin an action, but the right to maintain it, that is withheld by the statute for failure to comply with its terms; and if, before the defense is interposed, the plaintiff complies with the statutory provisions, the action may be maintained.

[4] The defense is an affirmative one and is waived unless pleaded in the answer. *Vaughan v. Kujath*, 44 Mont. 484, 120 Pac. 1121; *California S. & L. Society v. Harris*, 111 Cal. 133, 43 Pac. 525. The appellant alleged that he had complied with the statute, and, while this allegation was not necessary in order to state a cause of action, it was, nevertheless, denied, and we think the denial was sufficient to raise the issue. But so long as the statute was complied with by the appellant before the answer was interposed, the action should not abate. The right to maintain the action is simply suspended until the statute is complied with.

[5] 4. Finally it is contended that the action should have been commenced under the provisions of section 2741, Revised Codes, authorizing a suit in equity to restrain the collection of an illegal or unauthorized tax, and not under section 2742, giving the right to recover an unlawful tax paid under protest. A nice distinction is made in the brief of the respondents between an illegal tax and an unlawful one. We do not, however, find

it necessary to analyze or distinguish the two words. Section 2741 gives a cause of action, at law, in all cases where taxes are paid under protest. Section 2742 provides for a suit in equity in certain cases. The remedy in equity is limited, but that at law is unlimited. *Montana Ore Pur. Co. v. Maher*, 32 Mont. 480, 81 Pac. 13. In this connection it is suggested by counsel that section 2742 does not give a right of action against a city for taxes or licenses paid under protest, for the reason that the concluding paragraph thereof provides that the tax so paid shall be held by the county treasurer and no part thereof paid to the State Treasurer until the determination of the action brought for the recovery thereof. We are satisfied, however, that section 2742, as originally enacted, was designed to create a right of action in all cases. Its phraseology so indicated. It provided that an action might be brought against the officer to whom the tax or license was paid, or against the county or municipality on whose behalf the same was collected. See section 4024, Political Code of 1895. The legislative assembly of 1905 (Laws 1905, c. 109) amended the measure by adding the last paragraph, just referred to; and the language therein employed, reading the amended act as a whole, might indicate that the entire section related only to actions against a county. But such is not the case. The reason for the amendment was: It was found necessary to provide that taxes and license fees paid to the county treasurers under protest should remain in their hands until the final determination of any action brought to recover the same; otherwise the portion paid to the state would not be available for refunding purposes, in case of an adverse judgment.

5. The case of *Hopkins v. City of Butte*, 16 Mont. 103, 40 Pac. 171, involved a controversy which arose in 1891 before the statute giving a right of action for the recovery of taxes and licenses paid under protest was enacted. Mr. Justice Hunt said: "The common-law rule, * * * in the absence of statute, must govern."

For the reasons herein given, the judgment of the district court is reversed, and the cause is remanded, with instructions to enter a judgment in favor of the appellant. Reversed and remanded.

HOLLOWAY, J., concurs.

BRANTLY, C. J. I concur in the result reached by my Associates because I think that, under the facts disclosed by the record, the ordinance was enacted in the first instance as a revenue measure, and for that reason void under the decision in *Johnson v. City of Great Falls*, 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974. The purpose of its enactment is made clear by the fact that, though the city council has enacted other

ordinances providing for police supervision of many, if not all, the occupations pursued by the residents of the city, the funds provided by it have never been expended in any measure in enforcing them. Approximately an amount equal to two-fifths of the entire revenue of the city is derived from its imposition. All of this has been and is being expended for general purposes without the least regard to the health or safety of the inhabitants. If it was enacted as a part of the police regulations of the city, the fact that the other ordinances have not been enforced is no reason why the plaintiff should have relief in this proceeding. The course for him to pursue would manifestly be to invoke the proper process to compel the city authorities to perform their duty.

SMITH v. ZIMMER et al.

(Supreme Court of Montana. March 4, 1912.
On Rehearing, May 29, 1912.)

1. HIGHWAYS (§ 213*)—INJURIES—QUESTION FOR JURY—CHARACTER OF HIGHWAY.

On evidence in an action for injuries sustained by plaintiff from a defective highway, held that the question whether the road was a public highway falling under defendant's jurisdiction within the definition of Rev. Codes, § 1337, was for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 535-537; Dec. Dig. § 213.*]

2. HIGHWAYS (§ 197*)—INJURIES FROM DEFECTS—ACTION—PRESUMPTION.

One traveling upon a public highway in the nighttime has a right to presume that the public officers charged with its care have done their duty.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 491-493, 498-503; Dec. Dig. § 197.*]

3. NEGLIGENCE (§ 122*)—ACTION—BURDEN OF PROOF.

Where the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is upon him to relieve himself from the suspicion of a want of due care on his own part which will otherwise be imputed to him.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

4. HIGHWAYS (§ 213*)—INJURIES FROM DEFECTS—ACTION—QUESTION FOR JURY.

On evidence in an action for personal injuries sustained on a defective highway, held that whether plaintiff acted as a reasonably prudent person would in the emergency was for the jury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 535-537; Dec. Dig. § 213.*]

5. HIGHWAYS (§ 208*)—INJURIES FROM DEFECTS—ACTION—PLEADING—PROOF.

In an action against a supervisor of a county road district for injuries sustained upon a defective highway in his district, it is not necessary for the plaintiff to allege and prove that defendant had funds at his disposal which he could use to make the necessary repairs on the road; the question of defense based upon such facts must be determined upon an answer.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 522-525; Dec. Dig. § 208.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

6. OFFICERS (§ 116*)—LIABILITIES—NEGLIGENCE.

Where a duty is imposed on an officer by statute or arises by implication out of the character of the office and the nature of its duties, and the duty is imperative and not merely discretionary, an individual to whom the duty is owing and who is injured by its negligent non-performance has a right of action against the officer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 193, 194, 196; Dec. Dig. § 116.*]

7. HIGHWAYS (§ 198*)—COUNTY COMMISSIONERS—LIABILITY FOR INJURIES FROM DEFECTIVE HIGHWAY.

Under Rev. Codes, §§ 1356-1360, 1362-1364, 1372, 1373, 1387, defining the duties of county commissioners with respect to highways and their powers over the supervisors of road districts, which make them the agency ultimately responsible for the care, repairing, and supervision of public highways, the commissioners may be personally responsible to an individual for injuries sustained by reason of their negligent failure to see that a highway is put in proper repair or that warning is given of the defect.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 504-507; Dec. Dig. § 198.*]

8. HIGHWAYS (§ 198*)—SUPERVISOR OF ROAD DISTRICT—LIABILITY FOR INJURIES FROM DEFECTIVE HIGHWAY.

The supervisor of a county road district, charged by Rev. Codes, § 1372, with the imperative duty of removing obstructions from highways in his district, is personally liable to an individual injured by reason of an obstruction or want of repair in such highway on the ground of his failure to make the repairs by removing the obstruction.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 504-507; Dec. Dig. § 198.*]

Holloway, J., dissenting in part.

Appeal from District Court, Lewis & Clark County; J. Miller Smith, Judge.

Action by G. W. Smith against Henry Zimmer, supervisor of the Augusta Road District in Lewis and Clark county, and Joseph J. Hindson and others, county commissioners of Lewis and Clark county. Judgment for defendants, and plaintiff appeals. Reversed as to defendant Zimmer, and affirmed as to defendants Hindson and others.

Action for damages for a personal injury. During the year 1909 and up to the time this action was commenced, the defendants Hindson, Richardson, and one Moses F. Root were the commissioners of Lewis & Clark county. Moses F. Root, made one of the original defendants herein, died before the trial, and defendant W. F. Root, the administrator upon his estate, was substituted in his stead. Defendant Zimmer was the supervisor of the Augusta road district in Lewis & Clark county. The complaint alleges that it was the duty of the defendant Zimmer to see that the public roads in the Augusta district were kept in a reasonable state of repair, and, in case any of them became dangerous or impassable from any cause, to restore them by repairing the defects therein, and in the meantime, and until any defect was remedied, to advise the public of its existence; that it was the duty of the

defendants Hindson, Richardson, and Root, as commissioners of the county, to see that defendant Zimmer discharged the duties named; and, in case he failed to perform them; to cause all reasonable and necessary repairs to be made, and in the meantime to advise the public of the existing conditions; that at the times herein mentioned there was maintained in the district a public road leading from the town of Augusta south to, across, and beyond Elk creek; that early in the month of June, 1909, a washout occurred at a culvert on the road near the crossing over Elk creek which rendered it impassable and dangerous; that this defective condition was permitted to remain until the time of the accident; that Zimmer knew of it but failed and neglected to remedy it or to advise the public by posting or causing notices to be posted at or near the place, or by any other means; that the defendants Hindson, Richardson, and Root, though advised that the condition was dangerous, and though they knew that defendant Zimmer was derelict in his duty in the premises, failed and neglected to take any steps to have necessary repairs made or to give notice or warning to the public by posting notices or otherwise; and that the defect was a public nuisance of which defendants had notice. It is then alleged that on October 11, 1909, the plaintiff, while driving his wagon along the road, being without knowledge or warning of the defect therein and it being so dark that he could not see, was precipitated into said washout, whereby he sustained injuries rendering him permanently crippled and lame.

The defendants Hindson, Richardson, and Root, after admitting that they were commissioners as alleged, deny specifically all the allegations in the complaint. They then allege several affirmative defenses among which are the following: (1) That plaintiff was guilty of contributory negligence; (2) that the defect in the highway was being repaired as rapidly as possible, that all the highways in the county at the time of the accident were in a greatly damaged condition, and that plaintiff knew of the defect by which he was injured; (3) that at all the times mentioned the defendants were acting in their official capacity as county commissioners and were proceeding in good faith in the honest discharge of all their duties, and particularly with reference to the road upon which plaintiff was injured. The answer of Zimmer is substantially the same except that as an additional defense he alleges that the board of commissioners had not made any appropriation of funds for the repair of the roads in his district to cover a later date than May 31, 1909, and that all appropriations made for such repairs had been exhausted long before the date of the accident. There was issue by reply.

At the close of plaintiff's evidence the de-

fendant commissioners and Zimmer interposed separate motions for nonsuit, both of which enumerated the grounds (1) that the evidence fails to show that any of the defendants owed a legal duty to plaintiff; (2) that it fails to show that the defendants had notice of the defect in the road; (3) that it fails to show that the road is a public highway; (4) that it affirmatively shows contributory negligence upon the part of plaintiff. The motion of defendant Zimmer included the additional ground: (5) That the evidence fails to show that there were funds available with which to repair the roads in his district. The court sustained the motion generally and rendered judgment for the defendants. The appeal is from the judgment.

Walsh & Nolan, of Helena, for appellant.
O. W. McConnell, of Helena, for respondents.

BRANTLY, C. J. (after stating the facts as above). The evidence discloses the following: The accident occurred on October 11, 1909, near the point where the road crosses Elk creek by a steel or iron bridge. As it approaches the bridge, the road extends along the shore of the stream only a few feet away. It is upon a grade two and a half or three feet above the level of the natural surface. At the bridge it turns at a right angle. In the grade was a culvert constructed so as to allow the passage of water into Elk creek through a coulee which the road crosses. On the side toward the stream between the culvert and the bridge, the grade, except a small portion about three feet in width, had been undermined and washed away by high water in the latter part of the preceding June, leaving a cut bank and an excavation several feet in depth. At the time of the accident this excavation was filled with water. In the morning plaintiff had gone to Augusta traveling over a cut-off road through the country. He left there about dark taking the county road because, as he said, he deemed it safer. He knew that there had been high water early in the year and that the roads in some places had been washed out, but had no knowledge of any washout on this road. The night was so dark that he could not see. He trusted to his team which consisted of old and gentle horses to follow the road. When the horses passed the culvert and reached the excavation they plunged into it, partially overturning the wagon into the water. He was much frightened by the suddenness of the accident and, being unable to see, could not tell what further danger was impending. He was under the impression that the horses in their plunging would completely overturn the wagon and pin him down in the water. As he struggled in the water to escape the plunging horses and to extricate himself, his foot was caught and held fast in the "comb"

of the wagon brake. He finally succeeded in releasing the horses by cutting the traces with his pocket knife; but in the struggle to avoid injury from them and afterwards to release his foot, which he finally did by cutting off his shoe, his ankle was bruised and wrenched, with the result that he has become permanently lame.

There is little direct testimony tending to show that any of the defendants had actual notice of the condition of the road, but it is not controverted that the washout had occurred in the month of June and that no attempt had been made to repair the defect or remove the obstruction caused by it. It appears that the road is an old and regularly traveled road having been used as such for many years, the plaintiff stating that he had known and traveled it for 39 years; that it had been repaired at times by the supervisor of the district; and that, as already noted, it crosses Elk creek by an iron bridge. It appears also that there is a record and map of it among those of the county roads kept in the office of the county clerk.

Passing, for the moment, the question whether upon the facts disclosed there arose a liability on the part of the defendants or any of them for an injury resulting from their failure to discharge a duty enjoined upon them by law, the motion for a nonsuit should not have been sustained upon any of the four other grounds enumerated. Upon the assumption that it was the imperative duty of the defendants under the law, without reference to their rank of office, to keep the roads of the county in a reasonably safe condition, they were under an obligation equally imperative to exercise reasonable care to inspect them from time to time to ascertain their condition in order that they might perform this duty, for it would be absurd to say that they owed a duty to the public generally and to the private citizen personally by reason of their official position, but that they were under no obligation to ascertain when action on their part was required, or that they were not obliged to act until they had received personal notice of a condition calling for action. An equivalent proposition would be to assert that, though these officers have exclusive control and supervision over the county roads with the incidental but imperative duty to keep them in reasonably safe condition, they are not required to repair until they are requested to do so. If they are liable at all, the rule of reasonable diligence applicable to municipalities applies to them; viz., that when the defect has existed for such a length of time and under such circumstances that the municipality or its officers, in the exercise of reasonable care and diligence, ought to have obtained knowledge of it, notice will be presumed. *Leonard v. City of Butte*, 25 Mont. 410, 65 Pac. 425; *Elliott on Roads and Streets*, § 628. The evidence on

this branch of the case was sufficient to require it to be submitted to the jury.

[1] The evidence was also sufficient to go to the jury upon the question whether the road was a public highway falling under the jurisdiction of the defendants within the definition of the statute (Rev. Codes, § 1337), viz.: "All * * * roads laid out or erected by the public or now traveled or used by the public, or, if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways." The record kept by the commissioners, presumably under the requirements of other provisions of the Codes (sections 1341, 1357), amounts to a recognition of the road in question by the board of commissioners, the executive body of the county, as a public road. This, together with the other facts showing its use by the public, was a sufficient *prima facie* showing that it is a public road. *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Bequette v. Patterson*, 104 Cal. 282, 37 Pac. 917; *Bayard v. Standard Oil Co.*, 38 Or. 498, 63 Pac. 615; *Kircher v. Town of Larchwood*, 120 Iowa, 578, 95 N. W. 185; *Madison Township v. Scott*, 9 Kan. App. 871, 81 Pac. 907.

[2] The fact that the injury suffered by the plaintiff was due in any measure to his inadvertence in driving into the excavation or to his struggle to extricate himself from the dangerous position does not necessarily lead to the conclusion, as a matter of law, that he was guilty of negligence. The evening was so dark that he could not see. It was natural that, not having any knowledge of the washout, he should leave the horses to follow the road. He had a right to presume that there was no pitfall therein into which they would take him, in other words, that the public officers had done their duty. *Weed v. Village of Ballston Spa*, 76 N. Y. 329. And, when the wagon was overturned into the water and his foot became fastened, it was but natural that in his fright and anxiety for his own safety and that of his property, induced by his inability to understand the situation, he did not act with that coolness and prudence which would have been required of him under ordinary circumstances.

[3, 4] In alleging the fourth ground of the motion, the defendants evidently sought to invoke the exception or exception to the general rule that contributory negligence is a matter of defense, viz., that, when the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him to exculpate himself from the suspicion thus created of the lack of due care on his own part, which will otherwise be imputed to him. *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905. If it be admitted that, had plaintiff refrained from struggling to save himself and his prop-

erty, he would not have been caught in the brake or suffered injury, it was nevertheless, under the circumstances shown, a question for determination by the jury whether he acted as a reasonably prudent person would in the emergency in which he unexpectedly found himself. *Kennon v. Gilmer*, supra.

[5] We are of opinion, also, that the fifth ground of the motion was not well laid. The question involved was considered by this court in *Merritt v. McNally*, 14 Mont. 223, 36 Pac. 44, and decided adversely to the contention of defendants. As there pointed out, it is not incumbent upon the plaintiff to allege and prove that defendant Zimmer had funds at his disposal which he could use in order to make the necessary repairs in the road, but that the question of defense based upon such matter must be determined upon an answer. See, also, *Adsit v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 306; *Weed v. Village of Ballston Spa*, supra.

[6] This brings us to the consideration of the question presented by the first ground of the motion. In *Adsit v. Brady*, supra, Judge Bronson, speaking for the court, said: "When an individual sustains an injury by the misfeasance or nonfeasance of a public officer who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case. This principle is so well settled that it is only necessary to inquire whether there be anything in this case to take it out of the operation of the general rule." The rule thus broadly stated includes nonfeasance or misfeasance with reference to any official duty, whether it is ministerial or discretionary, or whether it falls exclusively within the class of those which are due to the public only, as distinguished from those which are due to the private citizen also.

After pointing out the distinction between the different kinds of duties imposed upon public officers, Judge Cooley, with reference to their liability to private suits for nonfeasance or misfeasance in the performance of them, says: "The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it or to perform it properly is an individual wrong and may support an individual action for damages."

In *Shearman and Redfield on Negligence* (3d Ed.) § 156, the rule is stated thus: "The liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty as to which the neglect is alleged. Where his duty is absolute, certain, and imperative, in-

volving merely the execution of a set task—in other words, is simply ministerial—he is liable in damages to any one specially injured either by his omitting to perform the task or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exercised or withheld according to his own judgment as to what is necessary and proper, he is not liable to any person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority. An officer possessing such discretionary powers is spoken of as a judicial or quasi judicial officer from the likeness of his discretionary functions to those of a judge who decides controversies between individuals."

We apprehend that no court would fail to observe the distinction here pointed out because it is based upon principles of public policy. It would be intolerable if every public officer were compelled to act or refrain from acting at his peril of a suit for damages by a private citizen without regard to the nature of the duty involved or the character of the resulting injury. It must therefore be the case that, unless the particular duty is one the performance of which the individual citizen has a right to demand in his own behalf, or the omission or inadequate performance of which results in special injury to him, he has no right of action for a dereliction with reference to it by the officer upon whom it is imposed, for in such a case the wrong is public, not private, and must be redressed, if at all, by some remedy invoked on behalf of the public, such as summary removal from office, or removal by impeachment, or a criminal prosecution under the provisions of law applicable. A reference to a few cases will show that this is the rule established by current authority. As we have said, the statement of Judge Bronson in *Adsit v. Brady*, *supra*, taken literally, would cover every case of official dereliction, yet at the close of the opinion, in answer to the contention of counsel that the defendant had a discretion with reference to the duty involved, and that his neglect should have been charged as willful and malicious, the court said that in the performance of the particular duty he had no discretion. This statement impliedly recognized the distinction pointed out by Cooley and Shearman and Redfield, *supra*.

In *Garlinghouse v. Jacobs*, 29 N. Y. 297, the same court, through Judge Wright, criticized the opinion in *Adsit v. Brady* as stating the rule too broadly; but in the case of *Robinson v. Chamberlain*, 84 N. Y. 389, 90 Am. Dec. 713, it was said by Peckham, Judge, with reference to the rule as therein declared: "This is a healthful rule, sound entirely in public policy, if as a rule of law it can be questioned." The case is cited and approved in *Hover v. Barkhoof*, 44 N. Y.

117, and later cases. It may be said, however, that the dereliction in question in each of these cases was with reference to a specific duty expressly imposed by statute upon the defendant. In *Adsit v. Brady* the charge was neglect as superintendent of repairs on canals to remove an obstruction from the Erie Canal, a duty enjoined upon the defendant by statute. In *Robinson v. Chamberlain*, for a similar reason, the defendant, who had under authority of a statute undertaken by contract to keep a portion of the canals in proper condition and repair, was held for neglect of his duty upon the theory that, having by his contract assumed to perform a specific duty, he was liable for any negligence resulting in special injury to a private citizen just as much as a public officer would have been had the same duty been imposed upon him. In *Hover v. Barkhoof* the commissioners of a town, having sufficient funds in their hands, or obtainable, to repair a defective bridge, were held for neglect to repair which resulted in damage to plaintiff by a fall of the bridge. In this case the duty was imposed by statute.

It may well be said that the rule of liability is the same whether the duty is imposed by statute or arises by implication out of the character of the office and the attendant duty, yet the duty must be clear and certain. In *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171, under a charter of a town which imposed upon the board of town trustees and the marshal the duty to keep the streets of the municipality in repair, it was held that these officers were liable to the plaintiff for permitting a culvert to remain open and without guard by reason of which the plaintiff fell into it and was injured. The court quotes approvingly from *Robinson v. Chamberlain*, *supra*, wherein the broad rule as stated in *Adsit v. Brady* is approved. But the court evidently understood the rule as referring to duties ministerial in character and not to those which are discretionary.

In *County Commissioners v. Duckett*, 20 Md. 468, 83 Am. Dec. 557, the commissioners of Anne Arundel county were held liable for an injury caused by a defect in a road because they were charged generally with the duty of keeping the roads in repair.

In *Sells v. Dermody*, 114 Iowa, 344, 86 N. W. 326, there was involved the question whether a road supervisor was liable for neglect to repair a road in his district whereby the plaintiff suffered injury. The court, after an extensive citation of authorities including American and English cases, held that he was. The following authorities also sustain the rule: *Mattson v. Astoria*, 89 Or. 577; 65 Pac. 1068, 87 Am. St. Rep. 687; *Amy v. Supervisors*, 11 Wall. 138, 20 L. Ed. 101; *Bennett v. Whitney*, 94 N. Y. 303; *County Commissioners v. Wilson*, 97 Md. 207, 54 Atl. 71, 56 Atl. 596; *Pennington v. Streight*, 54

Ind. 376; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *McCORD v. High*, 24 Iowa, 336; 11 Cyc. 412.

In two cases (*Merritt v. McNally*, supra, and *Bair v. Struck*, 29 Mont. 45, 74 Pac. 69, 63 L. R. A. 481) this court has recognized and applied the rule holding public officers liable for nonfeasance or misfeasance with reference to ministerial duties. In some states the liability of officers having supervision of the public roads is denied. In *Worden v. Witt*, 4 Idaho, 404, 39 Pac. 1114, 95 Am. St. Rep. 70, the court bases its conclusion that they are not liable upon considerations of public policy. Where the services required by the statute are compulsory, it is held that liability does not attach except when declared expressly by the statute. *Thornton v. Springer*, 5 Tex. 587. The holding in these cases is exceptional.

[7] The liability of defendants in this case, then, is to be determined by reference to the provisions of the Codes defining their duties. These are the following: The boards of county commissioners must divide their respective counties into suitable road districts. Rev. Codes, § 1356. The board has general supervision over the highways and must cause to be opened and worked such as may be necessary. It also has power to do whatever in its judgment and discretion may be necessary for the best interests of the roads and road districts in the county, and the road supervisor shall in all things be under the direction and control of the board. Section 1357. The board must appoint road supervisors. Section 1358. The supervisor shall be a resident of his district. Section 1359. "Under the direction and supervision of the board of county commissioners" the supervisor must take charge of the roads, keep them clear from obstructions and in good repair, cause banks to be graded, bridges and causeways to be made where necessary, and to keep the same in good repair and renew them when destroyed. Section 1360. If a supervisor neglects or fails to perform the duty imposed by law and such rules and regulations as may be laid down by the board, the board may remove him and appoint another suitable person in his place. Section 1362. The supervisor must open, or cause to be opened when ordered by the board, all highways which have been laid out and established, and must keep the same in good repair; and, if the levy for that purpose is not sufficient, the board may appropriate from the general road tax any amount that may be necessary for the purpose. Section 1363. When directed by the board to repair any highway in his district, the supervisor must proceed without unnecessary delay, and for that purpose is empowered to employ laborers, teams, and obtain implements. Section 1364. If at any time during the year a highway becomes obstructed, the supervisor must "upon being notified thereof" forthwith cause

the obstruction to be removed, and for this purpose he may order out such number of the inhabitants of the district as may be necessary. Section 1372. He must cause encroachments upon the highways to be removed. Section 1373. The board may by order direct the county surveyor or any member of the board or both to inspect the condition of any highway before payment is made for work thereon. Section 1387. The board must keep a roadbook containing a record of all proceedings and adjudications relating to the use, maintenance, change or discontinuance of roads and road districts, and relating to road supervisors. Section 2890.

It thus appears that the agency ultimately responsible for the care of the public roads is the board of commissioners. This body acts as a unit. A majority of its members control its action. But this is not a reason why the individual members who are in the majority should not be held responsible for the result of a dereliction of duty. Under the provisions of the statute the general supervision of the roads, which includes attention to necessary repairs upon those already made as well as the improvement of them, and the opening of new ones, is vested in the board. It must designate suitable districts and appoint a supervisor for each of them. He must act under the requirements of the law and the regulations prescribed by the board and keep the roads clear of obstructions and in good repair. In case a road becomes obstructed from any cause, upon being notified—that is, when he has actual knowledge of the fact or the circumstances are such that notice must be presumed—he must at once cause the obstruction to be removed. To meet the exigency, ample means are put at his disposal. If he fails in his duty, one of two courses is open to the board, viz., it may order him to do his duty and thus compel performance, or it may remove him and substitute an efficient man in his place. Does the time never come when the duty to pursue one of these courses becomes imperative? Upon making the appointment, may the members of the board close their eyes to conditions which are certain to arise from time to time demanding efficient action to guard the interests of the public generally and the safety of the individual citizen who had a right to expect them to discharge their duty? May they, knowing that a supervisor is grossly derelict in his duty, divest themselves of all responsibility to the individual members of the community by the claim that they owe service to the general public only, and that their duties are altogether discretionary? We think not.

[8] Clearly the supervisor is liable under the provision of section 1372, supra, for under it, when an emergency arises calling for action, his duty is made imperative. So, also, when through his dereliction conditions of which the members of the board must

have notice are permitted to continue, imperiling the safety of the citizen, the obligation is upon them to act; in other words, to see that their appointee, the supervisor, or one appointed in his stead, discharges his official duty.

Under the facts appearing in the evidence, a prima facie case of liability is made against the defendant Zimmer for failure to make the repairs by removing the obstruction, or, in case he could not do so, for failure to warn the public of the existing condition, and as against the other defendant for failing to compel him to discharge his duty. At the trial all of the defendants may be able to show that the conditions were such that, with the means at their disposal, they were unable to make the necessary repairs. But the burden rests upon them to do so; the presumption being that they had such means. But even this would not excuse the omission to take suitable measures to give notice of the obstruction or to provide suitable barriers to prevent a traveler from being injured by it if the facts show that such was the case.

The judgment is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

SMITH, J., concurs.

HOLLOWAY, J. I dissent from the conclusion of the majority of the court in so far as it holds that the complaint states a cause of action against the individual commissioners or the estate of Moses F. Root, deceased, or that the evidence produced makes out a prima facie case as against them.

The duty enjoined by law upon the commissioners is a public duty for the breach of which the public may obtain redress, but to hold that the statute which confers general supervisory control upon the commissioners over the road supervisors creates a duty in the commissioners which is owed directly to every individual is to my mind contrary to the spirit and purpose of the law. With this heavy penalty attached it seems impossible that any sane man will hereafter accept the office of county commissioner with its meager compensation. If the duty which these commissioners owed to the plaintiff was such a duty only as they owed to all members of the community in common, then it is elementary that for a breach of that duty an action in favor of the individual will not lie. I content myself with a reference to 2 Elliott on Roads and Streets, §§ 857-863, and the cases therein cited.

On Rehearing.

SMITH, J. The problem presented by this case cannot be solved along any logical lines. Regarded as a defendant in an action to recover damages for personal injuries on ac-

count of his alleged official negligent act, or neglect to act, a county commissioner appears to be sui generis. At first blush it is difficult to see why he should not be subject to the rules of law applicable to every other official and individual; that is to say, personally liable for his negligent misconduct or malfeasance. Whichever way the cause is decided would seem to violate some well-settled principle of law. A majority of the court, of which the writer was one, has determined that county commissioners may be held personally responsible for damages sustained by reason of their negligent failure to repair, or give warning of, a defective public highway. The position thus taken is fortified by a large number of very respectable authorities which are cited in the opinion already rendered. On the other hand, the Supreme Court of Idaho in *Worden v. Witt*, 4 Idaho, 404, 39 Pac. 1114, 95 Am. St. Rep. 79, held unreservedly that county commissioners are not individually liable in damages for injuries sustained by reason of defective highways. In that case the court said: "To hold counties or county commissioners liable for all injuries arising from defective highways in this country would result in two very undesirable conclusions; the literal abrogation of the office of county commissioner (for no sane man would assume the position with such a liability attached) and the bankruptcy of every county in the state." I cannot recognize either reason as sound. In the first place, no one has ever contended, so far as I know, that county commissioners are liable for all injuries arising from defective highways. The majority opinion and the cases therein cited simply hold that county commissioners are liable when they have been found guilty of negligence. This general rule applies to every other individual, official, and corporation in the state, and I fail to see any good reason why county commissioners should be immune from it. Again I think the averment that no sane or responsible man will be willing to assume the duties of the office if commissioners are to be held liable for acts of negligence is not only entitled to no weight as an argument but is a misstatement of fact. I respectfully protest against such an argument being employed to influence a court in its determination of an important question of law. The fundamental law of a state is not to be changed or misconstrued out of consideration for an individual who may be adversely affected by his violation of it.

The liability of county commissioners is not absolute, but depends upon a solution of the question whether or not they have been guilty of negligence. I see no occasion for excitement on the part of the county commissioners of the state and no reason why they should not proceed as heretofore to maintain old and open new highways with a

view to accommodating the people of their respective counties and developing the country. All they are required to do is to exercise a reasonable degree of care in the performance of the duties devolving upon them by law—the duties which they have taken an oath to perform—the same degree of care which an ordinarily prudent man would exercise in the conduct of his own affairs. I predict that substantial and patriotic citizens will still be found who are public-spirited enough to hold the office and properly perform its duties.

The nonliability of the county itself rests upon an entirely different principle from that which is invoked in an attempt to show that the commissioners cannot be made to respond in damages personally. The reason why a county is not liable is that it is a political subdivision of the state, and neither the latter nor any of its subdivisions may be sued without its consent. Such consent has never been given by the lawmaking power of this state. 5 Thompson on Negligence, § 5822. The doctrine that a city is liable for neglect to keep its highways in suitable repair is grounded upon the principle that the state has committed the care and reparation of the public highways within the corporate limits to the corporation, and that the latter has assumed the trust as a corporate duty. 5 Thompson on Negligence, § 5806. Mr. Thompson also says (section 5822, supra) that the reason of the rule which charges a city with liability and under the same circumstances exonerates a county is artificial and not supported by legal reason or analogy.

In my judgment the Supreme Court of Vermont has taken the only logical position in denying the liability of selectmen, officers similar to our county commissioners, although I think the argument advanced is in part fallacious. In *Daniels v. Hathaway*, 65 Vt. 247, 26 Atl. 870, 21 L. R. A. 877, the court held that selectmen were not liable to an action for damages for personal injuries alleged to have resulted from a defect in a public highway for the reason that, in matters relating to public highways, they act as a board, and their duties are to a certain extent judicial or quasi judicial. While it is doubtless true that many of the duties devolving upon a board of county commissioners are quasi judicial in that they involve the exercise of judgment and discretion, it cannot be said that a negligent omission to act at all, or to take any precautions for the safety of the traveling public, is a judicial or quasi judicial act. When an act is characterized as negligent, it seems to me to be a contradiction in terms to say that it was the result of judgment and discretion. I therefore adhere to the opinion that in a proper case county commissioners are liable to those who, by reason of their negligent conduct or neglect of duty, suffer injury.

But the court has also held that they as

individuals may be charged with constructive notice of a defect in a highway. I have no pride of opinion in this matter, and since listening to the reargument I have arrived at the conclusion that the court was in error in so holding. I am impressed with the soundness of the doctrine that, in order to charge the individual commissioners or any of them with a neglect of duty, it must appear that the board as such had actual notice of the defective condition of the highway. I have no doubt that, when an office is held by a single individual, notice to him personally is ordinarily notice to him officially. But when a duty devolves upon a board which has sole power to act, and not upon its individual members in order to put the board of its members in error or default, notice must be served upon the board; that is, actual notice must come to its members while convened officially. As was well said by Mr. Justice Start of the Supreme Court of Vermont, in *Daniels v. Hathaway*, supra, one member cannot act alone; he can neither order repairs nor remove a supervisor for neglect of duty. Two might act if legally convened as a board, but unless so acting they would be as powerless as one. Mr. Commissioner Callaway for this court in *Williams v. Commissioners*, 28 Mont. 360, 72 Pac. 755, said: "To bind the county . . . [the board] must act as an entity and within the scope of its authority. Its members may not discharge its important governmental functions by casual sittings on drygoods boxes or by accidental meetings on the public streets; the statutes do not vest the power of the county in three commissioners acting individually, but in them as a single board; and the board can act only when legally convened." If after the board has been officially notified any two or more of the individual members thereof negligently refuse to act as a board, I know of no reason why those so refusing should not be held personally responsible in damages for any resulting injury to a traveler on the highway.

Meetings of the boards of county commissioners are limited and regulated by law. When not in session as a board, although the individual members are still county commissioners, they are powerless to perform any official function. I am of opinion therefore (1) that, before the individual members of a board of county commissioners can be held personally liable for negligent conduct in refusing to repair a public highway, the board of which they are members must have actual notice of such defective condition; (2) that, if, after such actual notice to the board any two or more members thereof negligently or willfully refuse to cause the defect to be repaired, either directly or through the agency of the supervisor, the members so guilty of negligent conduct are liable to one who, without contributory negligence, is injured thereby. I use the words "neglect" and "negligently" advisedly. They

are the crucial words in what I have written. Without negligence or willful misconduct there can be no liability. The office of county commissioner is one of very great dignity and importance. In all matters calling for the exercise of discretion or judgment, the members of the board are immune from control or criticism by the courts, provided they act honestly and in good faith. Their decisions are not to be disturbed. They are intrusted with large discretionary powers under the law and are presumed to be actuated only by the highest motives and considerations. But they are no more exempt from the consequences of willful or negligent misconduct than are the judges of the courts or any other public officials.

Holding these views, I am of opinion that the judgment of the district court in favor of the respondents Hindson, Richardson, and Root should be affirmed.

HOLLOWAY, J. I concur in the result announced by Mr. Justice SMITH that the plaintiff is not entitled to recover against the commissioners as against the estate of Moses F. Root, deceased. I do not, however, agree with much that is said in the course of the opinion. I still adhere to the conclusion which I announced in my dissenting opinion at the time this cause was first decided.

PER CURIAM. The judgment of the district court in favor of the respondents Hindson, Richardson, and Root is affirmed.

BRANTLY, C. J. A rehearing was granted the defendant commissioners because of the importance of the ultimate question involved and the difficulty the court had experienced in reaching a satisfactory conclusion upon it. Upon the rehearing it was strenuously and plausibly argued that, since the commissioners cannot act as individuals, but only as an organized board, they as individuals have not the power and therefore cannot be required to give personal attention to the duty of supervising and directing repairs upon the public roads. I nevertheless still believe that the conclusion reached in the original opinion is correct. That the commissioners cannot act except as a board is true because it is only in this capacity that they represent the county. *Williams v. Commissioners*, 28 Mont. 360, 72 Pac. 755. That they may not hold more than four regular meetings during the year is also true except that this limitation does not apply to counties of the first, second, and third classes (Rev. Codes, § 2891). It is equally true, however, that they may hold meetings at any time when the business of the county requires them to do so. Revised Codes, §§ 2886, 2891. These special meetings could never be held unless they were rendered necessary by reason of knowledge possessed by the individual members of conditions re-

quiring the attention of the board. If as individuals they must take notice of other matters requiring official action by them as a body at the place designated by law, there is no apparent reason why they must not take notice that the county roads and bridges need repairs, and that the supervisor in a particular district is, through inefficiency or neglect, failing to give necessary attention to his duties. Can it be said that when a regular meeting has adjourned the members of the body are not responsible to the public until the time for another meeting has arrived? When it is brought to the knowledge of one commissioner that a supervisor is grossly derelict in the performance of his duty, does he discharge his duty to the public by remaining silent and ignoring conditions which, as every private citizen knows, require attention? If so, the power to hold extra sessions has no apparent purpose, and a commissioner is not burdened with any public duty except to go to the county seat four times a year and attend to such duties only as are specially enjoined upon the board by law to be done at that time or are specially called to its attention while in session. The correct theory, it seems to me, is that a commissioner is a public officer on the same footing with every other, and that knowledge gained by him as an individual of matters demanding official action requires him, so far as he may, to see that the board takes action; and that when there are floods which must necessarily result in washouts, weakened bridges, and other like defects in the public roads, or when similar conditions are produced by other causes, he must be presumed to take notice of them and act with that degree of diligence which the circumstances demand. It is true that in many respects the duties of the board touching the public service, particularly those pertaining to public roads, are judicial or quasi judicial, but to say that the different members owe no duty to the public except when they are acting officially, and that the official body is not bound to act until it has been officially informed of conditions imperatively demanding attention, is to put them upon a footing different from that of any other public officer.

Nothing said in the original opinion implies that it is incumbent upon the board to keep the county roads in the state of improvement and repair which is necessary in case of city streets. Reference in every case must be had to the character of the particular road, the amount of use to which it is subject, and the means and opportunity at hand to give it attention. Reasonable care, in view of the circumstances as they are made to appear, must be the rule. So where notice of conditions is to be inferred from lapse of time, the circumstances of the case must be considered and liability be determined by reference to them.

I am fully aware of the difficulty to be overcome in order to reach any satisfactory solution of the question presented, but I am unable to agree with the reasoning of the court either in *Worden v. Witt* or in *Daniels v. Hathaway* referred to by Mr. Justice SMITH. The county is not liable. To sustain the contention of counsel that the commissioners cannot under any circumstances be held liable would leave the citizen without adequate redress, and to hold that the board must have official notice before liability can attach, it seems to me, leads to the same result. I therefore do not concur in the result reached by a majority of the court. I adhere to the conclusion announced in the original opinion that a prima facie case was made out against the commissioners, as well as the supervisor, and that the judgment of the district court should be reversed.

REID v. LINCOLN COUNTY et al.

(Supreme Court of Montana. June 24, 1912.)

1. COUNTIES (§ 52*)—BOARD OF COUNTY COMMISSIONERS—MEETING.

Where all of the members were present and acted as the board of county commissioners pursuant to a previous resolution, the question of notice of the meeting was immaterial in so far as it affected the acts done at that meeting.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 63-65; Dec. Dig. § 52.*]

2. COUNTIES (§ 178*)—BONDS—ORDER—NOTICE—"FERRY."

Rev. Codes, § 2935, provides that notice of election to authorize a county bond issue shall clearly state the object of the loan, and Const. art. 13, § 5, provides that no county shall incur any indebtedness or liability for any single purpose to an amount exceeding \$10,000, without the approval of a majority of the electors voting. *Held*, that as the notice required by the statute was merely a general notice, and as the people of the county may, in the absence of constitutional provision, expend the county moneys for any purpose they desire, the order and notice for special election held for the issuance of bonds to create a highway system, with bridges, and which included public ferries, was not invalid because merely generally stating those purposes, and not mentioning ferries; a "ferry" being a mere incident or movable portion of a highway where it crosses a stream.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2749-2751; vol. 8, p. 7662.]

3. COUNTIES (§ 178*)—BONDS—ORDER—NOTICE.

An order for an election to determine the issuance of a county bond issue to create a highway system is not insufficient because merely stating the amount of money necessary to accomplish the general purpose.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

4. COUNTIES (§ 178*)—BOND ISSUE—ELECTION—VALIDITY.

Where, under the statute, qualified voters were prevented from voting at a special coun-

ty election to determine whether bonds should be issued, the exclusion of those voters does not render the election invalid, where it could not have changed the result.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

5. COUNTIES (§ 178*)—BONDS—ELECTIONS—BALLOT.

The ballot, in a special election to authorize the issuance of county bonds for a public highway system in a county, which recited that the issue was the selling of county bonds in the amount of \$125,000 to provide funds for a system of public highways, bridges, and free ferries, said bonds to be payable in 20 years and redeemable in 15, was sufficient under Rev. Codes, § 2938, providing that the ballot in such election shall state the bond proposition and the terms thereof explicitly and at length; it being only necessary in such cases to substantially follow the form of the statute.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

6. COUNTIES (§ 183*)—BONDS—VALIDITY.

County bonds issued to provide funds for a highway system, which included a free ferry, were not invalid because the form of the bonds omitted reference to ferries; ferries being a mere portion of the highway.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 275-281, 283, 284; Dec. Dig. § 183.*]

7. COUNTIES (§ 186*)—BONDS—ADVERTISEMENT.

Rev. Codes, § 2906, provides that the board of county commissioners must fix the denomination of county bonds, and section 2907 provides that when the board issues any bonds it is its duty to sell the same and give notice by advertisement of the time of sale; such advertisement stating the amount of such bonds for sale. *Held*, that the statute did not require the form of the bond to be adopted prior to the advertisement, and, as only the gross amount of the bonds need be stated in the advertisement, an advertisement of county bonds in a named sum without giving their denomination was not insufficient.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 289-292; Dec. Dig. § 186.*]

8. COUNTIES (§ 178*)—BONDS—SPECIAL ELECTION—SUBMISSION OF QUESTION.

As Const. art. 13, § 5, merely requires a vote by the electors of a county before the county board can incur indebtedness beyond a specified sum, an issue of bonds ratified by special election is not invalid because the proposition submitted to the voters included the construction of highways, ferries, and bridges, all of which were part of a general scheme of an improvement of the highway system of the county.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

9. FERRIES (§ 5*)—ESTABLISHMENT—COUNTIES—"HIGHWAY."

A public ferry being merely a part of the highway, a county may establish such ferries in the absence of special statutory authority.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3291-3306; vol. 8, p. 7678.]

10. COUNTIES (§ 183*)—HIGHWAYS—POWER OF INHABITANTS.

While Rev. Codes, § 2894, gives the boards of county commissioners general power and authority to establish and maintain highways, ferries, and bridges, and section

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

1390 et seq. provides for the establishment of such highways on petition by the freeholders and upon condemnation of property, the inhabitants of a county may establish a highway by any method of procedure they may elect, and so an issue of bonds to provide funds for the establishment of a highway system is not invalid when authorized by a valid election, because there might be no petition for such highway, or because the board of commissioners yet had to condemn land for the location of its bridges.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275-281, 283, 284; Dec. Dig. § 183.*]

11. APPEAL AND ERROR (§ 1108*)—MOOT CASE.

An issue of county bonds for the establishment of a highway system, including the building of a bridge over navigable waters will not be declared invalid because, at the time of the election, permission from Congress to erect the bridge had not been obtained; the permission having been obtained pending the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4410; Dec. Dig. § 108.*]

Appeal from District Court, Lincoln County; J. B. Erickson, Judge.

Action by Robert Reid against Lincoln County and the Board of County Commissioners of Lincoln County, and Paul D. Pratt and others, Commissioners. From a judgment for defendants; plaintiff appeals. Affirmed.

Noffsinger & Walchil, of Kalispell, for appellant. Albert J. Galen, Atty Gen., and James W. Scott and Booth & Maiden, all of Libby, Logan & Child, of Kalispell, and Rowland & Gray, of Libby, for respondents.

SMITH, J. The only question involved in this appeal is whether plaintiff's amended complaint states facts sufficient to constitute a cause of action. The district court sustained a general demurrer thereto and entered judgment in favor of the defendants. Plaintiff appeals from the judgment.

The action was begun by the plaintiff, a citizen and resident of Lincoln county, to restrain the individual defendants, who comprise the board of county commissioners of said county, from selling and issuing the negotiable bonds of the county to the amount of \$125,000 for the purpose of raising funds with which to construct roads, bridges, and ferries in the county. The proceedings had by the defendants looking to the bond issue are set forth at length in the amended complaint, as follows:

"The following resolution was adopted by unanimous vote: 'Whereas, the county commissioners of Lincoln county, Montana, do deem and consider that it is essential to the future growth and prosperity of the county that an adequate system of highways, bridges and ferries be constructed through the county, all connected and making accessible each city and town of the county with one another and with every part of the county, to the end that the said county may develop

its immense natural resources now largely latent by reason of the lack of roads and bridges and ferries throughout the county; that the present road and bridge and ferry facilities are quite inadequate; that a system of roads and bridges and ferries connecting the various parts of the county are so naturally and necessarily related that they are in fact a single project, consisting of interdependent parts; that the acquisition of rights of way for such roads, sites for necessary bridges and approaches thereto and landings for ferries are essential to such proposed improvements as an entirety; that it is necessary and essential, and to the best interests of Lincoln county and all of the people and property holders thereof that Lincoln county incur indebtedness of one hundred and twenty-five thousand dollars for the purposes of raising funds in such amount with which to construct the proposed roads, bridges and ferries; and that the best way to raise such funds is to issue bonds against the general credit of the county of Lincoln, as provided by law: Now, therefore, be it resolved, and it is hereby resolved by the board of county commissioners of Lincoln county, Montana: That a system of roads, bridges and free ferries, comprising one general highway with branch roads, be laid out and constructed in manner as follows: Beginning at a point on the Lincoln county line southerly of Stryker; thence to continue northwesterly through Trege and Fortine to the town of Eureka, following the route of the existing public road; thence westerly to the village of Rexford, following said route; thence southerly and westerly on the east and south side of the Kootenai river to the city of Libby; thence westerly on the south side of the Kootenai river to the village of Troy. That a steel or iron bridge be constructed across the Kootenai river at the town of Troy. That a steel or iron bridge be constructed across the Kootenai river at the city of Libby. That a steel or iron bridge be constructed across the Kootenai river at the village of Rexford. That each of said bridges be connected with and be a part of said system of highways, bridges and free ferries. That there shall be constructed such other branch roads leading to and connecting with said system of highways, bridges and free ferries as the board of commissioners determine. That such free ferries as the board of county commissioners may deem necessary and as a part of said system of highways, bridges and free ferries shall be constructed for the purpose of and as a means of transportation across the Kootenai river. That from the proceeds of said bonds there shall be appropriated by the board of county commissioners for the construction and repair of said system of highways, bridges and free ferries the following amounts: The sum of forty-five thousand dollars for the construction, repair and improvement of said system of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

highways and bridges and free ferries located and situated within the boundaries of the road districts of Lincoln county numbered one, two, three, four, thirteen, fourteen and fifteen, respectively. The sum of forty thousand dollars for the construction, repair and improvement of said system of highways, bridges and free ferries located and situated within the boundaries of the road districts of Lincoln county numbered five, six, seven, eight, nine, sixteen, seventeen, eighteen and nineteen, respectively. The sum of forty thousand dollars for the construction, repair and improvement of said system of highways, bridges and free ferries located and situated within the boundaries of the road districts of Lincoln county numbered ten, eleven, twelve, twenty and twenty-one, respectively. That all roads now laid out and built or partly built along the proposed routes, or any of them, shall as far as practicable, be repaired and utilized in definitely established roads and highways. That none of the money obtained by this proposed bond issue be expended upon any roads or highways used as a part of or connecting the said system of highways and bridges and free ferries situated within the corporated limits of any incorporated city or town, save and except necessary approaches to any bridge or free ferry. That the necessary sites for all proposed bridges across the Kootenai river and the necessary approaches thereto and the construction of the said bridges, iron or steel, shall be procured and done in conformity of law. That a special election of the qualified electors of said Lincoln county, Montana, be called and the same is hereby ordered called to be held on Saturday, the 28th day of October, 1911, in form and manner as provided by law, at which the proposition of so bonding the said county, in the sum of one hundred and twenty-five thousand dollars be submitted to such electors for their approval or rejection. That a copy of this resolution be spread upon the records of the board of county commissioners.

"The following proclamation was adopted: Be it resolved, that a proclamation for a special election for bonds for a system of highways and bridges and free ferries be issued and published by the county clerk in the manner prescribed by law; that the proclamation be published in the Eureka Journal, the Western News and the Libby Herald; and that the clerk attach the seal of Lincoln county to said proclamation, which proclamation is as follows: Election Proclamation. By the Board of County Commissioners of Lincoln County, Montana. By virtue and in pursuance of the authority vested in the board of county commissioners of Lincoln county, Montana, we, Paul D. Pratt, F. P. Garey and I. P. Barlett, the duly elected, qualified and acting commissioners of the county of Lincoln, state of Montana, and as such constituting the board

of county commissioners of said Lincoln county, do hereby proclaim that on Saturday, the 28th day of October, 1911, there will be held in the several election precincts of Lincoln county, state of Montana, a special election by the qualified electors of the county of Lincoln, to submit to said qualified electors for their approval or rejection the proposition to raise money for public improvements desired to be made in the said county of Lincoln, as follows, to wit: The issuance of coupon bonds in the amount of one hundred and twenty-five thousand dollars, such bonds to be redeemable in fifteen years and payable in twenty years, and to bear interest at the rate of five per cent. per annum, interest payable semiannually at the time prescribed by law, for the repair and construction and improvement of a system of highways and bridges and free ferries in accordance with law within the county of Lincoln, as follows, to wit: Beginning at a point on the Lincoln county line southerly of Stryker; thence to continue northwesterly through Trego and Fortine to the town of Eureka, following the route of the existing public road; thence westerly to the village of Rexford, following said route; thence southerly and westerly on the east and south side of the Kootenai river to the city of Libby; thence westerly on the south side of the Kootenai river to the village of Troy. That a steel or iron bridge be constructed across the Kootenai river at the town of Troy. That a steel or iron bridge be constructed across the Kootenai river at the city of Libby. That a steel or iron bridge be constructed across the Kootenai river at the village of Rexford. That each of said bridges be connected with and be a part of [said] system of highways, bridges and free ferries. That there shall be constructed such other branch roads leading to and connecting with said system of highways, bridges and free ferries as the board of county commissioners determine. That such free ferries as the board of county commissioners may deem necessary and as a part of said system of highways, bridges and free ferries shall be constructed for the purpose of and as a means of transportation across the Kootenai river. That from the proceeds from the sale of said bonds there shall be appropriated by the board of county commissioners for the construction and repair and improvement of said system of highways, bridges and free ferries the following amounts: The sum of forty-five thousand dollars for the construction, repair and improvement of said system of highways and bridges and free ferries located and situated within the boundaries of the road districts of Lincoln county numbered one, two, three, four, thirteen, fourteen and fifteen, respectively. The sum of forty thousand dollars for the construction, repair and improvement of said system of highways, bridges and free ferries located and situated within the

boundaries of road districts of Lincoln county numbered five, six, seven, eight, nine, sixteen, seventeen, eighteen and nineteen, respectively. The sum of forty thousand dollars for the construction, repair and improvement of said system of highways, bridges and free ferries located and situated within the boundaries of the road districts of Lincoln county numbered ten, eleven, twelve, twenty and twenty-one, respectively. And in order that said election may be conducted in a quiet and orderly manner, we do hereby offer a reward of one hundred dollars (\$100) for the arrest and conviction of any person violating any of the provisions of title 4, part 1, of the Revised Codes of Montana of 1907. In witness whereof we have hereunto set our hands and caused the seal of the county of Lincoln, state of Montana, to be affixed at Libby, the county seat, this 18th day of September, A. D. 1911. Done in open meeting by the county commissioners. Paul D. Pratt. J. P. Bartlett. E. P. Garey. Samuel Carpenter, Attest by the county clerk.'

"The following resolution was adopted: 'Be it resolved that the county clerk be authorized and directed to do and perform any and all acts required by law and necessary for the calling and conducting of the special election to be held on October 28, 1911, for the purpose of submitting to the qualified electors the question of authorizing the issuance of bonds in the sum of one hundred and twenty-five thousand dollars for a system of highways, bridges and free ferries in Lincoln county.'"

The complaint then further alleges:

"(6) That thereafter and pursuant to the action taken by said board as aforesaid, the said board by its said clerk did publish in the said Eureka Journal, Western News, and Libby Herald prior to October 28, 1911, and for the length of time required by law, said identical proclamation for said special election and in the form and in words as hereinabove in the fourth paragraph set out at length, and that no other notice of said election was given.

"(7) That thereafter on the 28th day of October, 1911, said election was held, pursuant to said proclamation, and out of a total of 660 votes cast, 433 were in favor of said proposed bond issue and 227 against said proposed bond issue, but that at said election only electors whose names appeared upon the old registration lists prepared and used for the general election of 1910 were permitted to vote, and that electors whose names did not so appear upon said 1910 registration lists, but whose names 30 days prior to said election were duly registered with, and did at the time of said election appear upon the registration books of, the clerk of Lincoln county under the provisions of chapter 113, Laws of 1911, were not permitted to vote; and that said election was the only election ever had upon the proposed bond

issue referred to in this complaint, and that there were many electors whose names did not appear upon said list and who had no opportunity to register and vote at said election.

"(8) That for said election the defendant county prepared and furnished an official ballot, and the electors of said county used said official ballot for voting upon said proposition and that said proposition was stated upon said ballot so used by said electors at said election in words as follows and not otherwise, viz.:

☐ For the issuance against the general credit of Lincoln county of coupon bonds in the amount of one hundred and twenty-five thousand dollars, the purpose of said issue being to provide funds for a system of public highways, bridges and free ferries in said county, said bonds being payable in twenty years and redeemable in fifteen years, and bearing interest at the rate of five per cent. per annum payable semi-annually.

☐ Against the issuance against the general credit of Lincoln county of coupon bonds in the amount of one hundred and twenty-five thousand dollars, the purpose of said issue being to provide funds for a system of public highways, bridges and free ferries in said county, said bonds being payable in twenty years and redeemable in fifteen years, and bearing interest at the rate of five per cent. per annum payable semi-annually.

"(9) That thereafter on November 6, 1911, said board of county commissioners, all members thereof being present, met in special session and made an order directing that said bonds issue, in the sum of one hundred twenty-five thousand dollars (\$125,000), redeemable in fifteen years and payable in twenty years, bearing interest at the rate of five per cent. per annum, to secure funds for the repair, construction and improvement of a system of highways, bridges and free ferries, and passed a further order that said bonds be advertised for sale for thirty days in said Eureka Journal, a local newspaper, and in the American Banker of New York City, New York; and at said meeting adopted a form of advertisement for the sale of said bonds, which said proceedings as so had by said board more fully appear from the minutes of said board, and the board acted therein as shown by said minutes, and of which said minutes the following is a full, true and correct copy:

" 'Commissioners' Journal, Pages 232 and 233. Board convened as a board of county commissioners in special session. Done by mutual consent, all members of board waiving notice of said meeting.

" 'Upon motion duly carried the following resolution was adopted: "Resolution. That the county of Lincoln issue coupon bonds in the sum of \$125,000 and such bonds to be redeemable in fifteen years and payable in twenty years, and to bear interest at the rate of five (5) per cent. per annum, interest payable semi-annually at the times prescrib-

ed by law to secure funds for the repair and construction and improvement of a system of highways and bridges and free ferries in accordance with law in the county of Lincoln as authorized at the election held October 28th, 1911."

"Upon motion duly carried the following resolution was adopted: "Resolution. That said coupon bonds be advertised for sale and that said bids for the purchase of said bonds be advertised for in a local newspaper, to wit, the Eureka Journal, and a New York newspaper, to wit, the American Banker of New York City, N. Y., for thirty days, said advertisement to state the amount of said bonds for sale and the conditions governing the submission and consideration of bids for same, advertisement being as follows: 'Advertisement. \$125,000, Lincoln County, Montana, 5 per cent. Road and Bridge Bonds. Notice. Notice is hereby given that sealed bids will be received by the county commissioners of Lincoln county in the state of Montana, at the office of the county clerk at Libby, Montana, until the 4th day of January, 1912, for the sale by the said county of \$125,000 of road and bridge bonds, the denomination of said bonds to be either \$500 or \$1,000 each, or the issue to be divided between said denominations, payable in twenty years and redeemable in fifteen years, and to bear interest not to exceed five per cent. per annum, interest payable at the office of the county treasurer in said county on the first day of January and July of each year. Bids will be opened in the council chambers of the board of county commissioners of Lincoln county, at Libby, Montana, on Thursday, January 4, 1912, at two o'clock p. m. A certified check for \$6,000 made payable to John C. Friend, county treasurer of Lincoln county, shall be filed in a separate sealed envelope with the county clerk at least twenty-four hours before the time set for the opening of the bids, check to be returned to bidder if bid is rejected. The board reserves the right to reject any and all bids. Samuel Carpenter, County Clerk.'"

"(10) That thereafter and for 30 days prior to January 4, 1912, said advertisement for the sale of said bonds was published in said Eureka Journal and said American Banker of New York City, in the words and form as declared and adopted by said board and as in the foregoing paragraph set out, and no other advertisement or notice for the sale of said proposed bonds or any of them was ever made, had, or given."

"(11) That thereafter on January 4, 1912, at a meeting of said board the bid of N. W. Halsey & Co. of Chicago for said bonds was approved and accepted as the best bid."

"(12) That thereafter on February 5, 1912, pursuant to notice theretofore given, the said board of county commissioners met in special session at Libby, Mont., and passed a

resolution directing that said bonds issue, and adopted a form of bond; and passed a further order directing that the said bonds be prepared and executed, and, when so executed, delivered to the county treasurer of Lincoln county and by him surrendered to said N. W. Halsey & Co. upon payment by it to the said county treasurer of the amount of said bid; which said proceedings had by said board and these resolutions passed and form of bond adopted, and as they appear upon the minutes of said meeting, are in detail as follows:

"'Commissioners' Journal. The following resolution was passed by the board, all members voting aye:

"'Whereas, at an election duly called and held in Lincoln county, Montana, after notice thereof had been duly given for the time and in the manner required by law, more than a majority of the votes cast were in favor of authorizing the issue of the road and bridge bonds of said county to the amount of one hundred and twenty-five thousand dollars (\$125,000): Therefore, be it resolved, by the board of county commissioners of Lincoln county, Montana, that for the purpose of constructing roads and bridges in Lincoln county, there are hereby directed to be issued one hundred and twenty-five (125) road and bridge bonds of one thousand dollars (\$1,000) each, dated the first day of January, 1912, and becoming due twenty (20) years after date and payable at the option of Lincoln county fifteen (15) years after date, which said bonds shall bear interest, evidenced by coupons, at the rate of five (5) per centum per annum, payable semi-annually, on the first day of January and July in each year, both principal and interest of said bonds to be made payable at the banking house of N. W. Halsey & Company in the city of Chicago, Illinois. Said bonds shall be sealed with the county seal, and said bonds and coupons shall be signed by the chairman of the board of county commissioners and by the county treasurer and be countersigned by the county clerk; and said bonds shall be substantially in the following form:

"'No. ———. \$1,000.

"'United States of America.

"'State of Montana.

"'Lincoln County Road and Bridge Bond.

"'Know all men by these presents, that the county of Lincoln, in the state of Montana, for value received, hereby promise to pay to the bearer one thousand dollars, lawful money of the United States of America, on the first day of January, 1932, with interest on the said sum from the date hereof until paid at the rate of five (5) per centum per annum payable semi-annually on the first day of January and of July in each year on presentation and surrender of the interest coupons hereto attached. Both principal and

of highways, bridges, and free ferries as the board of county commissioners may determine' constitute each a separate and single purpose, and that each of said propositions should have been submitted to the electors of said county as separate and distinct propositions, and that before submitting such propositions the board should have determined the amount of money necessary and required to be raised for the purpose of carrying out each of said separate propositions and should have given the electors an opportunity to declare separately, for or against any or all of said propositions, but that at said election said right was denied to said electors.

"(3) That the proceedings of the board of county commissioners for the calling of said special election, and the proclamation issued and published therefor, specify it to be one of the purposes of said proposed bond issue to raise funds for the construction of free ferries, but that at no place in said proceedings or in any subsequent proceedings had by said board relative to said proposed bond issue is it specified how many such ferries are to be constructed, or at what place such ferries or any of them are to be operated, and such proceedings are in said respects so indefinite and uncertain as to wholly fail to determine any of said matters relative to said ferries and failed to impart to the electors of said county any knowledge or information relative thereto. That said purpose for raising funds for said free ferries is an inseparable and interdependent part of the entire proposed bond issue, and of itself, on account of said defect in not stating said purpose, invalidates and makes null and void all the proceedings relative to the entire bond issue.

"(4) That the proceedings of the board of county commissioners for calling said special election, and the proclamation issued and published therefor, specify it to be one of the purposes of the proposed bond issue to raise funds by means of which 'there shall be constructed such other branch roads leading to and connecting with said system of highways, bridges, and free ferries as the board of county commissioners determine'; and that at no place in said proceedings is there a more definite statement than as above recited, nor is there in said proceedings at any place any statement, order, or declaration, by said board of county commissioners, or at all, as to how many 'such other branch roads' are to be constructed, or where the same are to be located, or what termini, if any, they are to have, or what proportion of said funds are to be used and appropriated for the purpose of constructing said branch roads or any of them. That in this respect said proceedings and the whole thereof are entirely too indefinite and uncertain, and failed to impart to the elector or to any one any definite or any knowledge or information relative to such propos-

ed 'branch roads,' the number thereof, the location thereof, or the termini thereof, or the cost of construction of each or any or all of them, or at all, and that the purpose of raising funds for the construction of 'such other branch roads' was made an inseparable and interdependent part of said entire proposed bond issue, and that said uncertainty and indefiniteness in said proceedings and in said order calling said special election, and in said election proclamation, and throughout said proceedings relative to 'such other branch roads' and such proposed free ferries, makes indefinite and uncertain said entire proceedings relative to said proposed bond issue, and makes said proceedings illegal and void.

"(5) That said board of county commissioners, defendants herein, have exceeded the powers given them by the Constitution and statutes of the state of Montana, in each and every step taken in or toward the issue of said bonds, or any of them, in this, to wit: That they have included in the purpose of said proposed issue the construction of free ferries, and no power is given by the Constitution, nor the statutes of the state of Montana, to counties or boards of county commissioners, or to either of them, to issue coupon or other bonds to provide funds to be used for the construction of free ferries, and that the proposition of raising funds by means of said proposed bonds for the purpose of constructing such proposed free ferries is under said proceedings an inseparable and interdependent part of said entire proceeding.

"(6) That the advertisement of the proposed sale of said bonds, published in said *Eureka Journal* and in said *American Banker* of New York City, and each of them, is illegal and void, for the reason that, prior to adopting the form of said advertisement, and publishing the same, said board of county commissioners wholly failed to pass any order adopting a form of said proposed bond; and said advertisement fails to definitely specify the denominations of said proposed bond, or the number thereof, or the date that said bonds are to bear, and fails to advise prospective purchasers that they are entitled to receive such amount or proportion of said bonds as they or any of them may desire to purchase, and fails to state that said bonds are also for free ferries.

"(7) That said bonds have not been legally or properly or at all advertised for sale as required by law, or at all, among other things in this: That the order of said board of county commissioners directing the issuance of said proposed bonds and fixing the form thereof was not made until the 5th day of February, 1912, and that since the making of said order none of said bonds as fixed and determined by said order have been advertised for sale as required by law, or at all, and that the said board of county

commissioners intend to deliver said bonds and each of them as so fixed and determined by said order of February 5, 1912, without any or further advertisement for the sale thereof, and plaintiff verily believes and alleges that unless restrained by an order of this court said defendants will deliver said bonds and each of them to said N. W. Halsey & Co. without further or any advertisement for the sale of said bonds.

"(8) Plaintiff further alleges: That the form of bond adopted and ordered issued by said board of county commissioners on February 5, 1912, which form is fully set out in paragraph 11 of this complaint, is illegal and void for the reason that each of said bonds recites upon its face that 'this bond is issued by the county of Lincoln for the purpose of constructing roads and bridges in said county,' and makes no reference to the fact that a portion of said bonds were voted and are purported to be issued for the purpose of free ferries. That said statement in said bonds as to their purpose is misleading, and that plaintiff as a taxpayer is entitled to have said bonds show, and in order to be legal said bonds should show, the purpose for which they were issued, so that all purchasers and subsequent holders thereof may be fully charged with knowledge of the purpose or purposes for which said bonds are issued. That, in view of the preceding proceedings had relative to said proposed bond issue, said form as so adopted by said board of county commissioners on said 5th day of February, 1912, is improper, illegal, and void and not in conformity with the proceedings had relative to said bond issue and is misleading for the reason that said bonds and each of them as proposed to be issued and delivered fail to recite upon their face, or at all, that the same are also issued for the purpose of raising funds for free ferries.

"(9) That said board of county commissioners are proceeding to issue said bonds in the form and pursuant to the order therefor made and adopted by said board on the 5th day of February, 1912. That said order directing the issuance of said bonds is at fatal variance with the proceedings theretofore had relative to said bond issue, and particularly at fatal variance with the order of September 18th, determining the necessity for said bond issue, and directing said election to be called, and election proclamation published for said election, and with subsequent proceedings, particularly in this: That in all of said proceedings up to said 5th day of February, 1912, it was ordered and directed and proclaimed to be part of the purpose of said proposed bond issue to raise money to be used for the purpose of constructing highways, bridges, and free ferries, whereas said order of February 5th declares that said bonds be issued 'for the purpose of constructing roads and bridges in Lincoln county,' and makes no reference to and ig-

nores the matter of free ferries for which a portion of said bonds were originally declared by said board of county commissioners, and voted by said electors, and that the issue of said bonds in the form prescribed by and pursuant to said order of February 5, 1912, is illegal and void, among other things on account of said fatal variance, and that in any event, before said bonds can be legally issued, it is necessary for said board to pass a new order directing the issuance and the form of said bonds.

"(10) That the funds which will be realized from said bond issue, if consummated, will be and are grossly insufficient and inadequate in amount to effect or carry out all the purposes for which said bonds were voted, and that by reason of such inadequacy many of the purposes for which said bonds were voted and are purported to issue will be defeated and can neither be carried out nor effected from the funds to be realized from said proposed bond issue.

"(11) That the official ballots used at said election failed to state said proposition and the terms thereof explicitly and at length, and that the proposition as stated upon said ballot was not stated thereon as required by law, nor was it stated explicitly or at length, or sufficiently to fully or fairly advise the voter as to the proposition upon which he was voting.

"(12) That none of the proposed highways mentioned in said proceedings and proposed to be constructed from the funds to be realized from said proposed bond issue, except the old county road from the western boundary of Lincoln county and Rexford via Stryker, Fortline, and Eureka, have ever been laid out or have any existence whatsoever, and that at present there are no such county roads, and that no petition or petitions for the laying out or establishment of said roads or any of them have been signed or made by 10 or a majority or any of the freeholders of the road district or districts or of any of the road districts for, or in which said proposed highways are to be laid out or constructed from said funds, and that no such or any petitions prior to the commencement of this action or at all have been filed with said board of county commissioners therefor.

"(13) That there is now no existing public highway, nor has there been any petitioned for by freeholders as required by law or at all, leading to, from, or across the Kootenai river at the proposed site of the proposed bridge at Rexford. That there is now no existing public highway, nor has there been any petitioned for by freeholders as required by law or at all, leading to, from, or across the Kootenai river at the proposed site of the proposed bridge at Troy.

"(14) That no petition has ever been made or filed with said board of county commissioners by which it is made to appear, or at

all, that it is necessary to keep or maintain any of the proposed public ferries proposed to be constructed from the funds to be realized from said bond issue, nor has there ever been made or filed with said board, or at all, any petition whatsoever requesting the establishment of any of said proposed free public or other ferries.

"(15) That the Kootenai river, across which said bridges are proposed to be constructed; is, at the point where said bridge at Rexford is to be constructed, a navigable stream, under the laws of the United States and the state of Montana, for the purpose of transportation of persons and freight between points in the Dominion of Canada and United States, and between points within the state of Montana. That none of said defendants have had, ever received, or now have any power or authority to construct any of said bridges across said navigable stream without first obtaining authority therefor from the government of the United States and from the state of Montana, which authority, or permission, has never been granted by either the government of the United States, or any of its officers, or the said state of Montana, to said defendants or any one, except that since the commencement of this action, and on or about the 1st day of March, 1912, and at the instance of the defendants, a bill was passed by the Congress of the United States authorizing the construction of said bridges across the said Kootenai river, which said bill may become a law at any time upon the approval of the President, which bill the President has since approved."

[1] 1. The first contention of the appellant is that the board of county commissioners was not legally in session on September 18th. This contention is disposed of by a consideration of the fact that all of the members were present and acting as a board of county commissioners, pursuant to a previous resolution of the board; so that the question of notice of the meeting became altogether immaterial. See *Moree v. Granite County*, 44 Mont. 78, 119 Pac. 286.

[2] 2. It is also contended "that the order and notice of election did not sufficiently describe the purpose of said bond issue, or the highways to be constructed; that they were too general and indefinite, and delegate to the board discretion as to the purposes for which the money should be expended, in allowing them to construct such ferries and branch roads as they may desire; and said order and notice were therefore void." We think the criticism is unmerited. Section 2935, Revised Codes, merely provides that the notice of election shall clearly state the object of the loan. This means the general object of the loan. It is not necessary to specify all of the details. So long as a reasonably comprehensive notice is given, the courts have no power to declare it insufficient. Different states have different re-

quirements; but, if our own statutory mandates are complied with, no other notice need be given. *Mansur v. City of Polson*, 45 Mont. —, 125 Pac. 1002.

Article 13, § 5, of the state Constitution, provides that no county shall incur any indebtedness or liability for any single purpose to an amount exceeding \$10,000 without the approval of a majority of the electors therein voting at an election provided by law. This constitutional restriction is a limitation upon the authority of the board of county commissioners; it has no reference to the power of the people. We agree with the learned counsel for the appellant that this provision was intended to vest in the electors of the county the power to determine whether a proposed indebtedness, exceeding \$10,000, for the construction of certain contemplated improvements, shall be incurred. But counsel place altogether too narrow and rigid a construction upon the constitutional and statutory provisions relating to the subject. Unless expressly or impliedly prohibited from so doing by other constitutional declarations, the people of a county may spend their money for any object which they may desire. The power of the board of county commissioners is limited, but that of the people themselves is unlimited, save as heretofore suggested. They may intrust to the board the expenditure of their funds if they see fit. They may rely upon the judgment and discretion of the board to any extent they desire; and the only condition precedent to a delegation of authority by them is that the board shall give such notice of its contemplated action as will enable them to vote intelligently thereon and in such a way that it shall not become necessary to accept or reject one of two or more projects, which have no reasonable relation to each other, in order to express satisfaction or dissatisfaction with others which are improperly submitted as one general plan. It was therefore permissible for the people of Lincoln county to delegate to the board of county commissioners the power to exercise a reasonable discretion as to the details of the plan of contemplated improvements. The matter of constructing branch roads was simply a detail of the main project. Not any branch roads may be necessary. On the other hand, it may be found advisable, in carrying the general scheme into effect, to spend a portion of the money for branch roads. If it is, the power of the board in the construction thereof will be limited to such as are not independent improvements in themselves, but are necessary and germane to the main proposition.

The construction of a ferry is, ordinarily, a matter of relatively small expense. Unlike an expensive bridge across a river like the Kootenai, it may, we think, well be considered as a mere detail or incident of the highway. It seems to us it may be presumed that the people would unhesitatingly in-

trust to the board of county commissioners so relatively unimportant a detail as the selection of sites for ferries and the manner of construction thereof. A "ferry" is simply a movable portion of a highway where it crosses a stream. *Hackett v. Wilson*, 12 Or. 25, 6 Pac. 652.

[3] 3. It was sufficient to state the amount of money necessary to accomplish the general purpose. *Morse v. Granite County*, supra.

[4] 4. Inasmuch as only those electors whose names appeared on the registration lists of 1910 were permitted to vote, it is contended that the election was void.

All that the Constitution requires is that the plan shall receive the approval of a majority of the electors of the county voting at an election provided by law. Section 491, Revised Codes, declares that, at any special election held for any purpose in any county, copies of the official register and check list which were printed or written before and used at the next preceding general election must be used, and no new registration need be made. It is claimed that this provision is unconstitutional. But the election should be held valid unless it appears that a sufficient number of legal voters to have changed the result were prevented by casting their ballots. *State ex rel. Fletcher v. Ruhe*, 24 Ney. 251, 52 Pac. 274. "An election should not be made void on a mere abstraction not affecting the result." *Well v. Calhoun* (C. C.) 25 Fed. 865. "If a registry is had under an unconstitutional law and an election held upon the basis of such registry, there can be little, if any, doubt that the election will be held valid, unless it is shown that a sufficient number of legal voters to have changed the result were prevented by such law from casting their ballot." 6 Am. & Eng. Ency. of Law (2d Ed.) p. 769. No such showing was made in this case.

[5] 5. It is contended, also, that the ballot used did not sufficiently state the proposition to be voted on.

Section 2938, Revised Codes, relates to forms of ballots to be used at elections wherein any question or proposition of, or relating to, bonds is submitted to the people. It provides that the ballot shall state the bonding proposition and the terms thereof explicitly and at length. We think the form of ballot was sufficiently comprehensive and explicit. It was not necessary to state therein the course, termini, or exact location of the proposed highway, or the number or location of the proposed bridges and ferries. The fundamental and initial question to be determined in all cases is whether the people are willing to authorize the commissioners to spend a definite amount of money for a certain public improvement. It was declared, in argument by counsel for both sides, that Lincoln county, one of the new counties of the state, is almost devoid of the necessary highway facilities to enable the people to

get from one part of the county to another without great expense and loss of time. The resolution of the county commissioners recites that in their judgment it is essential to the future growth and prosperity of the county that an adequate system of highways, bridges, and ferries be constructed, all connected, and making accessible each city and town in the county. We know that large portions of the county are mountainous and that many large streams flow within its borders. The project as proposed does not deal with separate improvements, independent of each other, and disconnected in point of utility. It is one large scheme involving a system of highways, bridges, and free ferries. We think the employment of the word "system," qualified by the information that it relates to highways, bridges, and free ferries, which is descriptive of what the plan or system comprehends, was a sufficient compliance with the terms of the statute. The opportunity is perhaps as propitious as any which may occur for a declaration by this court that our constitutional and statutory laws were designed to clothe the boards of county commissioners of the state with large discretionary powers in dealing with projects like the one we have under consideration. Certain well-defined constitutional restrictions must at all times be recognized and observed; but, aside from these, the policy of the law, is that the mere details of contemplated public improvements shall be left to their discretion. Where explicit statutory directions are given, they must, of course, be complied with; but all that is necessary in the initiation of a plan like the instant one is, in general, that the people shall be given an opportunity to intelligently exercise their judgment. If county boards and similar administrative bodies are to be continually harassed and hampered by the nice technicalities of the law, oftentimes lacking in substance and devoid of real merit, the settlement and development of this vast northwestern empire will be greatly impeded and retarded. As we read the statutes, the policy of the lawmaking bodies has been, rather, to make proceedings like the one in question as expeditious, simple, and inexpensive as possible, to accomplish the desired result, always bearing in mind, as heretofore suggested, that the consent of the people must be founded in an intelligent understanding on their part of the general purpose for which the money is to be expended. In preparing the ballot it was only necessary to substantially follow the directions of the statute. *Tinkel v. Griffin*, 26 Mont. 426, 68 Pac. 859.

[6] 6. The form of bond omits any reference to ferries; but, as we have heretofore decided that a ferry is merely a portion of the highway, the omission was immaterial.

7. We also regard the recital therein that all statutory and constitutional provisions of law have been complied with as immaterial.

in view of the fact that this case will be determined before the bonds are issued.

[7] 8. Objection is made that no form of bond was adopted prior to the advertisement for the sale. It is also contended that the bonds were not properly advertised for sale.

Section 2906, Revised Codes, provides that the board must fix the denomination of each bond and prescribe the form thereof. Section 2907, Revised Codes, provides that when the board issues any bonds it is its duty to sell the same and give notice by advertisement of the time of the sale; such advertisement must state "the amount of such bonds for sale." It will thus be seen that it is not necessary to give the form of the bonds in the advertisement or even a description thereof. We find nothing in the law to warrant the conclusion that the form of bond must be adopted prior to the advertisement. An inspection of the advertisement as set forth in the amended complaint also leads to the conclusion that the bonds were properly and legally advertised for sale.

[8] 9. Counsel contend: "The various purposes for which the bonds are to be issued and the various propositions submitted to the electors at said election do not constitute a single purpose within the meaning of the Constitution and the laws of this state." While it is true that the authorities are quite uniform that in bond elections each separate proposition must be separately voted upon, we have grave doubts that this rule of law is founded in constitutional provisions similar to our section 5 of article 13, supra. We know of no constitutional or statutory reason why the people may not vote on a dozen propositions combined, if they can intelligently do so. The reason of the rule of law is to be found in the fact that the courts have always been solicitous that the elector shall be given an opportunity to express his free and unhampered assent, or to express his dissent. *Blaine v. City of Seattle*, 62 Wash. 445, 114 Pac. 164. In the case just cited the court held that an ordinance providing for the submission to the people, as one project, of the question whether bonds should be issued for eight district improvements in no manner related to each other, was void because they could not freely and intelligently vote thereon. Other well-considered cases might be cited to the same point.

In the case of *Stern v. City of Fargo*, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665, it appeared that a proposition was submitted to construct a waterworks plant and "an electric light plant in connection with the said pumping station for furnishing street and other lights and power." The court said: "It is contended that the two purposes or objects, namely, a pumping station and electric light plant, are made one by use of the phrase 'in connection.' No serious contention is made that without the use of such words an electric light plant and water-

works and pumping station would be separate and distinct from each other. It appears to us that subjects which are so different, and which have no natural or necessary connection, cannot be made one, and the law and the reasoning of the courts evaded by a play upon words." The resolution submitting the two distinct propositions as one was held void. The same court, in *Hughes v. Horsky*, 18 N. D. 474, 122 N. W. 799, held that the question of issuing bonds for a combined courthouse and jail could be properly submitted to be voted on as one proposition; but, where the plan was to construct separate buildings for each purpose, the questions of bonds for a courthouse and bonds for a jail should be separately submitted.

All of these cases (and they are all cited by the appellant) accord with our views of the law governing this case. But we do not agree with the construction placed upon the proposed plan of the county board by counsel for the appellant. The distinction between a comprehensive single purpose, and two distinct purposes which have no natural relation to each other, is well illustrated by the decisions we have just noticed, and many others. For instance, the Supreme Court of Utah, in *State ex. rel. Horsely v. Carbon County*, 114 Pac. 522, held that a proposition to issue \$30,000 county bonds, \$25,000 to build bridges and \$5,000 to build and repair roads, as one general object, did not state two purposes required to be separately submitted. The court said: "The purpose was one general object. A bridge across the streams in the country in question without some kind of a highway would be useless. A highway without bridges over the streams would be impracticable. Both are but parts of one general object. To say the purpose here was a union of two separate and distinct objects, one might as well say that a stated purpose to purchase a site for a specified sum for school purposes and to erect a school building thereon for another specified sum contained or related to two separate and distinct objects or purposes, and proposed two separate appropriations for them, which would appear to be groundless."

The point is practically set at rest in this state by the cases of *Morse v. Granite County*, supra; *Hefferlin v. Chambers*, 16 Mont. 349, 40 Pac. 787; *Yegen v. Board of County Commissioners*, 34 Mont. 79, 85 Pac. 740; *Jenkins v. Newman*, 39 Mont. 77, 101 Pac. 625. In the last case this court held that the building of a bridge and the approaches thereto was a single purpose within the meaning of the constitutional limitation.

[9] 10. It is contended that the county of Lincoln had no authority to issue bonds for the purpose of establishing free ferries. We have already held that, for the purposes of this action, a ferry is to be construed as a part of the highway and a necessary incident to the general plan. We regard the fact

as altogether immaterial that express statutory authority to establish free public ferries was not given by the Legislature until the year 1909. See Session Laws of 1909, c. 33, p. 37.

[10] 11. It is also contended that the county has no power to bond for unestablished roads, or bridges on unestablished roads.

Section 2894, Revised Codes, gives boards of county commissioners general power and authority to establish and maintain highways, ferries, and bridges, and section 1890 et seq. points out the methods of procedure. Elliott on Roads & Streets, § 328, p. 343, is cited by counsel to the effect that in all cases the statute governs, and, where a particular mode of procedure is provided, that mode must be pursued, in order to give the county board jurisdiction to proceed, which is undoubtedly true. But again let us say that counsel give altogether too narrow and rigid a construction to the statutory provisions under which the respondent board has proceeded. In theory, at least, the entire body of electors of Lincoln county has acted. The statutes last quoted have reference to the powers and duties of county commissioners in particular cases. We have no doubt whatever that a board of county commissioners has power on its own initiative to establish highways, bridges, and ferries when necessary. The only limitation of this power has reference to the cost of the project. But be that as it may, in the absence of constitutional restrictions or prohibitory legislation, the people of a county can establish and construct as many highways, bridges, and ferries as they deem necessary and by whatsoever method of procedure they may elect. Incident to the authority given to issue bonds is the necessary power to proceed with the entire project for which the bonds are to issue.

But it is contended that the board may not be able, after selling the bonds and obtaining the proceeds thereof, to proceed with the construction of the highways, because the requisite number of freeholders may not petition therefor; and, again, it may not be able to acquire the rights of way. *Carlson v. City of Helena*, 39 Mont. 82, 102 Pac. 39, 17 Ann. Cas. 1233, is cited to the effect that it must first appear that the particular project can be carried out. This case is not in point. There the city had bound itself to acquire a particular water supply or none at all; it had divested itself of all discretion in the matter. While in the instant case, as we have seen, the project is comprehensive and, to a certain degree, elastic. The commissioners have been given authority to exercise a wise discretion as to the details of the plan, and it is not to be presumed that in a sparsely settled country, such as is comprised for the most part in Lincoln county, they will not be able to proceed and finish

the proposed system of highways, bridges, and ferries, substantially in compliance with the mandate of the electors from whom their authority emanates.

[11] 12. It appears that permission was not received from the Congress of the United States to construct bridges over the Kootenai river, which is a navigable stream, until after the bond election; and it is contended that this fact vitiated the proceedings. However, as permission has since been obtained, we think it would ill become a court of equity to reverse the judgment under the circumstances. The matter has resolved itself into a purely abstract proposition.

The judgment is affirmed. Remittitur forthwith.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

Ex parte WOODS.

(Criminal Court of Appeals of Oklahoma. Aug. 14, 1912.)

(Syllabus by the Court.)

1. HABEAS CORPUS (§ 30*)—GROUNDS—JURISDICTION OF TRIAL COURT.

Where a prisoner in custody under sentence of conviction seeks to be discharged on habeas corpus, the inquiry is limited to the question whether the court in which the prisoner was convicted had jurisdiction of the person of the defendant and of the crime charged; and, if the trial court had jurisdiction and power to convict and sentence, the writ cannot issue to correct mere errors.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

2. HABEAS CORPUS (§ 30*)—GROUNDS—DEFECT IN INDICTMENT OR INFORMATION.

A discharge from imprisonment under a criminal conviction cannot be granted on habeas corpus, because the indictment or information was defective.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

3. HABEAS CORPUS (§ 4*)—GROUNDS—IRREGULARITIES.

Habeas corpus does not lie to correct mere irregularity of procedure where there is jurisdiction. When the trial court has jurisdiction, errors in its proceeding can only be reviewed on appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 4; Dec. Dig. § 4.*]

Application by Floyd Woods for writ of habeas corpus. Denied.

G. T. Ralls, of Coalgate, for petitioner.

DOYLE, J. This is a petition for a writ of habeas corpus. The petition is filed for the purpose of setting at liberty Floyd Woods. It is alleged in the petition that Floyd Woods is illegally restrained of his liberty, and is unlawfully imprisoned in the penitentiary at McAlester, by virtue of an unlawful and illegal judgment and sentence of conviction in the district court of Coal county.

It appears from the petition that Floyd Woods was, on April 30, 1910, indicted by the grand jury of Coal county for the crime of grand larceny. A plea of not guilty was entered, and Woods was, on the 16th day of March, 1911, placed upon trial upon this indictment in said district court. On the same day the jury returned their verdict, as follows: "We, the jury, drawn, impaneled, and sworn in the above-entitled cause, do upon our oaths find the defendant, Floyd Woods, guilty as charged in the indictment herein, but cannot agree upon the punishment." And on the same day petitioner was sentenced to serve a term of 18 months in the penitentiary.

The indictment, a copy of which was attached to the petition, charged that: "One Floyd Woods and Oran Wright did commit the crime of grand larceny in the manner and form as follows, to wit: That they, the said Floyd Woods and Oran Wright, did then and there unlawfully, willfully, fraudulently, and feloniously take, steal, and carry away, by stealth and by fraud and by force, from and out of the possession of one Jeff Wood, and without his consent, one certain red heifer yearling calf, unbranded and unmarked, said calf being then and there the property of him, the said Jeff Wood, with the unlawful and felonious intent on the part of them, the said Floyd Woods and Oran Wright, then and there to deprive him, the said Jeff Wood, of said property, and to appropriate and convert the same to the use and benefit of them, the said Floyd Woods and Oran Wright."

The judgment, a copy of which was attached to the petition, is that the defendant is guilty of grand larceny; and the record shows that a commitment issued on the judgment, directing the sheriff of Coal county to take and deliver said Woods to the warden of the penitentiary at McAlester. He was so delivered on December 12, 1911. The petition also contains a certificate of the clerk of said district court "that the 16th day of March, 1911, the same being the day on which Woods was convicted and sentenced to the penitentiary, was not the last day of the term of court."

It is further alleged that said district court was without jurisdiction in the premises: First. Because "said indictment charges your petitioner with the crime of grand larceny, but does not allege any value of the property alleged to have been stolen." Second. That "your petitioner was convicted of the crime of grand larceny under said indictment, and was on the same day sentenced to the penitentiary for the term of 18 months, and that no waiver of time for sentence was made by your petitioner."

Argument upon the petition for said writ was had, and the writ was refused.

[1] Where a prisoner in custody under sentence of conviction seeks to be discharged

on habeas corpus, the law is well settled that the inquiry is limited to the question whether the court in which the prisoner was convicted had jurisdiction of the person of the defendant and of the crime charged. And if the trial court had jurisdiction and power to convict and sentence, the writ cannot issue to correct mere errors. *Ex parte Wilkins*, 7 Okl. Cr. —, 115 Pac. 1118. "The writ of habeas corpus is not designed for the correction of errors or mere irregularities, and cannot be substituted for an appeal or writ of error. And where a petitioner is imprisoned under a judgment of conviction for crime, unless the court was without jurisdiction to render the particular judgment, and the judgment is void and not merely voidable, relief cannot be had by habeas corpus, however numerous and gross may have been the errors committed during the trial, or in the proceedings preliminary thereto." *In re Talley*, 4 Okl. Cr. 398, 112 Pac. 36, 31 L. R. A. (N. S.) 805; and cases therein cited.

It is contended on behalf of petitioner that the facts, if true, which are alleged in the indictment do not constitute a felony under our Criminal Code. This contention is destitute of merit. Larceny is defined by our statutes as follows: Section 2591, Snyder's Sts. provides: "Larceny is the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof." Section 2593 provides: "Larceny is divided into two degrees; the first of which is termed grand larceny, the second petit larceny." Section 2594 provides: "Grand larceny is larceny committed in either of the following cases: 1. When the property taken is of value exceeding twenty dollars. 2. When such property, although not of value exceeding twenty dollars in value, is taken from the person of another. Larceny in other cases is petit larceny." Section 2595 provides: "Grand larceny is punishable by imprisonment in the state prison not exceeding five years." Section 2606 provides: "That if any person shall steal any stallion, mare, colt, gelding, ridgeling, or any ass, genet, or mule, or any bull, cow, calf, steer, or stag, he shall be guilty of a felony and on conviction thereof shall be punished by confinement in the state penitentiary for a term of not less than one nor more than ten years."

The only difference between the crime of stealing a 'domestic animal under section 2606, supra, and larceny under the general statute is that this provision abolishes the degrees of the crime and makes the stealing of any of the domestic animals therein named a felony, without regard to the amount of their value.

In the case of *Crowell v. State*, 7 Okl. Cr. —, 117 Pac. 883, this court said: "When a prosecution is predicated upon section 2606, to support a conviction, the ownership of the animals stolen must be alleged and

proved; and it is necessary to allege, and prove a felonious intent on the part of the taker to deprive the owner thereof, and to convert the same to his (the taker's) own use, which specific proof is not necessary to support a conviction under the general larceny statute. That was done in this case. The allegation of value in the information is not material, and may be rejected as mere surplusage, which does no harm. * * * The words 'grand larceny,' mistakenly used in entering judgment, could not in any way have misled or injured the defendant."

[2] A discharge from imprisonment under a criminal conviction cannot be granted on habeas corpus, because the indictment or information was defective.

In the case of *In re Eckart*, Petitioner, 166 U. S. 481, 17 Sup. Ct. 638, 41 L. Ed. 1085, Mr. Justice White, delivering the opinion of the court says: "In its decision refusing the writ applied for by Eckart, the Supreme Court of Wisconsin held that, while the conviction under the sentence in question was erroneous, the error in passing sentence was not a jurisdictional defect, and the judgment was, therefore, not void. In this view we concur. The court had jurisdiction of the offense charged, and of the person of the accused. The verdict clearly did not acquit him of the crime with which he was charged, but found that he had committed an offense embraced within the accusation upon which he was tried. It was within the jurisdiction of the trial judge to pass upon the sufficiency of the verdict and to construe its legal meaning; and if in so doing he erred, and held the verdict to be sufficiently certain to authorize the imposition of punishment for the highest grade of the offense charged, it was an error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ of habeas corpus."

Under article 7 of the Constitution, which article treats of the judicial department, the district courts of the state have no jurisdiction in misdemeanor cases; and when an indictment for a misdemeanor is returned therein the district court must order the indictment transferred to the court having jurisdiction to try and determine the same.

The indictment here correctly charged a felonious larceny of live stock, except for the erroneous use of the term "grand larceny"; and, if the trial court erred in the same manner in its judgment, such error can only be reviewed upon appeal in this court, and not by habeas corpus. As the district court of Coal county had jurisdiction to pronounce the judgment of conviction against petitioner, it follows that the judgment is not void.

[3] The question whether or not the court appointed a time for pronouncing judgment, as prescribed by section 6901 and section 6902 of the Code of Criminal Procedure, can

only be reviewed upon appeal in this court. Habeas corpus does not lie to correct mere irregularity of procedure where there is jurisdiction.

For the reasons stated, the writ of habeas corpus was and is refused.

FURMAN, P. J., and ARMSTRONG, J., concur.

RICHARDSON et al. v. PARKER, McCONNEL & CO.

(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

FRAUDS, STATUTE OF (§§ 23, 159*)—PROMISES TO ANSWER FOR DEBT OF ANOTHER—ORIGINAL OR COLLATERAL PROMISE—QUESTION FOR JURY.

Where a party verbally promises to pay for advancements to be made to another, if the verbal contract primarily creates a liability on the part of the promisor, the same is not within the statute of frauds.

(a) If the intention, however, of the promisor was that he should only be collaterally liable, and pay only in case of default on the part of the party to whom the advancement was actually made, then such verbal contract would be void as within the prohibition of the statute of frauds.

(b) Held, under the facts in this case, that the question as to whether the verbal undertaking was primary or collateral was a question of fact to be determined by the jury under proper instructions.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. §§ 23, 159.*]

Error from Tillman County Court; T. E. Campbell, Judge.

Action by Parker, McConnel & Co. against W. A. Richardson and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

McGuire & Caudill and L. P. Mosler, all of Frederick, for plaintiffs in error. Mounts & Davis, of Frederick, for defendants in error.

WILLIAMS, J. This proceeding in error seeks to review the judgment of the lower court in an action wherein the defendants in error, Parker, McConnel & Co., sued the plaintiffs in error, W. A. Richardson and P. P. Richardson, as defendants, on a certain itemized account, wherein it was alleged that the said defendants were indebted to plaintiffs in a certain sum "for goods, wares, and merchandise, viz., groceries, which plaintiffs sold and delivered to said defendant C. M. Richardson." The defendants answered by general denial. Trial was had, and judgment rendered in favor of the plaintiffs in the sum sued for, to wit, \$279.15.

The contention in this case is that the goods, wares, and merchandise were sold to C. M. Richardson, and not to the plaintiffs in error; and therefore they are not liable, because they did not agree in writing to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

become bound therefor. Paragraph 2, § 1089, Comp. Laws 1909; section 847, Stat. Okla. Ter. 1896.

The evidence tended to show that W. A. Richardson stated, when talking with defendants in error: "We will just let that go, but will pay [referring to the one in controversy] that account later on." C. M. Richardson was one of the sons of W. A. Richardson. The evidence also tended to show that said W. A. Richardson said: "that was his son that had moved down here, and wanted me to let him have some groceries, and went on to say that whatever he got he would see that it was all right and paid for. He said that he would be out there farming with them, but what one got they were all good for, and impressed it upon my mind they would pay for it. He told me to keep the account separate, so that they would know what he got on the books from P. P. Richardson's account."

After C. M. Richardson moved away, the defendants in error sent him a note to sign, writing him as follows: "Mr. C. M. Richardson, Okeene, Okla.—Dear Sir: We are to-day sending First National Bank of Okeene a note for the amount of your account, with interest to date. We had a conversation with your father the other day, and he instructed us to do this and said you would sign note and return at once. Now, we hope you will attend to this at once and save us a trip up there. As this amount is so large we cannot afford to carry it in this shape any longer. We think, under the existing circumstances, that you will certainly sign this note without any trouble."

Later the defendants in error again wrote to the same party as follows: "I have just seen your father and brother in regard to your account and they claim you have made no arrangements for them to settle your account, only that they would sign a note with you for the same. We are again sending to the First National Bank of Okeene note with interest to date shown thereon, which we hope you will go and sign as soon as you return with your signature."

The evidence further, on the part of the defendants in error, was as follows: "The conversation was that occurred at the time when Mr. Richardson brought his son in there and introduced him, and told us he wanted to open up an account, and that they would be responsible, and that they would see that it was paid, if he didn't."

The evidence further, on the part of the plaintiffs, was that the plaintiffs in error stated to the defendants in error, before the goods were sold to C. M. Richardson, that they would pay for such goods.

In *May v. Roberts*, 28 Okl. 619, 115 Pac. 771, the syllabus is as follows:

"R. said to M., a physician, 'I want you to go to that little house (pointing same out). My tenant's wife, Mrs. B., is sick there; and

I want you to look after her and take care of her.' M. asked him about the pay, and he said, 'I will see that it is paid.' It was in answer to M.'s question about pay for such service as he might render to Mrs. B. that he said, 'I will see that it is paid.' Held, that it was error to exclude this evidence from the jury.

"(a) Such evidence was competent and material for the consideration of the jury, in connection with all the facts and circumstances proved, to determine whether the liability created was primary or collateral.

"(b) If the liability was primary, such verbal contract was valid, and not within the statute of frauds.

"(c) If the intention was that the husband of Mrs. B. should be primarily liable, and that R.'s liability should be only collateral (that is, to answer in case of the husband's default), then the contract was void as within the statute of frauds."

In the case at bar, the cause was submitted to the jury by the trial court under instructions conformable to the rule announced in the above case.

The question as to whether, under all the evidence, the credit was given jointly to C. M. Richardson with his father, W. A. Richardson, and P. P. Richardson, or to C. M. Richardson, with the understanding that, if he did not pay for said goods, wares, and merchandise, then the said father and brother would. If the former, the plaintiffs in error were liable; if the latter, the statute of frauds intervened and struck down the contract. Under the evidence in this case, it was a question of fact for the determination of the jury under proper instructions. The jury having found against the contention of the plaintiffs in error, and there being some substantial evidence to sustain such verdict, the same will not be disturbed on review in this court.

The judgment of the lower court will be affirmed. All the Justices concur.

TYLER COMMERCIAL COLLEGE v. STAPLETON.

(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§§ 63, 129*)—CONTRACTS RELATING TO REAL PROPERTY—EFFECT OF PERFORMANCE.

The owner of a building leased same to a corporation for a period of three years at a stipulated rental of \$75 per month. The lessee, after the expiration of about one year, by parol agreement, assigned the lease. The assignee took possession of the demised premises, paid the purchase price for the lease, and performed the covenants thereof by paying for a time the monthly rentals to the lessor, as provided in the lease contract; but, before the expiration of the lease, plaintiff abandoned the premises and refused to pay the rents for the unexpired term. Held, that the assignment of the lease was in violation of the statute of frauds, and void (section 1089, Comp. Laws 1909),

but that the acts of the assignee relieved it from the operation of the statute, and that the assignee was liable to the lessor for the full term of the lease.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83, 97-104, 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. §§ 63, 129.*]

2. LANDLORD AND TENANT (§ 208*)—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEE.

The assignee of a lease is liable to the lessor by reason of privity of estate for rents on the demised premises, so long as the privity of estate continues.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 737, 821-831; Dec. Dig. § 208.*]

3. LANDLORD AND TENANT (§ 208*)—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEE.

An assignee cannot, by mere abandonment of possession of the premises, without an assignment of the lease, avoid liability for rents.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 737, 821-831; Dec. Dig. § 208.*]

Error from District Court, Logan County; A. H. Huston, Judge.

Action by Alta Z. Stapleton against the Tyler Commercial College. Judgment for plaintiff, and defendant brings error. Affirmed.

Tibbetts & Green, of Guthrie, for plaintiff in error. C. G. Hornor, of Guthrie, for defendant in error.

HAYES, J. Defendant in error, herein after called plaintiff, brought this action in the court below against plaintiff in error, hereinafter called defendant, to recover the balance due her as rents on a certain building located in the city of Guthrie. She alleges in her petition and amendments thereto that she leased to the Capital City Business College, a corporation, certain rooms in her building, in the city of Guthrie, for a period of three years, beginning on January 1, 1904, and expiring January 1, 1907; that the Capital City Business College took possession of said rooms under the lease, and retained them and paid the rents thereon until the month of October, 1904, at which time it sold, assigned, and delivered to defendant said lease contract and possession of said rooms. She further alleges that defendant assumed said lease contract, and agreed with the Capital City Business College, for a good and valuable consideration, to pay the rent thereunder to the plaintiff in the sum of \$75 per month for the full, unexpired term of said contract. She alleges that defendant occupied said premises and paid the rents thereon until September 27, 1905, at which time it vacated the premises and thereafter refused to pay the rents. She alleges that after the premises had been vacated by defendant, and it had refused to pay further rents thereon, she took possession of the premises, and, after making certain repairs, was able to re-rent the premises only at a reduced rent. She prays judgment

for the amount of the rents at the rate of \$75 per month, as stipulated in the contract, for the time the building stood vacant after the same was vacated by defendant, and for the difference in the rental provided for in the contract and the amount she was able to re-rent the building for, after the same was vacated by defendant, for the remainder of the term.

After answer of defendant, admitting several of the allegations of the petition, but denying that it assumed the lease, or that it agreed to pay the rents to plaintiff thereunder for the remainder of the term, the cause was tried to the court, without a jury, who made findings of fact and conclusions of law in part as follows:

"(1) Upon a consideration of the evidence, the court finds that on and prior to the 28th day of November, 1903, the plaintiff was the owner of the real estate described in her petition and the lease attached thereto, and that on said date she executed and delivered to the Capital City Business College, a corporation, a lease for said premises to continue for the term of three years from the 1st day of January, 1904, until the 1st day of January, 1907, and for which said corporation was to pay her the sum of \$2,700, payable in monthly installments of \$75 each at the beginning of each month.

"(2) That on or about the 1st of November, 1904, the Capital City Business College sold out all of its assets to certain individuals, who immediately transferred the same to the defendant, the Tyler Commercial College, a corporation, and that the Capital City Business College was by said transfer of all of its assets in effect dissolved, and it ceased to exist as a corporation thereafter, and that the defendant, Tyler Commercial College, succeeded to all of its assets, property, contracts, rights, and good will.

"(3) That the defendant, the Tyler Commercial College, continued to carry on business in the city of Guthrie under the name of the Capital City Business College, and continued to operate the business college and to occupy the premises of the plaintiff up until the 30th day of September, 1905, and paid to her the rent stipulated in the lease.

"(4) That on the 17th day of August, 1905, the defendant served a written notice upon the plaintiff that it would terminate its tenancy and would vacate the premises on or about the 30th day of September, 1905, and that it did vacate the premises described on the 30th day of September, 1905.

"(5) That in payment of the September, 1905, rent, the defendant sent to the plaintiff a check, upon which was written in small letters, 'House rent, in full of implied contract;' and the court also finds that the plaintiff did not see or observe the same before cashing the check.

"(6) That after said premises were vacated by the defendant the plaintiff expended the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sum of \$500 in rearranging the interior of the building for another tenant.

"(7) That on the 15th day of December, 1905, the plaintiff re-rented said premises to another tenant for the sum of \$40 per month, and has continued to receive from such other tenant the sum of \$40 per month on and through the remainder of the term fixed in the lease."

Conclusions of Law.

"(1) From which the court concludes that the original lease from the plaintiff to the Capital City Business College was a valid lease, and binding upon the Capital City Business College, and that the defendant, Tyler Commercial College, in succeeding to all of the assets, property, and good will of the Capital City Business College, and under its rights under the lease, became liable for its contracts, and liable to perform its contract to pay the rent stipulated under this lease."

Other conclusions of law were made by the trial court; but it is not necessary to set them out here. The judgment was for the plaintiff, as prayed for, except that she was not allowed for money expended in repairing the building and remodeling it, in order to rent it after it had been vacated by defendant.

There was a motion for a new trial by defendant, urging as one of the grounds for a new trial that the findings of the court were not supported by the evidence; and the overruling of this motion is assigned as error in the petition in error. But in defendant's brief this assignment is not set out; nor is it pointed out in the brief what findings of the court are without sufficient evidence to support them. It therefore must be taken by this court that the finding of the court upon the facts is correct.

There is no specific finding of the court that the Capital City Business College, by any written contract, ever assigned the lease to defendant; and there is absence of any evidence in the record to that effect. Nor is there any separate, specific finding that the Capital City Business College otherwise sold and assigned the lease to defendant; but we construe finding of the court, numbered 2, in which it is found that all the assets of the Capital City Business College were transferred to certain persons, and that those persons transferred same to defendant, to be in effect a finding that there was a parol assignment of said contract; and counsel for defendant, in their brief, have dealt with the case upon the theory that there was a parol assignment to defendant by the Capital City Business College of its lease with plaintiff. Defendant contends, first, that such parol assignment is within the statute of frauds, and therefore void; second, that the taking of possession of the demised premises by defendant, and the payment of rents thereon for the portion of the term defendant occupi-

ed the premises, does not relieve the parol assignment of the operation of the statute of frauds; and, third, that if such performance does relieve the parol assignment of the statute, an assignee of a leasehold interest is liable for the rents only for the time he occupied the premises; and that, as it has paid all rents maturing before it vacated the premises, no recovery by plaintiff can be had against it.

[3] Some of the cases support the last of defendant's foregoing contentions; but the decided weight of authority, consisting both of decided cases and the text-books, does not support this rule. At page 1087, Underhill on Landlord and Tenant, it is said: "Where the lessee makes an absolute assignment of the whole term, the assignee thereby becomes responsible, after he has accepted the assignment, for rent subsequently accruing, and for the subsequent breach of covenants running with the land, though he never takes possession of the premises. The assignee of a lease becomes liable for rent by reason of privity of estate, and not by reason of occupation of the premises. This is the general rule, and is well supported by the authorities. The apparent exceptions to it, which make the liability of the assignee of the lease to the lessor depend upon the possession, are usually distinguished by some other element than the possession."

[2] The liability of the assignee to the lessor is based upon privity of estate, and, so long as that privity of estate continues to exist, the assignee's liability continues; and it cannot be terminated by removal from the premises and refusal to pay rents. It may be terminated by a valid assignment of the entire unexpired term to any other person; for a valid assignment terminates the privity of estate between the first assignee and the lessor. *Bonetti v. Treat*, 91 Cal. 228, 27 Pac. 612, 14 L. R. A. 151, where the cases supporting this doctrine are well collected in a note. See, also, section 181b, and section 158c, *Tiffany on Landlord and Tenant*.

Kimbriel v. Montgomery, 28 Okl. 743, 115 Pac. 1013, is relied upon by defendant as deciding favorably to it its contention that it is not liable to the plaintiff lessor for the rents; but that case has no application. One of the questions decided in that case was that the lessor could not recover from the sublessee the rents, and that the lessor must look to the original lessee. The distinction between the relation and liability of an assignee and a sublessee to the lessor is well defined by the authorities. There is neither privity of estate nor privity of contract between the sublessee and the sublessor; but between the assignee and the lessor there is privity of estate, and the assignee is liable upon the covenants that run with the land. Section 449, *Taylor on Landlord and Tenant*; section 651, *Underhill on Landlord and Tenant*.

[1] It follows in the instant case that, if any valid assignment was made to defendant by the Capital City Business College, defendant is liable; for the privity of estate created by such assignment was never terminated before the expiration of the term.

Section 780, subd. 5, Wilson's Rev. & Ann. St. (section 1089, subd. 5, Comp. Laws 1909), provides: "An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, * * * is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Section 880, Id., provides: "No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors. * * *"

Whether, under the foregoing statutes, a lease for a term of less than one year may be assigned otherwise than in writing need not be determined; for in this case both the original term of the lease and the unexpired term at the time of the transfer of the lease to defendant was for a longer period than one year; and these statutes include such an assignment and require it to be in writing. 20 Cyc. 218; Taylor on Landlord and Tenant, § 427. There was no written assignment to defendant, and the parol assignment and transfer to it of the lease is therefore void, unless the doctrine of part performance applies and takes the contract out of the operation of the statute. This exact question has not often been considered by the courts of this country.

Welsh v. Schuyler, 6 Daly (N. Y.) 412, Polk v. Reynolds, 31 Md. 108, Nally v. Reading, 107 Mo. 350, 17 S. W. 978, Chicago Attachment Co. v. Davis Sewing Machine Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754, have been cited by plaintiff as supporting the rule that part performance does not take a parol assignment of a lease out of the statute of frauds, so as to authorize a lessor to recover rents in an action at law against the assignee. Neither Polk v. Reynolds, supra, nor Welsh v. Schuyler, supra, are in point. All that was decided in the Polk Case was that a verbal agreement or understanding to transfer a leasehold interest in land falls within the statute of frauds, and is therefore void. In Welsh v. Schuyler, the plaintiff lessor sought to recover rents from a person who had occupied the demised premises with the permission of the original lessee, and had paid a part of the rents to the plaintiff lessor. It was held by the court that defendant being in possession and paying rents to the lessor was presumptive evidence that he had accepted and held an assignment of the lease, but that he was not estopped to show that he never accepted a valid assignment of the lease; and that, where the lease was for a period greater

than three years, an assignment, not in writing, is invalid, because in violation of the statute of frauds. The rule of part performance was not invoked by plaintiff nor considered by the court. The other two cases cited by plaintiff, however, are in point, and hold that the doctrine of part performance has no application in an action for rents by the landlord against the assignee under a parol assignment; but the court in each of those cases based its decision upon the rule prevailing in the respective states in which those cases arose, that, whatever might be the rule in equity as to such doctrine, it has no place in an action at law. That plaintiff may invoke the doctrine of part performance in this action is supported by the following cases: Dewey & Stone v. Payne & Co., 19 Neb. 540, 26 N. W. 248; Baker v. Maler & Zobelein Brewery, 140 Cal. 530, 74 Pac. 22; Edwards v. Spalding, 20 Mont. 54, 49 Pac. 443; Grant v. Ramsey, 7 Ohio St. 158; Browder et al. v. Philney, 30 Wash. 74, 70 Pac. 264.

The rule supported by these last-mentioned cases, we believe, to be based upon the sounder reason, and more conducive to justice under the Code of Procedure in force in this state. The contract here involved, and which, it is charged, infracts the statute, does not create any estate in real estate, as does the lease contract. Whether the contract of assignment stands or falls does not affect the leasehold estate, which was granted by the original lease contract to the lessee; for that contract was in writing, and is valid. What was undertaken by the parol assignment was not to create an estate, but to convey an interest in real estate that had been created by the original lease contract and held by the lessee. This contract of assignment was capable of immediate performance by the execution thereof by the lessee and acceptance thereof by the assignee and payment of the consideration. The consideration was paid by the assignee to the extent that he paid for all the assets transferred by the Capital City Business College, the original lessee, to it, including the lease in controversy; and it had also performed the covenants of the lease for part of a time thereafter by payment of the rents, and had been in possession of the property, using and enjoying same. By our Code the distinction between actions at law and suits in equity are abolished, and all actions in which a civil remedy is sought are denominated civil actions. Section 5542, Comp. Laws 1909. Plaintiff, in his petition, is required to set up therein only a statement of the facts constituting his cause of action in ordinary and concise language, and make demand for the relief to which he thinks himself entitled (section 5627, Comp. Laws 1909); and defendant may set forth in his answer as many grounds of defense as he may have, whether they be such as have been heretofore denomi-

nated legal or equitable, or both. Section 5634, Comp. Laws, 1909. Under these provisions of the Code, defendant in the instant case could plead, in any action of ejectment that might be brought against it, either by the lessor or the original lessee, any equitable defenses he may have. *Meadors v. Johnson*, 27 Okl. 544, 112 Pac. 1121; *Talley et al. v. Kingfisher Imp. Co.*, 24 Okl. 472, 103 Pac. 591, 20 Ann. Cas. 352. And an equitable estate in land may, under our Code, be made the basis of an action for possession. *Shy v. Brockhouse*, 7 Okl. 35, 54 Pac. 306; *McClung v. Penny*, 12 Okl. 303, 70 Pac. 404.

It would therefore follow, if the doctrine of part performance cannot be applied in the case at bar, that under the procedure in this state, if plaintiff, or if the lessee, brought an action to eject defendant from the premises, defendant could set up its equitable defense, its right to a specific performance of the contract, to defeat the action of ejectment, and secure the performance of the assignment to the extent that it could enjoy the full unexpired term of the original lease. This protection would be given to defendant in an action that, in the absence of our Code provisions, would be designated an action at law; and yet, in a similar action, the court would refuse to enforce the covenants of the contract against defendant by requiring him to pay the rents. There is nothing in the statute that requires such a construction as will permit this inconsistent and inequitable administration of the law. In *Bard v. Elston*, 31 Kan. 274, 1 Pac. 565, from which state our Code was adopted, a plaintiff lessor sought, by an action of forcible entry and detainer, to eject his lessee under a parol lease for a term of six years from the demised premises. The lessee had been in possession of the land for a period of five years, had planted and cultivated crops thereon, built fences and houses, and made other improvements, and, in addition thereto, had paid the rents and taxes thereon. The court held that defendant might invoke the doctrine of part performance in his defense to the action, and that his acts had been sufficient to take the contract out of the statute and make it valid for the full term of the lease. In the opinion, written by Mr. Justice Valentine, concurred in by Mr. Justice Brewer, it was said: "Mere possession or mere payment of rent will not, as a general rule, make a parol lease for more than one year valid for the full term. But parol leases exceeding one year, as well as other parol contracts with regard to real estate, may sometimes be taken out of the statute of frauds by a part performance of the contract, and by such part performance be made valid to their full extent. *Taylor's Landlord and Tenant*, § 32; *Grant v. Ramsey*, 7 Ohio St. 157. But parol leases for more than one year, in order to become valid by a part performance, should generally be such as would,

by such part performance, become substantially a purchase of an interest in the real estate."

In *Deisher v. Stein*, 34 Kan. 39, 7 Pac. 608, there was a parol agreement to execute a written lease of land for a term of more than one year. After the lessee had gone into possession, expended labor, money, and material in making improvements on the land, and getting it into condition to enjoy, the landlord refused to execute the lease and ousted the lessee from possession. In an action by the lessee against the landlord to recover damages, it was held that the lessee's acts constituted such a part performance of the contract as to take it out of the statute sufficiently to enable him to recover for the time, labor, money, and material expended thereon as his damages.

In *Bard v. Elston*, supra, the equitable doctrine of part performance was invoked by the defendant; while in *Deisher v. Stein*, supra, it was invoked by the plaintiff, and constituted a part of his cause of action. In the latter case, it was said by the court in the opinion: "It must be remembered that in Kansas all the old forms of action, and all distinctions between actions at law and suits in equity, are abolished, and in their stead only one form of action is recognized, called a civil action; and in this form of action all that a plaintiff needs to do in stating his cause of action is to state the facts of his case; and if such facts would entitle him to recover in any form of action, either at law or in equity, he will be entitled to recover under such statement."

Speaking of what performance is necessary to relieve a contract for the sale of real estate or interest therein of the operation of the statute, this court, in *Collins v. Lackey et al.* (recently decided, but not yet officially reported), 123 Pac. 1118, said: "The authorities are practically unanimous that payment of the purchase price and taking possession under the contract and making valuable improvements on the granted premises constitute such a performance of the contract as will warrant a decree of specific performance. There is some division in both the English and the American authorities as to whether taking possession alone under the contract, without making valuable improvements, is sufficient to take the contract out of the operation of the statute. The weight of authority, both in England and in this country, however, supports the rule that possession alone of land under a verbal contract, when delivered to the vendee, is sufficient performance to take the case out of the statute of frauds, without the additional circumstances of payment of consideration, or the making of valuable improvements." See, also, *Halsell et al. v. Renfrow*, 14 Okl. 674, 78 Pac. 118, 2 Ann. Cas. 286; and *Sutherland v. Taintor*, 17 Okl. 427, 87 Pac. 900.

Defendant had gone into possession, paid

the purchase price, and performed on its part every obligation of the contract of assignment, except the covenant of the original lease to pay rents, part of which, however, he had paid.

It follows from the foregoing views that plaintiff was entitled to recover, and the judgment of the trial court should be affirmed.

After the first hearing in this cause, this court prepared and filed an opinion, affirming the judgment of the trial court upon a question of practice; but, after a rehearing upon a petition therefor, it appears to the court that the question considered in the first opinion was not presented by the briefs of plaintiff in error sufficiently in compliance with the rules of the court so as to entitle it to consideration; and, without at this time determining whether we were correct in our conclusion on the question then decided, we have considered the case upon its merits, and on a theory upon which it was presented to the trial court. The trial court appears to have held the defendant liable, because the assignment to it by the Capital City Business College of all of its assets effectually worked a dissolution of the latter corporation. We entertain some doubts whether, under the facts found by the court, and under the facts which the evidence in the record in any way tend to support, liability of defendant can be sustained upon this theory; but the theory upon which we have sustained the judgment of the trial court was one of the theories presented by the pleadings, and upon which the case was tried; and, if the trial court gave a wrong reason for the judgment rendered, such fact constitutes no ground for reversal.

The judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. DUNN, J., not participating.

SNIDER v. PERKINS et al.

(Supreme Court of Oklahoma. July 9, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1032*)—REVIEW—BUDGET OF SHOWING ERROR.

In the Supreme Court error must be affirmatively shown; and where this is not done the judgment of the court below will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

Error from Bryan County Court; Chas. A. Phillips, Judge.

Action by T. J. Perkins and another against F. M. Snider. Judgment for plaintiffs, and defendant brings error. Affirmed.

Cruce, Cruce & Bleakmore, of Ardmore, for plaintiff in error. C. C. Hatchett, of Durant, for defendants in error.

KANE, J. This was an action for damages for the conversion of a boxhouse situated on a certain tract of land in Bryan county, commenced by the defendants in error, plaintiffs below, against the plaintiff in error, defendant below, in the county court. On trial there was a verdict for the plaintiffs, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

Counsel for plaintiff in error say in their brief: "In the discussion of this case, we cannot see where any authorities can be cited to assist this court in any way in the solution of the controversy between the parties hereto. The plaintiff in error is relying upon all the assignments of error filed herein. At the same time the particular questions involved are: First, as to whether or not the county court of Bryan county had jurisdiction to try this case, and, if it did, whether or not the court erred in excluding from the jury certain testimony offered upon the part of the defendant below, and, if not, whether or not the court erred in taking from the jury by its charge what testimony there was introduced. All of these questions must be decided by the court for itself. We can think of no authorities that would assist this court."

The court can think of no authorities which support the contentions of counsel; and, as it is not apparent that any of them are well taken, we will indulge the presumption that the judgment of the court below is correct, and affirm the same. In the Supreme Court error must be affirmatively shown; and where this is not done the judgment of the court below will be affirmed. *Seaver v. Rullison*, 29 Okl. 128, 116 Pac. 802. It is so ordered. All the Justices concur, except WILLIAMS, J., disqualified, and DUNN, J., absent, and not participating.

UNITED STATES EXPRESS CO. v. STATE et al.

(Supreme Court of Oklahoma. July 9, 1912.)

(Syllabus by the Court.)

CARRIERS (§ 11*)—REGULATIONS—ORDERS OF CORPORATION COMMISSION—EVIDENCE.

Evidence examined, and held sufficient to sustain the justness and reasonableness of the order of the Corporation Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 2, 3; Dec. Dig. § 11.*]

Appeal from the State Corporation Commission.

Appeal by the United States Express Company from an order of the Corporation Commission, requiring the company to establish and maintain an uptown office in the town of Hobart for the transaction of its business. Order affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Cottingham & Bledsoe, of Oklahoma City, for appellant. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for appellees.

KANE, J. This is an appeal from order No. 526 of the Corporation Commission, requiring the appellant to establish and maintain an uptown office in the town of Hobart for the transaction of its business, to be located at some point on the square in the center of the town, and to collect and deliver express packages anywhere in the corporate limits of the city. After a full hearing held at the city of Hobart, and an exhaustive finding of fact, the Commission concluded that "the citizens of Hobart are entitled to an uptown office for the transaction of their business with said United States Express Company, and that receipts from its business at said office justifies the small additional expense." The only ground of complaint is that the order is unjust and unreasonable. After a careful consideration of the record, we are satisfied that the findings and conclusions of the Commission are amply supported by the evidence. "On appeal from an order of the Corporation Commission, the presumption obtains * * * that the order is reasonable, just, and correct; and he who complains on appeal of such order has upon him the burden of establishing the unreasonableness, unjustness, or incorrectness of such order." A. T. & S. F. Ry. Co. v. State, 23 Okl. 510, 101 Pac. 262, 18 Ann. Cas. 102; C. R. I. & P. Ry. Co. v. State, 24 Okl. 370, 103 Pac. 617, 24 L. R. A. (N. S.) 393; M. K. & T. Ry. Co. v. State, 24 Okl. 331, 103 Pac. 613; K. C. M. & O. Ry. Co. v. State et al., 25 Okl. 715, 107 Pac. 912.

The order of the Commission is affirmed. All the Justices concur, except DUNN, J., absent, and not participating.

W. H. ASHLEY SILK CO. v. OKLAHOMA FIRE INS. CO.

(Supreme Court of Oklahoma. July 9, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 70*)—DECISIONS REVIEWABLE—ORDER SUSTAINING DEMURRER.

Under section 6067, Comp. Laws 1909, an appeal may be taken from an order sustaining a demurrer to a petition prior to the entry of a final judgment against the pleader.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 146, 151, 154-160; Dec. Dig. § 70.*]

Error from District Court, Muskogee County; John H. King, Judge.

Action by the W. H. Ashley Silk Company against the Oklahoma Fire Insurance Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

Stewart & Stewart, of Muskogee, for plaintiff in error. Brook & Brook, of Muskogee, for defendant in error.

KANE, J. This is an appeal from an order sustaining a demurrer to the petition. Counsel for defendant in error, in their brief, do not controvert the contention of counsel for plaintiff in error on the merits, but contend that, inasmuch as the appeal was taken prior to the entry of final judgment against the pleader, the same must be dismissed, and cite Grunawalt v. Grunawalt, 24 Okl. 756, 104 Pac. 906, as an authority to that effect. We do not think that case is in point. The case of Wesley et al. v. Diamond et al., 26 Okl. 170, 109 Pac. 524, is more analogous. In the latter case it was held: "Under section 6067, Comp. Laws Okla. 1909, an order that involves the merits of an action or some part thereof may be reversed, vacated, or modified by the Supreme Court before final judgment is rendered in the cause in the trial court."

Section 6067, supra, specifically provides that an appeal lies from an order which sustains or overrules a demurrer.

The judgment of the court below must be reversed and the cause remanded, with directions to overrule the demurrer. All the Justices concur.

HARLOW V. BOARD OF COM'RS OF

PAYNE COUNTY et al.

(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

1. BRIDGES (§ 18*)—CONSTRUCTION BY COUNTIES—STATUTORY PROVISIONS.

In measuring the distance between the proposed location of a bridge to the nearest bridge on the same stream, to determine whether the proposed location is not nearer than six miles to the nearest bridge, as is required by section 7881, Comp. Laws 1909, the statute contemplates and requires that said measurement shall be upon a straight line between said points.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 6; Dec. Dig. § 13.*]

2. BRIDGES (§ 10*)—CONSTRUCTION—AUTHORITY OF COUNTY COMMISSIONERS.

Under section 6 of an act of the Legislature of 1903 entitled "An act authorizing the construction of bridges" (Sess. Laws 1903, p. 246), as amended by section 3 of an act of the Legislature approved March 10, 1905 (Sess. Laws 1905, p. 354), where the bridge to be constructed is more than 200 feet in length, and crosses a stream that is the boundary line between two townships, the board of county commissioners is authorized to contract for the construction of such bridge only when the adjoining townships have offered and agree with the county to pay each one-half of one-fourth of the cost of construction of said bridge; and the board of county commissioners is without power, under said statute, to contract for the construction of such a bridge where the adjoining townships have offered to pay only one-third of one-fourth of the cost of the construction of said bridge, and an incorporated town

in one of said townships, offers to pay one-third of one-fourth of such cost.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 20-22; Dec. Dig. § 10.*]

3. COUNTIES (§ 196*)—REMEDIES OF TAXPAYERS—EXISTENCE OF REMEDY AT LAW.

A resident taxpayer may invoke the aid of a court of equity to enjoin the carrying out by a board of county commissioners a void contract for the construction of a bridge, to be paid for in part by taxes levied upon the taxpayers of the county, although such taxpayers may have had the right of appeal to the district court from the order of the board of county commissioners, ordering the construction of such bridge.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

Error from District Court, Payne County; A. H. Huston, Judge.

Action by George Harlow against the Board of County Commissioners of Payne County and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Burford & Burford, of Guthrie, for plaintiff in error. D. W. Weldon, Co. Atty., C. H. Lowry, Robt. A. Lowry, and Burdick & Grubbs, all of Stillwater, for defendants in error.

HAYES, J. Plaintiff, a resident taxpayer of Payne county, brought this action in the court below to enjoin the board of county commissioners of that county from entering into and carrying out a contract for the construction of a certain bridge over a river in that county, and from levying a tax to raise funds to pay for the construction of the bridge, and to enjoin the county treasurer from extending such tax upon the tax rolls of the county, and from collecting same. Upon the application of plaintiff, the judge of the district court, at chambers, granted a temporary injunction, enjoining and restraining defendants in error from doing any of the aforesaid acts. This temporary injunction was subsequently, upon motion of defendants in error, dissolved by the court; and it is from the order dissolving the injunction that this appeal is prosecuted.

[1] Plaintiff in error, by his contentions in this court, presents for our consideration two legal propositions. The first proposition urged is that the board of county commissioners are without authority to contract for the construction of the proposed bridge, because it is located within a distance of less than six miles of another bridge constructed across the same river, which is prohibited by section 2 of an act of the Legislature approved March 11, 1903 (Sess. Laws 1903, p. 244; section 7881, Comp. Laws 1909). The proposed bridge is to be constructed at a point on the Cimarron river where said river forms the boundary line between Mound and Union townships, in Payne county. These two townships have agreed with the county to pay each one-third of one-fourth

of the cost of construction of said bridge, and the town of Cushing, an incorporated town in one of said townships, has agreed to pay one-third of one-fourth of such cost, and the county is to pay the remaining three-fourths. There has never been any agreement of the board of trustees of the adjoining townships to pay equally one-fourth of the expense of the construction of said bridge; and plaintiff's second proposition is that, because of this fact, and by reason of section 6 of an act of the Legislature approved March 11, 1903 (Sess. Laws 1903, p. 246), as amended by section 3 of an act of the Legislature approved March 10, 1905 (Sess. Laws 1905, p. 354; section 7885, Comp. Laws 1909), the board of county commissioners is without authority to contract for the construction of the bridge. The act of the Legislature approved March 11, 1903, entitled "An act authorizing the construction of bridges" (Sess. Laws 1903, p. 244), provides for the construction and repairing of bridges across streams in the state where such bridges exceed the length of 200 feet between the banks of the stream on which any bridge is constructed. Section 2 of that act, which applies to the first proposition presented by plaintiff in error, reads as follows: "Said bridges shall be located at any point on said river or rivers, provided no bridge shall be built on any such river under the terms of this act nearer than six miles to any other bridge located and built: Provided further, that more than one bridge may be built within one mile of an incorporated town or city."

It is admitted that there is no incorporated town or city within one mile of the location of the proposed bridge; and it is also admitted that upon a straight line, or by the course of the stream, it is less than six miles to another bridge upon said stream, but that by the usual traveled public road it is more than six miles to said bridge; and the board of county commissioners, construing the statute to mean six miles by the public highway, determined that it had authority to contract for the construction of the bridge. This construction of the statute by the board of county commissioners, we think, was incorrect. A somewhat similar question was considered in *City of Blackwell v. City of Newkirk*, 121 Pac. 260, not yet officially reported, where it is said: "From an examination of the authorities we have been able to make, they appear to be practically in accord that, where distance is to be determined, it must be by a straight line, unless there is something in the nature of the case, or in the context of the act or instrument, indicating an intention to follow a different method."

The evident purpose of authorizing bridges to be constructed not within six miles of each other, and prohibiting them from being constructed nearer than six miles to another

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key No. Series & Rep'r Indexed.

bridge, is to provide for the construction of bridges at points upon any stream convenient to the traveling public coming from every direction to cross such stream; and at the same time to deny to the municipal authorities and to the board of county commissioners the power to burden the taxpayers by constructing too many bridges, or by constructing them nearer to each other than the reasonable necessity demands. It is urged by defendants in error that because a bridge constitutes a part of the road that the act should be construed as requiring the measurement to be made by the road leading from one bridge to the other. In providing for the location of these bridges and the distance between them, the convenience of the traveling public residing upon the highway leading from one bridge to another was not in the minds of the Legislature; for, as a rule, the travel direct from one bridge to the next nearest bridge is of no great consequence, and rarely would there be a public highway leading direct from one bridge to the next nearest; for, in most instances, the greater part of the public travel will be across the river, rather than up and down its course. Measuring the distance between the bridges upon a straight line will result in a uniform system; one that will enable counties and municipalities therein to construct bridges to meet the reasonable wants of the traveling public, and at the same time protect against extravagance and the imprudent location of bridges in close proximity; for, if the distance is to be measured by the public road, it could and probably would not infrequently happen, on account of there being no public road upon a direct line, or upon an approximately direct line from the location of one bridge to the other, that the distance by traveled road would be greater than the limit fixed by the statute, and at the same time the bridges would be a very short distance apart. The same would result if the distance is to be measured by the course of the stream, where the stream is irregular and runs in curves. Two points upon a river more than six miles apart by public road to-day may be to-morrow, because of the opening of new roads, less than six miles apart. A bridge when begun may be without the limitations of the statute, but be within them when completed. There is nothing in the act to indicate that a different measurement than a straight line measurement of the distance is contemplated; and, if a measurement by the public highway is adopted, it will render it possible, in many instances, for the municipal authorities to defeat the very purpose of the limitation upon their power to construct these bridges, for the distance between any two points upon a stream can be made to vary by changing the highways; and, without reviewing the authorities cited in *City of Blackwell v. City of Newkirk*, supra, but referring to our discussion of a similar

question in that case, and to the cases cited in that case, we hold that the statute here involved contemplates the measurement of the distance upon a straight line.

By act of the Legislature approved February 17, 1911 (Sess. Laws 1911, p. 41), section 2 of the act of 1903, supra, prohibiting the building of a bridge within six miles of another bridge upon the same stream, was repealed; but this repealing act was enacted several months after the order complained of herein was rendered in the court below, and after this appeal had been perfected. By reason of section 54, art. 5, of the Constitution, this repealing act therefore does not affect this proceeding.

It is also urged that the distance from the location of the proposed bridge to the nearest bridge is a question of fact which the board of county commissioners was empowered to determine; and that their determination cannot be reviewed in this proceeding. But, if any mistake was made by the board of county commissioners, it is not a mistake of fact, but a mistake in the construction of the statute defining its powers. The controversy revolves around what method of measuring the distance is contemplated and authorized by the statute. After the method of measurement is determined, there is no controversy about whether the construction of the proposed bridge is without or within the power of the board, except as that power is affected by the second proposition to be considered later. A board of county commissioners cannot misconstrue a statute as granting to it a power not granted, and thereby foreclose the court from restraining it within the jurisdiction conferred upon it, when the application is made therefor by an injured party.

[2] The statutory provisions bearing upon the second proposition are to be found in the act of the Legislature of 1903, as amended by the act of 1905, both of which acts have been referred to above. Section 4 of the act of 1903 authorizes the board of trustees of any organized township, with the consent of the board of county commissioners, to order the construction of bridges exceeding 200 feet in length across streams passing through such township, and authorizes the board of trustees to pay for the construction of any such bridge by drawing warrants on the road and bridge fund levied on all property in the township, or specially levied for the purpose of constructing said bridge. The same section also makes it the duty of the township board, when ordering the construction of any such bridge, to make, at the time it levies taxes in said townships, a special levy to pay for such bridge, which shall be in addition to the other taxes in the township, and which shall not exceed five mills on the dollar per year. By section 5 the township trustees are required, when they have determined that the construction of any bridge is necessary, and they have per-

formed the acts provided by the statute, to certify such fact to the board of trustees of any incorporated town or city in the township directly interested in the construction of said bridge; and it is made the duty of the board of trustees of said city or town thereupon to make a special levy to pay for said bridge, which shall be in addition to all other taxes in such incorporated town or city, and which shall not exceed five mills per year, and also makes it the duty of the township board to certify its acts to the board of county commissioners; whereupon the board of county commissioners, if it deems the bridge necessary and approves its construction, shall proceed to offer for bids and let the contract for its construction, two-thirds of the cost of the bridge to be paid by the organized townships, and one-third to be paid by the county. The bridge must be built under the supervision of the county commissioners, and it is to be and remain the property of the county. This section of the act was amended by the act of 1905; but it is not necessary to notice the changes effected by the amendatory act. Section 6 of the act of 1903 reads as follows: "When any stream requiring a bridge of over two hundred feet or more in length as contemplated in this act is the boundary line between two townships in the same county, then it shall be necessary for the board of township trustees of each township bordering on said stream to join in the construction of said bridge as herein provided, and to bear equally the two-thirds of the expense of construction of said bridge as herein provided, and to pay for the same as herein provided, the remaining one-third to be paid by the county and said bridge to be constructed by the board of county commissioners if said board finds the bridge necessary and approves its construction, and to remain the property of the county as provided in this act."

This section was amended by section 3 of the act of 1905 (Sess. Laws 1905, p. 354); but the only change made by the amendatory act is in the portion of the cost of the bridge that shall be paid by the county, and the portion that shall be paid by the adjoining townships. Neither the act of 1903 nor the amendatory act of 1905 contains any special procedure to be followed by the board of township trustees in ordering the construction of bridges authorized by section 6 of the act of 1903, as amended by section 3 of the act of 1905; but by the provisions of said section 6, as amended, to the effect that, in order for such bridge to be constructed, "it shall be necessary for the board of township trustees of each township bordering on said stream to join in the construction of said bridge as herein provided, and to bear equally one-fourth expense of such construction of said bridge as herein provided, and to pay for the same as herein provided. * * *"

(Italics ours), it was intended to provide that

the townships, for the purpose of constructing any bridge under this section, should follow the same procedure as is prescribed for the construction of a bridge by an organized township under section 3, where the bridge is to be constructed across a stream within a township. That procedure requires that, before the board of county commissioners can act and order the construction of a bridge, the board of trustees of the organized townships must agree and offer to pay equally one-fourth of the cost of construction of said bridge, and in paying same shall issue their warrants therefor, to draw 6 per cent. interest from the date of their issue; that when ordering the construction of the bridge they shall, at the time of levying taxes in the townships, make a special levy to pay for said bridge. These acts shall be certified by the township trustees of the townships to any incorporated city or town in the townships directly interested, who likewise shall make a special levy; and all these acts of the boards of trustees of the two townships must be certified by said boards to the county commissioners, who will then be authorized to act. What portion of the expense of construction of these bridges the incorporated towns and cities in the bordering township are required to aid the townships with and to bear is not here necessary to determine.

It is apparent from the statute that the county deals only with the townships. There is no provision for incorporated towns and cities to certify anything to the board of county commissioners. It is the townships that must order the construction of the bridge and agree to pay the portion required by the statute, and to provide for payment thereof. There is no provision in the statute that authorizes any agreement between the county and any incorporated town or city for the payment of any portion of this cost. It is the board of trustees of the incorporated townships that deals with incorporated cities and towns, and they are authorized to deal only with the board of county commissioners. In the instant case no offer has been made by the boards of trustees of the two townships to pay that part of the cost of constructing the bridge the statute requires; nor has it been certified to the board of county commissioners that all the acts required by the statute of the township boards have been performed. In lieu thereof, it is sought to have the bridge constructed upon the offer of each of the two townships to pay less than the part required by the statute to be paid by them, because an incorporated town offers, also, to pay a part.

"It is a settled rule that the grant of powers to boards of county commissioners must be strictly construed, because when acting under special authority they must act strictly on the conditions under which the authority is given; that they can exercise only

such powers as are specifically granted, or as are incidentally necessary for the purpose of carrying into effect such powers; and, where the law prescribes the mode which they must pursue in the exercise of such powers, it, as a rule, excludes all other modes of procedure." *Allen et al. v. Board of County Commissioners of Pittsburg County*, 28 Okl. 778, 116 Pac. 175.

At the same term of the Legislature at which the act of 1903, heretofore construed, was enacted, and just six days thereafter, there was enacted and approved an act of the Legislature entitled "An act relating to roads and bridges, etc." Chapter 29, Sess. Laws 1903, p. 236. Section 3 of that act reads as follows: "The board of county commissioners in each county shall have sole control of all bridges more than twenty feet long, and shall contract for the erection and maintenance of the same as hereinafter provided. The board of county commissioners may in their discretion enter into an agreement with any township board within said county whereby money may be appropriated from the county road and bridge fund for the purpose of constructing or improving any road or bridge in said township, or on any boundary line of said township. Any incorporated city or town may appropriate funds to aid the township or county in the construction or improvement of any road or bridge in such county."

There is nothing, however, in this section that conflicts with the provisions of the act of the same Legislature, heretofore construed, and as amended by the act of 1905. The foregoing section of the statute confers upon the board of county commissioners of each county sole control of all bridges more than 20 feet long, and power to contract for the erection and maintenance thereof. The act of March 11, 1903, as originally enacted, or as amended, does not take away from the board of county commissioners control of any bridge whatever, nor deny it the right to contract for the erection thereof, nor release it from the maintenance of same. Said act attempts only to prescribe the procedure by which certain bridges may be constructed; and section 3 thereof, just quoted above, does not authorize the board of county commissioners to make any contract with any incorporated city or town for the construction of any bridge. The sole power conferred upon it, relative to the construction of bridges jointly with any other authority, is that the commissioners "may in their discretion enter into an agreement with any township board within said county. * * *". Incorporated cities and towns are authorized to aid any township of a county in the construction of any bridge or road by appropriating funds for that purpose; that is, in order to induce the county to construct or repair bridges or roads, or to in-

duce a township to do so (either alone or upon agreement between the board of county commissioners and a township board), an incorporated city or town may donate to the county or township any fund to aid in its bearing its portion of the expense of such improvement. But the agreement for the construction of a bridge, either in a township, or on any boundary line thereof, must be between the board of county commissioners and the township.

[3] Defendants urge that plaintiff's action for an injunction will not lie, because he has a speedy and adequate remedy at law by an appeal from the action of the board of county commissioners to the district court. In support of their contention that plaintiff has such right of appeal, defendants cite and rely upon section 1690, Comp. Laws 1909, as construed in *Smith et al. v. Board of County Commissioners of Rogers County*, 26 Okl. 819, 110 Pac. 669. The decision in the last-mentioned case was made by this court without considering, and without having our attention called to, *Cummings v. Bd. of County Commissioners of Noble County*, 13 Okl. 21, 73 Pac. 288, with which it seems to be in some respects in conflict; but, if we assume in the present case that plaintiff has the right of appeal, still he may maintain this action. The board of county commissioners, for the reasons already stated, in contracting for the construction of the bridge, has acted without authority, and its act in attempting to carry out this contract, and to levy a tax for that purpose upon the taxpayers of the county, is illegal and void; and it may be restrained from carrying out this void contract by an injunction, without resort to the remedy of appeal. *Harney v. Indianapolis*, *Crawfordsville & Danville R. R. Co. et al.*, 32 Ind. 244; *Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264; *Dunbar v. Bd. Com'rs of Canyon County*, 5 Idaho, 407, 49 Pac. 409; *Fones Bros. Hdw. Co. v. Erb et al.*, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353. And plaintiff, being a resident taxpayer, may invoke the aid of a court of equity to prevent the illegal creation of the debt for the construction of the bridge, and of the illegal disposition of the money in the payment of such debt. *Hannan v. Bd. of Education of City of Lawton et al.*, 25 Okl. 372, 107 Pac. 646, 30 L. R. A. (N. S.) 214; *City of El Reno et al. v. Cleveland-Trinidad Paving Co.*, 25 Okl. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650; *Rowles v. Neely et al.*, 28 Okl. 556, 115 Pac. 344.

It follows that the judgment of the trial court must be reversed and the cause remanded, with instructions to proceed in accordance with the views expressed in this opinion.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

**HENDERSON-STURGES PIANO CO. v.
SMITH, Sheriff.**

(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

SHERIFFS AND CONSTABLES (§ 125*)—LIABILITY—AMERCEMENT.

Section 5997, Comp. Laws 1909, which provides for the amercement of sheriffs, is imperative in its terms, and grants no discretion to the court. When a sheriff fails to make return of a writ of execution as required by statute, it is the duty of the court to amerce him, whether his omission results from willful wrong or mere neglect, and whether such omission has resulted in actual injury or not.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 237-253, 330-337; Dec. Dig. § 125.*]

Error from District Court, Pontotoc County; A. T. West, Judge.

Motion by the Henderson-Sturges Piano Company to amerce T. J. Smith, Sheriff of Pontotoc County, for failure to make due return of an execution. From an order denying the motion, the piano company brings error. Reversed, with directions.

Thomas P. Holt, of Ada, for plaintiff in error.

HAYES, J. On the 24th day of June, 1909, plaintiff in error obtained a judgment in the district court of Pontotoc county, in an action then pending in said court, entitled "Henderson-Sturges Piano Company v. L. W. Simpson and J. W. Bolen." A motion to vacate said judgment was thereafter filed by defendants, which was overruled by the court. In the interim an execution had been issued, directed to defendant in error as sheriff of said county, which execution was returned, "Nothing done." On November 18, 1909, an alias execution was issued, directed to defendant in error, commanding him to take such goods and chattels of the said debtors necessary to pay the sum specified in said judgment and 6 per cent. interest from the date of the rendition of the judgment, and further commanding defendant in error to make due return of said writ into court within 60 days, as required by law. Defendant in error failed to execute said writ and return same into court within said 60 days from date thereof. Fifty-eight days after the return day of said writ, the same was returned into court; but prior thereto, on the 3d day of March, 1910, plaintiff in error began this action in the court below by filing his motion to amerce defendant in error for the amount of said judgment, with 10 per cent. additional for failure to make due return of said execution within 60 days, as required by statute. Notice of this motion, as required by statute, was served upon defendant in error. Defendant filed no answer; and, so far as the record discloses, made no defense to the proceeding. Thereafter, on the 26th day of March, 1910, the

court overruled said motion to amerce, and rendered judgment in favor of defendant in error. It is from the action of the court in overruling said motion of amercement that this appeal is prosecuted.

Section 5994, Comp. Laws 1909, makes it the duty of the sheriff or other officer to whom a writ of execution has been issued to return such writ into court within 60 days from the date of the issuance of same.

Section 5997, Id., provides in part as follows: "If any sheriff or other officer * * * shall neglect to return any writ of execution to the proper court on or before the return day thereof, * * * such sheriff or other officer shall on motion in court and two days' notice thereof, in writing, be amerced in the amount of said debt, damages, and costs, with ten per cent. thereon to and for the use of said plaintiff or defendant, as the case may be."

The foregoing statutes were adopted from the state of Kansas into this jurisdiction. In *Bond v. Weber*, 17 Kan. 410, they were construed by the Supreme Court of that state as follows: "If we give to this language [referring to the language of the above statute] its ordinary meaning, there can be but one conclusion. It is not that he *may* be amerced, but that he *shall* be. The duty of returning the execution within 60 days is expressly cast upon him; and a failure to perform that duty as expressly subjects him to amercement. The terms of the statute imply no discretion. The command is positive and peremptory. The amercement is not in compensation, and to be measured by the extent of the injury, but a penalty for neglect of duty, and of definite and fixed amount." See, also, *Smith v. Martin*, 20 Kan. 572.

The sheriff, by failure to return said execution within the time required by law, brought himself clearly within the terms of the statute, and subjected himself to be amerced therefor. *Duncan v. Drakely*, 10 Ohio, 43; *Moore v. McClellan*, 16 Ohio St. 50.

No brief has been filed in this court by defendant in error; and under numerous decisions of this court, among which are the following: *S. F. Sharpleigh Hdw. Co. v. Fritchard*, 25 Okl. 808, 108 Pac. 360; *School District No. 39, Pottawatomie County v. Shelton*, 26 Okl. 229, 109 Pac. 67, 138 Am. St. Rep. 962; *Butler v. Stinson*, 108 Pac. 1103; *Butler v. McSpadden*, 25 Okl. 465, 107 Pac. 170; *Ellis v. Outer*, 25 Okl. 469, 106 Pac. 957—the court is not required to search the record to see if there is any theory upon which the judgment of the trial court can be sustained; but, since the statute here involved is of a penal character, and great strictness is required of one who seeks to avail himself of the remedy it affords, we have carefully examined the record to ascertain if it presents any theory upon which

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the judgment can be sustained, but have been unable to find any.

The judgment of the trial court is reversed, with direction to proceed in accordance with this opinion.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. DUNN, J., not participating.

(34 OKL. 305)

ESTEE v. ESTEE

(Supreme Court of Oklahoma. July 18, 1912.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT.

Where a finding is reasonably supported by the evidence, it will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. DIVORCE (§ 51*)—GROUNDS—CONDONATION.

Where, after mistreatment of a wife has been condoned by her, the husband is guilty of similar mistreatment, the condoned offense is revived.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 185-187; Dec. Dig. § 51.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Dewey County; G. A. Brown, Judge.

Action by Rebecca J. Estee against William G. Estee. Judgment for plaintiff, and defendant brings error. Affirmed.

Adams & Smith, of Taloga, for plaintiff in error. Hickok & Myers, of Taloga, for defendant in error.

ROSSER, C. This is a suit for divorce brought by Rebecca J. Estee against William G. Estee in the district court of Dewey county, Okl. Both these parties had been married before, and were middle-aged or past, with children by former marriages, some of whom were grown. The grounds for divorce, as alleged in the petition, were that the defendant had been guilty of extreme cruelty, by striking, beating, and choking the plaintiff, upon different occasions. At the close of the testimony, the court found that the allegations in the petition were not proven, and refused to grant the divorce, but made an order requiring the defendant to pay plaintiff alimony in the sum of \$20 per month, and \$12.50 attorney's fee. On the next day after the hearing, the plaintiff asked leave to amend her petition so as to allege that the defendant, at various times while plaintiff and defendant were living together, falsely accused plaintiff of the larceny of \$60 belonging to defendant, thereby causing her great humiliation and distress and mental pain and distress of mind. The court permitted the amendment to be made, and thereupon set aside the decree refusing the divorce, and entered a decree of divorce

in favor of plaintiff, and rendered judgment that the defendant pay plaintiff the sum of \$300 as alimony.

The defendant assigns several errors, but only argues two: First That there was not sufficient testimony to justify the finding that the defendant had accused plaintiff of stealing the money, as alleged in the amended petition. Second That the plaintiff condoned whatever misconduct the defendant had been guilty of with reference to the accusation concerning the money.

[1] The evidence that the defendant accused plaintiff of stealing the money is not very strong. It nowhere appears that he made the direct accusation. The evidence, however, is capable of the construction that the defendant insinuated that plaintiff had stolen the money; and it shows clearly that after he knew the plaintiff considered that his references to the money were an insinuation that she had stolen the money he continued to talk about it up until their final separation. The trial court heard the parties testify, and the rule that the finding of a trial court is entitled to more weight, because of the fact that he has had an opportunity to observe the witnesses, is particularly applicable in a divorce case. A man of experience can readily determine from the demeanor of the parties in a divorce case, almost without regard to their testimony, which is to blame for the trouble between them. The evidence is reasonably sufficient to support the decree, and it will not be disturbed.

[2] The evidence shows that after the trouble had first arisen between the parties, with reference to the money, that they separated, and that afterwards, upon the solicitation of defendant, plaintiff went back to live with him. This was a condonation of past ill treatment, and, if the defendant had conducted himself properly toward his wife from that time on, she could not have been heard to allege, as a ground for divorce, any of his previous misconduct; but when he again made the insinuations complained of, and was guilty of other misconduct and mistreatment, he revived the condoned offense; and the court did not err in hearing all the testimony as to his mistreatment of her during their married life. 14 Cyc. 641-643.

The judgment should be affirmed.

PER CURIAM: Adopted in whole.

(33 OKL. 377)

ANDERSON *et al.* v. McMAHAN *et al.*

(Supreme Court of Oklahoma. July 23, 1912.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 430*)—TIME FOR TAKING PROCEEDINGS—SERVICE OF SUMMONS.

A petition in error will be dismissed on motion, even though the same is filed in this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court within the year allowed under the statute, where no waiver of issuance and service of summons is had, and no praecipe for same filed, and no summons is issued or general appearance made within such time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174; Dec. Dig. § 430.*]

Error from Jackson County Court; B. N. Woodson, Judge.

Action between Nell P. Anderson and others and B. W. McMahan and others. From the judgment, Anderson and others bring error. Writ of error dismissed.

E. E. Gore, of Altus, for plaintiffs in error. P. K. Morrill and T. M. Robinson, both of Altus, for defendants in error.

HAYES, J. The judgment from which this proceeding in error is prosecuted was rendered by the trial court on the 25th day of February, 1911, and the motion for a new trial was overruled on the 5th day of April, 1911. The petition in error and case-made were filed in this court on the 3d day of April, 1912; but no praecipe for summons in error was filed, no summons in error issued, and no entry of general appearance of defendants in error was made before the expiration of one year from the order overruling the motion for a new trial. No summons in error has ever been issued or served. On the 8th day of April, 1912, there was filed in this court a waiver of issuance and service of summons in error, signed by defendants in error. Under numerous decisions by this court that a petition in error will be dismissed, although filed within the year allowed by statute, if summons is not issued or waived, or a praecipe filed therefor, or general appearance made by the defendant in error within one year, this proceeding in error must be dismissed for want of jurisdiction. *Hudson v. Lapsley et al.*, 29 Okl. 681, 119 Pac. 125; *Manes v. Hoss*, 28 Okl. 489, 114 Pac. 698; *Coleman v. Eaton*, 26 Okl. 858, 110 Pac. 672; *Watson v. Rein et al.*, 26 Okl. 47, 108 Pac. 397; *Court of Honor v. Wallace et al.*, 23 Okl. 734, 102 Pac. 111. After the year allowed by statute for commencement of the proceeding in error in this court expires, parties cannot by agreement confer jurisdiction upon the court.

The motion to dismiss is sustained.

TURNER, C. J., and KANE and DUNN, JJ., concur. WILLIAMS, J., absent, and not participating.

(34 Okl. 294)

SMITH, WOGAN & CO. v. BICE.
(Supreme Court of Oklahoma. July 1, 1912.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 129*)—CONSTRUCTION—LIEN.

In Oklahoma a chattel mortgage creates a lien on the mortgaged property in favor of the

mortgagee, and does not convey the title to the property.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 216; Dec. Dig. § 129.*]

2. CHATTEL MORTGAGES (§ 239*)—TENDER OF PAYMENT—SUFFICIENCY.

An unconditional tender of the amount of the debt secured by the mortgage, though after the date it fell due, discharges the mortgage lien, whether the tender is kept good and the money paid into court or not.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 502; Dec. Dig. § 239.*]

3. CHATTEL MORTGAGES (§ 237*)—TENDER OF PAYMENT—SUFFICIENCY.

Where the mortgagor offered the money in payment of the mortgage, without requiring the mortgagee to do anything except take it, the tender was not rendered conditional by the statement of the mortgagor that when he paid it he intended to sue the mortgagee for damages.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 501, 502; Dec. Dig. § 237.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

It is not error to refuse a requested instruction to the effect that, if the mortgagor demanded a receipt, the tender was not unconditional, where the evidence shows that the mortgagor asked for his note and mortgage, but did not make their delivery to him a condition of the payment, and the undisputed evidence is that the mortgagee refused the tender, because the mortgagor threatened to sue for damages as soon as he had paid the debt.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Commissioners' Opinion, Department No. 2. Error from Comanche County Court; James H. Wolverton, Judge.

Action by Smith, Wogan & Co. against J. L. Bice. Judgment for defendant, and plaintiff brings error. Affirmed.

W. E. Earl, of Lawton, for plaintiff in error.

ROSSER, C. This was a replevin action by Smith, Wogan & Co. against J. L. Bice, brought originally in the justice of the peace court of the city of Lawton, to take possession of certain personal property by virtue of a chattel mortgage executed by the defendant. The case was appealed to the county court, and judgment was there rendered for defendant. This appeal was taken from that judgment.

The execution of the mortgage, by virtue of which plaintiff claims possession, was admitted; and it was also admitted that the note had not been paid. The defense was that the defendant, prior to the bringing of the suit, tendered plaintiff the amount due on the note the mortgage was given to secure. The jury found there had been a tender.

The evidence, as it appears in the case-made, shows that, prior to the bringing of the suit, defendant tendered plaintiff the amount due on the note. The defendant had been arrested on complaint of plaintiff's managing officer upon a charge of disposing of mortgaged property; and Mr. Wogan, who

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

represented the plaintiff in the matter, testified that defendant told him at the time of the tender that when he paid him he intended to prosecute plaintiff for false imprisonment. Mr. Wogan then refused to take the money, and thereafter plaintiff brought this suit. Defendant denied making any threat whatever at the time of making the tender. After the tender was refused, defendant returned the money which he had tendered to the person from whom he had borrowed it, and did not keep the tender good by paying it into court.

[1,2] Plaintiff contends that the tender was not sufficient to discharge the lien of the mortgage, because it was not kept good by paying or offering to pay the money into court. It seems to be the general rule in those states where a chattel mortgage vests title to the mortgaged chattel in the mortgagee that, in order to avail, the tender must be kept good. The rule is otherwise as to liens. It is the rule that an unqualified and unconditional tender discharges a lien, whether the tender is kept good or not. 38 Cyc. 163; Hunt on Tender, § 378, and following.

The reason for this rule is well stated by Judge Caldwell, in the case of *Mitchell v. Roberts* (C. C.) 17 Fed. 776: "In the case at bar, the question is whether a tender of the debt, after its maturity, extinguishes the lien on personal property pledged to secure its payment. Upon this question there is no conflict in the authorities. The rule is settled that a tender of the debt, for which the property is pledged as security, extinguishes the lien, and the pledgor may recover the pledge, or its value, in any proper form of action, without keeping the tender good or bringing the money into court, because, like a tender of the mortgage debt on the law day, the tender having once operated to discharge the lien, it is gone forever. This rule accords with justice and fair dealing. It would be an exceeding great hardship on the debtor if the creditor had the right to refuse to accept payment of the debt after it was due, and at the same time retain the debtor's property or a lien upon it for the debt. Advantageous sales would be prevented, collections delayed, and credit lost by the inability of the debtor to free his property. In many cases debtors would be ruined before they could obtain relief by the slow process of a bill in equity to redeem. And on a bill to redeem a debtor would have to pay interest and costs down to the decree, unless he had kept the tender good. Thus the debtor, in order to protect himself against interest and costs, would be deprived of both his property and the use of his money at the pleasure of his creditor, or until the end of a chancery suit could be reached. On the other hand, a creditor who refuses to receive payment of his debt, when lawfully tendered, cannot com-

plain at the loss of his security for that debt, 'because it shall be accounted his own folly that he refused the money when a lawful tender of it was made unto him.'"

Under the statutes of this state, a chattel mortgage does not convey title to the mortgaged property, but only creates a lien. Snyder's Comp. Laws, § 4415; *Litz v. Exchange Bank*, 15 Okl. 504, 83 Pac. 790; *Hixon v. Hubbell*, 4 Okl. 224, 44 Pac. 222.

In the states where a chattel mortgage does not vest title in the mortgagee, but only creates a lien in his favor, the same rule is applied in favor of the mortgagor as in the case of liens; and it is held that, when the mortgagor makes an unconditional tender, the lien of the mortgage is discharged unconditionally, and that the tender need not be kept good. *Thomas v. Seattle Brewing & M. Co.*, 48 Wash. 560, 94 Pac. 116, 15 L. R. A. (N. S.) 1164, 125 Am. St. Rep. 945, 15 Ann. Cas. 494; *Helphrey v. Strobach*, 13 Wash. 128, 42 Pac. 537; *Moore v. Norman*, 43 Minn. 429, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247; *Bartel v. Lope*, 6 Or. 321. See *Flanders v. Chamberlain*, 24 Mich. 305; *Jones on Chattel Mortgages* (5th Ed.) 637; *Hunt on Tender*, § 375.

It follows that in this state it is not necessary to keep a tender good by paying the money into court to discharge a lien of a chattel mortgage. This, of course, does not affect the right of the creditor to recover a personal judgment. The tender does not discharge the debt.

[3] It is urged that the tender was not unconditional. The evidence of Mr. Wogan is that defendant told him that he was going to pay the debt, and when he paid it he intended to prosecute the plaintiff for false imprisonment. This was denied by the defendant. The court instructed the jury that the tender must have been of the entire amount, and must have been offered unconditionally. As the evidence was conflicting, the jury had the right to take defendant's statement as to what occurred. But the threat to prosecute was not a condition at all. It was a mere warning to plaintiff as to what he might next expect. The plaintiff was not required to do anything except take the money. Taking the money would not have in any way impaired any defense to the prosecution the plaintiff had. The defendant, if he had a cause of action against the plaintiff, could have brought it, whether the tender was accepted or not.

[4] Plaintiff claims error in the refusal of the court to charge that if defendant demanded a receipt the tender was not valid. There was evidence that defendant testified on the trial in the justice court that he demanded his note and mortgage, but he denied this; and Wogan does not testify that he made it a condition of the tender that he receive his note and mortgage. Wogan made it clear that he refused the tender,

because he was threatened with a prosecution. There is no evidence that it was a condition of the tender that the note and mortgage should be surrendered. The court did not commit error in refusing the instruction asked.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

FERGUSON v. McKEE.

(Supreme Court of Oklahoma, July 23, 1912.)

(Syllabus by the Court.)

APPEARANCE (§ 8*)—REDELIVERY BOND—ERROR.

Where property has been taken under replevin, and defendant executes a redelivery bond, conditioned to return the property and pay costs and damages that may be awarded, and the sheriff returns the property to the defendant, the giving of such bond is an appearance in the action and a waiver of any defect in the summons.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 23-41; Dec. Dig. § 8.*]

Error from District Court, Adair County; John H. Pitchford, Judge.

Action by A. C. McKee against George Ferguson. Judgment for plaintiff, and defendant brings error. Affirmed.

Nance & Priest, of Stilwell, and Wm. Cravens, of Tahlequah, for plaintiff in error. E. B. Arnold, of Stilwell, for defendant in error.

HAYES, J. This is an action of replevin, begun in the district court of Adair county, by defendant in error against plaintiff in error for the recovery of certain personal property, and for damages for unlawful detention thereof. The action was begun in that court by defendant in error filing therein his petition, affidavit for replevin, and the bond, as required by law. Whereupon the clerk of the court issued an order of delivery and a summons to plaintiff in error. The order of delivery and summons were duly served on the 3d day of February, 1910. On the same day plaintiff in error executed a redelivery bond, which was duly approved by the sheriff, and the property described in the redelivery bond was returned to plaintiff in error. The cause was thereafter set down for trial on one of the days of the next regular term of said court; but plaintiff in error failed to file any answer or other pleading, and judgment by default was rendered. Thereafter he filed a motion to vacate the judgment, because the service of summons had upon him was void, by reason of certain defects in the summons, which motion was by the court overruled.

It is sought to reverse the judgment of the trial court here upon the ground that it was without jurisdiction on account of the defective service; but, if it be conceded that

the summons was so defective as to render the service void, still the trial court had jurisdiction to render judgment by default, for the execution by plaintiff in error of the redelivery bond, conditioned as the statute requires, constituted an entry of general appearance in the action and a waiver of any defects in the summons. *Fowler v. Fowler*, 15 Okl. 529, 82 Pac. 923.

It follows, therefore, that the judgment of the trial court should be affirmed; and it is so ordered.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

INTERNATIONAL BANK OF BRISTOW v. BOWSER.

(Supreme Court of Oklahoma, July 23, 1912.)

(Syllabus by the Court.)

REPLEVIN (§ 69*)—PROCEEDINGS—ISSUES AND PROOF.

An intervener in an action of replevin, in his plea of intervention, alleged that he had, by virtue of a certain chattel mortgage, a special ownership in the property replevied, and prayed judgment for possession thereof. At the trial all the evidence introduced by him, which was admitted over the objection of plaintiff, was to establish that he was the absolute owner of the property in controversy. Held, that the admission of such evidence, under the issues as formed by the pleadings, was error.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 125; Dec. Dig. § 69.*]

Error from Okmulgee County Court; M. M. Alexander, Judge.

Action by the International Bank of Bristow against Council Long and another, and Henry Bowser intervened. Judgment for intervener, and plaintiff brings error. Reversed and remanded.

Wm. L. Cheatham, of Bristow, for plaintiff in error. Eaton, Beldleman & Carter, of Okmulgee, for defendant in error.

HAYES, J. This is an action in replevin, commenced by plaintiff in error in the court below, hereinafter called plaintiff, to recover possession of two mules, in which plaintiff alleges a special ownership by virtue of a chattel mortgage executed by and delivered to it by one A. A. White. The action was originally instituted against Council Long and one Kennedy. After the writ of attachment had been issued and had been served, and the property delivered to plaintiff, defendant in error filed a plea of intervention, in which he alleges a special ownership in the property and right to possession thereof by virtue of a certain mortgage, executed by said A. A. White to the First National Bank of Beggs, which defendant in error alleges has been assigned to him. Upon the trial of the cause to a jury, verdict and judgment was rendered in favor of defendant in error.

At the trial, over the objection of plaintiff, defendant in error, the intervener, was permitted to introduce evidence tending to show that he was the absolute owner of the property in controversy, and that he had purchased the property from said A. A. White; and instructions were given by the court upon this evidence to the effect that, if the jury found that, in consideration of the payment of the debt of A. A. White to the First National Bank of Beggs by the intervener, it was agreed that the property involved should become the property of the intervener, then the verdict should be for the intervener. The admission of said evidence and the giving of said instructions constitute the grounds of some of the errors assigned for reversal of the cause.

The rule stated in 34 Cyc. p. 1497, is: "Either plaintiff or defendant may introduce evidence tending to show any property interest from which a right to possession arises, when they have alleged ownership generally without specifying the source of title, or have denied the adverse party's right to possession; but, where they have alleged a particular interest in the property, the evidence admissible in their behalf must be confined to that which tends to establish the interest alleged."

In *McMillan Hdw. Co. v. Ross*, 24 Okl. 696, 104 Pac. 343, it was held that, when the petition in a replevin suit alleges that the plaintiff is entitled to possession of certain personal property by reason of a special interest therein, evidenced by a certain note and a chattel mortgage, but the proof shall show that he is entitled to possession thereof, if at all, by reason of a certain other agreement with the defendant, and timely objection is made to such variance between the pleadings and the proof, it is fatal to the recovery of plaintiff.

Evidence of general ownership of the property in controversy by intervener was not an issue made by the pleadings in this case; and evidence offered to establish such issue was therefore inadmissible, and the objections thereto, which were timely made, should have been sustained.

Other assignments of error are set out in plaintiff's brief, some of which may have merit; but there has not been sufficient compliance with rule 25 of this court (95 Pac. viii) to entitle him to a consideration of same. This rule requires that the brief shall not only contain the specifications of error complained of, separately set forth and numbered, but that the argument and authorities in support of each point relied upon shall also be set out in the brief. The immense amount of business before this court demanding early attention makes this a salutary rule, and the enforcement of it necessary; for, if the court must be delayed to look up the authorities or brief the propositions suggested by counsel, even though the

propositions be familiar ones, a great amount of time will necessarily be consumed by the court in doing the work that should be done by counsel, and the dispatch of business before the court greatly retarded.

For the errors pointed out, the judgment of the trial court is reversed and the cause remanded.

TURNER, C. J., and KANE, DUNN, and WILLIAMS, JJ., concur.

ST. LOUIS & S. F. R. CO. v. LITTLE.
(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

RAILROADS (§ 406*)—OPERATION—INJURIES TO ANIMALS.

Where the law prohibits domestic animals from running at large, and a mare, being at large, strays upon the tracks of a railway company at a place it is not required to fence its tracks, and is killed by the train, it is error to instruct the jury that the employees of the company are required, at such place, to keep "a constant and careful lookout for stock which might be on the track." The duty of the company, under such circumstances, is to exercise ordinary care not to injure such animal after its presence on the track and its danger has been discovered.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1400, 1401; Dec. Dig. § 406.*]

Commissioners' Opinion. Division No. 2. Error from Marshall County Court; J. W. Falkner, Judge.

Action by Samuel Little against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

W. F. Evans, of St. Louis, and R. A. Kleinschmidt, and Fred. E. Suits, both of Oklahoma City, for plaintiff in error. Summers Hardy, Wm. M. Franklin, F. E. Kennamer, and Chas. A. Coakley, all of Madill, for defendant in error.

BREWER, C. In this case the plaintiff below sued the defendant for killing a mare on the 28th day of October, 1908, in the town of Kingston, Marshall county, Okl. The jury returned a verdict for plaintiff, and judgment was entered thereon, and this appeal is prosecuted to correct alleged errors occurring at the trial.

Marshall county is situated in what was formerly the Indian Territory, wherein, prior to the erection of the state of Oklahoma, there was no law restraining domestic animals from running at large. However, upon coming into statehood, the herd law in force in Oklahoma Territory theretofore was extended in force in the state, by the schedule to the Constitution, and the enabling act. *Leflore v. Saunders*, 24 Okl. 301, 103 Pac. 858.

The record in this case fails to disclose whether this law had been suspended at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

place and time of the killing of the mare. If such was the case, it was the duty of the plaintiff below to show the same. *St. L. & S. F. Ry. Co. v. Brown*, 122 Pac. 136; *M. K. & T. Ry. Co. v. Savage*, 122 Pac. 656.

The court below gave, over the objection of the defendant, the following instruction: "That although the mare was wrongfully on the defendant's track when it received the injury of which it died and was not seen by the engineer in time to avert the accident, yet if, by the exercise of ordinary care and watchfulness, he might have seen her in time to have averted the danger, the defendant was liable for the injury that resulted from the accident. It was certainly the duty of the engineer in passing through the limits of the town of Kingston to keep a constant and careful lookout for stock which might be on the track."

The state of this record considered, the giving of this instruction was reversible error; and it has been so held in *A. T. & S. F. Ry. Co. v. Davis & Young*, 28 Okl. 359, 100 Pac. 551; *A. T. & S. F. Ry. Co. v. Ward*, 120 Pac. 982; *St. L. & S. F. Ry. Co. v. Brown*, supra; *M. K. & T. R. Co. v. Savage*, supra. It is not necessary to discuss those cases, as a reference to them will show that this case is covered by the doctrine they announce.

However, as there is evidence in this case sufficient to justify it, the case should be reversed and remanded, and a new trial granted.

PER CURIAM. Adopted in whole.

STATE ex rel. HANKINS, Co. Atty., v.
HOLT et al.

(Supreme Court of Oklahoma. July 1, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 327*)—PARTIES—DEFENDANTS IN ERROR.

The rule of this court, requiring all parties who will be affected by a reversal or modification of the judgment appealed from to be made parties to the appeal, does not require persons over whom the lower court had not acquired jurisdiction by appearance or service of process to be served with copy of case-made or summons in error, although such persons may have been named as defendants in the petition below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1795, 1814-1820, 1822-1835; Dec. Dig. § 327.*]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Jackson County; Frank Matthews, Judge.

Action by the State, on the relation of M. L. Hankins, County Attorney of Jackson County, against W. R. Holt and others. Judgment sustaining a demurrer of defendant Payne, and plaintiff brings error. Motion to dismiss appeal denied.

M. L. Hankins, Co. Atty., of Altus, and J. M. Williams, for plaintiff in error. Garrett & Castleman, of Altus, for defendant in error.

HARRISON, C. This was an action, in the name of the state, by the county attorney of Jackson county against W. R. Holt, as principal, and S. J. Payne and D. B. Wade, as sureties, on a forfeited appearance bond. Summons was issued to all the parties, but served upon S. J. Payne only. Neither Holt nor Wade had any service of summons, nor made any appearance in the court below. Payne appeared and demurred to the petition for failure to state a cause of action, pointing out several specific instances wherein it was defective.

On September 2, 1911, the demurrer was sustained, and, plaintiff, electing to stand on the petition, gave notice of appeal; 60 days being given to serve case-made, 10 days for suggesting amendments, and 5 days for settlement. October 31, 1911, service of case-made was made on and accepted by defendant Payne. November 8, 1911, notice of settlement was served on and acknowledged by Payne. November 18th the case-made was settled and signed by the judge. February 29, 1912, petition in error and transcript of proceedings were filed in this court. On May 27, 1912, S. J. Payne, through his attorneys, Garrett & Castleman, filed a motion to dismiss the appeal, for the reason that no service of case-made has been made on either of the defendants W. R. Holt or D. B. Wade, and no summons in error issued to either of them. June 17, 1912, leave of this court having been obtained, plaintiff in error filed amended case-made by attaching copy of the summons issued out of the court below to the defendants, and on June 18th filed answer to the motion to dismiss.

It is contended by counsel for the defendant in error that the suit being brought against Holt, Payne, and Wade that all were parties in interest, as defendants below, and necessary parties to the appeal, and, as Holt and Wade were not served with case-made or with summons in error, the appeal should be dismissed.

The rule is well settled in this court, and, in fact, it is almost a universal rule, "that all parties interested in or to be affected by the reversal or modification of a judgment should be made parties to an appeal, and that they should be so made by the method prescribed by statute, such as service of case-made, summons in error, or waiver of same." But, as was said by the Supreme Court of Indiana, in *Robinson v. Vanderburg County*, 37 Ind. 385: "A party to a proceeding," as used in statutes, means such persons only as are parties in a legal sense, and who have been made or have become such in some mode prescribed or rec-

ognized by law; so that they are bound by the proceeding."

Substantially the same is held in *Basket v. Hassell*, 107 U. S. 608, 2 Sup. Ct. 415, 27 L. Ed. 500. That is, they are to be made "parties in interest," or "parties affected by the judgment," or "parties bound by the judgment," by some legal process prescribed by law through which the court acquires jurisdiction.

The case of *County Commissioners et al. v. Harvey*, 5 Okl. 468, 49 Pac. 1066, is exactly in point on the question involved in the case at bar. In that case certain parties, who were named as defendants in the court below, were not served with process, and made no appearance in the case. The appellant on appeal did not serve them with copy of case-made, nor have summons in error issued to them. Motion was made by defendant in error to dismiss the appeal, because they were not made parties to the appeal. The motion was denied, on the ground that such parties, not having been served with summons below, and having made no appearance in the proceedings below, were not necessary parties to the appeal. While the record herein fails to show any service of case-made, or service of summons in error, or waiver of same, by which defendants Holt and Wade might be made parties to this appeal, yet the amended transcript shows, on the return of summons below, that neither Holt nor Wade were served with summons in the trial court. If they were not served, and made no appearance in the court below, they were not parties, in a legal sense, to the proceedings, and, not being parties to the proceedings, their rights were not affected thereby, although they may have been named as defendants in the petition. A judgment against them, under such circumstances, would have been a nullity for want of jurisdiction over the parties; and this court has no jurisdiction in this case over parties over whom the court below had no jurisdiction.

The motion to dismiss must therefore be denied.

PER CURIAM. Adopted in whole.

PROCHNAU v. MARTENS.

(Supreme Court of Oklahoma. July 1, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 529*)—RECORDS—TRANSCRIPT—EFFECT OF DEFECTS.

A transcript, which does not contain a copy of the judgment appealed from, presents no question for this court to review, and the appeal will be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2374, 2389-2393; Dec. Dig. § 529.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Major County.

Action by B. B. Martens against Dan Prochnau. Judgment for plaintiff, and defendant brings error. Dismissed.

H. M. Bear, of Okeene, for plaintiff in error. E. W. Snoddy of Alva, for defendant in error.

HARRISON, C. This action was begun May 10, 1908, by B. B. Martens against Dan Prochnau, for damages in the sum of \$2,000, resulting from a drainage ditch cut from a deep depression or pond on the land of Prochnau, so as to drain the water from said pond onto plaintiff's land, thereby overflowing plaintiff's land and causing damages thereto. To plaintiff's petition, defendant answered by a general denial. The record comes here on a transcript certified to by the clerk of the district court, which transcript contains plaintiff's petition, defendant's answer, a verdict in favor of the plaintiff for the sum of \$500, signed by J. A. Scott, foreman, and motion for a new trial supported by affidavit of R. B. Detrick and Mary Prochnau, daughter of defendant, and brief memorandum from the civil docket and the following certificate: "June 29, 1910. Case No. 148. *Martin B. B. v. Prochnau D. State of Oklahoma, Major County*—ss.: This is to certify that the above and foregoing is a true and correct transcript of the petition, answer, verdict, and motion for new trial, and correct copy from civil docket, a true and correct transcript of the record proper in the above-entitled action. Witness my hand and the seal of my office this 29th day of June, 1910. Roy Davison, Dist. Clerk, by Katherin De Witt, Deputy. [Seal.]"

This, and the petition in error, constitute the entire record before us. The cause was briefed by both plaintiff and defendant in error. The plaintiff in error complains that the petition of plaintiff below does not state facts sufficient to constitute a cause of action; that the court erred in rendering judgment against defendant below, and erred in overruling the motion for a new trial. The record, however, does not disclose what the judgment was, or whether there was any judgment. The motion for a new trial is set out in full in the transcript before us, but it does not appear from the transcript what action, or whether any action, was taken by the court on the motion for a new trial. Hence, as the record contains no order overruling the motion for a new trial, contains no record of the action of the court in reference thereto, nor the judgment of the court, we have nothing before us for review.

"A transcript of the record which fails to contain a copy of the judgment or final order of the trial court from which the appeal is taken presents no question to this court for review." *Ford v. McIntosh*, 22 Okl. 423, 98 Pac. 841.

"A case-made which does not contain a copy of any judgment or final order render-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed by the trial court, and which fails affirmatively to show that any judgment or final order was rendered by the trial court, presents nothing that may be reviewed by the Supreme Court." *Olentine v. Powell*, 23 Okl. 363, 100 Pac. 556.

There being no copy of the judgment complained of, and no record from which we might know what judgment was rendered by the court below, the appeal must be dismissed.

PER CURIAM. Adopted in whole.

CITY OF SHAWNEE v. STATE PUB. CO.
et al.
(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 569*)—RECORD—CASE-MADE—SETTLEMENT.

Where no time has been fixed either by order of court or by notice given by the parties within the time for serving a case and suggesting amendments thereto for settling a case, the authority or term of a judge pro tempore ceases upon the expiration of the time fixed for suggesting amendments, and a case-made settled by him after that time is a nullity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2530-2545; Dec. Dig. § 569.*]

Error from Superior Court, Pottawatomie County; C. H. Ennis, Judge pro tem.

Action between the City of Shawnee and the State Publishing Company and others. From the judgment, the City brings error. Dismissed.

E. E. Hood, City Atty., and W. M. Engart, both of Shawnee, for plaintiff in error. B. B. Blakeney, of Muskogee, for defendants in error.

HAYES, J. This cause was tried in the court below before a judge pro tempore, who, on the 29th day of December, 1910, overruled a motion for a new trial and made and entered an order extending the time in which plaintiff in error could make and serve a case-made for a period of 90 days from said date. Two days thereafter the regular judge of the court also made an order extending the time for making and serving a case-made for a period of 90 days from said date. Each of said orders provided that defendant in error should have 10 days after service of the case-made in which to suggest amendments; the case-made to be settled and signed on 5 days' notice by either party. It is conceded by both parties to this proceeding that both of the orders extending the time within which to serve the case are valid, and that the time for such service under the second order expired on December 30, 1910. On December 21, 1910, the case was served by plaintiff in error upon defendant in error, and the time for suggesting amendments thereto

expired on the 31st day of the same month. On the 29th day of December, 1910, a second order was granted by the regular judge extending the time within which to serve a case-made. This order was made after the case had already been served. As it is admitted, and correctly so we think, by both parties, that this order does not affect the question now under consideration, we shall not refer to it again. No notice fixing a time to settle the case was served by either party before the expiration of the time in which to suggest amendments; but thereafter, upon notice, the case was finally settled and signed by the judge pro tempore on the 18th day of January, 1911.

A motion to dismiss the proceeding in error in this court challenges the authority of the judge pro tempore to sign and settle the case at the time he did. It has been often determined in this court that only the judge before whom the cause was tried has authority to sign and settle the case. *Upton v. American Trust Co.*, 122 Pac. 159; *Oligschlager v. Grell*, 13 Okl. 632, 75 Pac. 1131. This rule has been modified by a recent statute so that under certain contingencies the successor of the trial judge may settle the case; but the conditions upon which that authority vests in the succeeding judge do not exist in this case. The motion before us presents for the first time the question as to when the authority of a judge pro tempore to sign and settle a case exists. In *Burnett v. Davis*, 27 Okl. 124, 111 Pac. 191, the cause was tried before a regular judge, whose term of office was caused to expire by a change in the district which transferred the county in which the cause was pending from the district in which it was tried to another district, and the case went off in this court on a motion to dismiss, because the term of the trial judge did not expire during the time for making and serving a case, nor pending the time fixed for settling and signing same. In that case it was held that the statute gives authority to the judge who tries a case to certify, sign, and settle the same after he is out of office only when his term of office shall have expired or expires during the time fixed for making, settling, or signing a case; and, if no time is fixed for settling and signing the same by order of the court, then during the time fixed for making and serving the case. The decision in *Burnett v. Davis*, supra, was based upon section 6075, Comp. Laws 1909 (section 4742, Wilson's Rev. & Ann. St.).

This court, following the Kansas cases, has several times determined that a judge pro tempore has no power, after he ceases to sit as a court in the trial of a cause, to extend the time for making and serving a case-made in an action tried before him; and that such extension can be granted only by the regular district judge, who is, in fact, in possession of the office. *City of Shawnee v. Far-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ren, 22 Okl. 652, 98 Pac. 812; *Hornier v. Cofferty & Sons*, 23 Okl. 906, 101 Pac. 1111; *Casner v. Woolley*, 28 Okl. 424, 114 Pac. 700. The writer of this opinion, uncontrolled by the former decisions of this court and of the Supreme Court of Kansas, from which state our statute of procedure has been adopted, is of the opinion that the sounder and more just rule and the one supported by the best reason is that the power of a judge pro tempore, selected or appointed to try a cause in which the regular judge is disqualified, does not cease at the end of the trial, but that his power continues with sufficient authority in him to make any and all orders necessary for the final disposition of the cause, including any order that may be necessary for lodging the case in the appellate court; but, whatever may be the personal views of the writer upon this question, the rule has been too long established in this jurisdiction to be disturbed now, and, in determining the question now before us, it must be done in view of the holdings of this court that the case-made must be settled by the judge pro tempore before whom it was tried, and yet his power for some purposes is ended when he ceases to sit as a judge in the trial of a cause. The only statutory provision authorizing an ex-judge to sign and settle a case-made is to be found in section 8075, Comp. Laws 1909, which in part provides; "And in all causes heretofore or hereafter tried, when the term of office of the trial judge shall have expired or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign, or settle the case in all respects as if his term had not expired. * * *

In the last clause of section 9, art. 7, of the Constitution, it is provided; "In the event any judge shall be disqualified for any reasons from trying any cause in his district, the parties to such case may agree upon a judge pro tempore to try the same; and if such parties cannot agree, at the request of either party, a judge pro tempore may be selected by the members of the bar of the district present at such term."

Sections 2 and 3 of the act of the Legislature providing a method for the selection of a judge pro tem. (article 1, c. 14, Sess. Laws 1909) reads in part as follows:

"In any case civil or criminal, pending in any court of record in the state * * * the parties or their attorneys of record * * * may agree upon some member of the bar * * * to act as special judge to hear and decide and render judgment in the same manner and to the same effect as such disqualified judge could have rendered but for his disqualification.

"If the cause be a civil one, and the parties or their attorneys of record do not agree, the clerk of the court in which the cause is pending shall hold an election for

the selection of a special judge or judge pro tempore to try such cause."

Accurately speaking, a judge pro tempore has no term of office. He is selected for a definite purpose, to wit, to try a cause in which the regular judge is disqualified. The statute does not attempt to fix his term; nor does he take the term of office of the regular judge who continues as the regular judge of the court with full authority in all cases except the one in which he is disqualified. The judge pro tempore becomes clothed with all the power of the regular judge as to such cause, necessary for him to hear such cause and render judgment therein; and when the cause has been tried and judgment rendered, his powers cease, unless continued by some order of the court. Discussing the question here involved, the Supreme Court of Kansas, in *Columbia Mfg. Co. et al. v. Stoddard Mfg. Co.*, 61 Kan. 640, 60 Pac. 320, after reviewing the case of *K. & C. P. Ry. Co. v. Wright*, 53 Kan. 272, 36 Pac. 331, said: "The above case is, in effect, a holding that the term of office of a judge pro tem. is limited to such specific periods as he sets for the making and service of the case and the suggesting of amendments thereto, and the settlement of the case, and that, if within such term of office no time is fixed for the settlement of the case, such term cannot be prolonged by specifying an indeterminate period within which the parties may come before him for the settlement of the case, or, at least, that if the time for its settlement has been left indeterminate, it must be determined by a notice given within the term fixing a definite date for the settlement of the case."

And in *Missouri Pacific Ry. Co. v. Preston*, 68 Kan. 518, 66 Pac. 1050, the same court, in the fourth paragraph of the syllabus, held: "A judge pro tem., upon overruling a motion for a new trial and rendering final judgment, allowed a certain time for the making and service of a case-made for this court, fixed a time within which amendments were to be suggested, and ordered that it be settled upon 10 days' notice by either party. Held, that the term of office of such judge expired after the last day fixed for suggesting amendments, and that a case-made settled and signed by him after that time will not be considered."

And in *Butler v. Scott*, 68 Kan. 512, 75 Pac. 496, it is said; "In cases tried before a judge pro tem. it is obvious that the contingency referred to cannot arise. The term of office of a judge pro tem., where no time is fixed for settling a case, is held to be co-extensive with the time allowed for suggesting amendments, and therefore cannot expire before the time fixed for making the case."

The foregoing decisions of the Kansas court were made under a statute, providing for the service and settling of a case-made, the same as exists in this state, and under

statutes relative to the selection of pro tempore judges very similar to the statutory and constitutional provisions of this state; and we adopt the rule of those cases and hold that, where no time has been fixed either by order of court or by notice given by the parties within the time for serving a case and suggesting amendments thereto for settling a case, the authority or term of a judge pro tem. ceases upon the expiration of the time fixed for suggesting amendments, and a case made settled by him after that time is a nullity.

In the case at bar, no notice was given by either party fixing the time for settling the case before the expiration of the time within which to suggest amendments; and the case was not signed and settled by the judge pro tem. until after the expiration of said time.

It therefore follows that this proceeding in error should be dismissed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

(31 Okl. 107)

CHIDSEY et al. v. ELLIS et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

PLEADING (§ 417*)—WAIVER OF OBJECTIONS—RULING ON DEMURRER.

Where a demurrer is sustained to a pleading, and the pleader takes leave to amend, he thereby waives the error, if any has been committed, in sustaining such demurrer. In order to take advantage of a ruling on a demurrer when such demurrer is sustained, the party must stand upon his pleading held to be defective, and not amend.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1401, 1402; Dec. Dig. § 417.*]

Error from District Court, Murray County; R. McMillan, Judge.

Action by J. C. Chidsey and others against D. F. Ellis and others. From a judgment dissolving a temporary injunction, plaintiffs bring error. Dismissed.

W. E. Latimer, of Sulphur, and Carr & Field and Thompson & Patterson, all of Pauls Valley, for plaintiffs in error. Ledbetter, Stuart & Bell, of Oklahoma City, for defendants in error.

DUNN, J. This case presents error from the district court of Murray county. A statement sufficient to present the controlling proposition is that the trial court granted a temporary injunction which on motion it dissolved. From this action an appeal was taken to this court, and a supersedeas granted staying the effect of the order dissolving the injunction. It is conceded by both parties that the force and effect of the motion upon which the temporary injunction was dissolved was that of a demurrer, and counsel in

their petition in error state that the same "was tantamount to a declaration that the petition filed by the plaintiffs in error failed to state a cause of action." On sustaining this motion, and while the order dissolving the injunction was effective, instead of standing upon the petition relied on, counsel for plaintiffs filed an amended petition in lieu of the original, which had the effect of superseding it, and it is insisted in this court by counsel for defendants in error that in so doing plaintiffs waived any error committed by the court in sustaining the demurrer to the original petition and in dissolving the temporary injunction. This contention must be sustained. The rule is stated by the Supreme Court of the territory of Oklahoma, in the case of Berry et al. v. Barton et al., 12 Okl. 221, 71 Pac. 1074, 66 L. R. A. 513, as follows: "When a demurrer is sustained to a pleading, and the pleader thereupon takes leave to amend, he thereby waives the error, if any has been committed, in sustaining such demurrer. In order to take advantage of a ruling on a demurrer when such demurrer is sustained, the party must stand upon his pleading held to be defective, and not amend." In this case is cited a great number of authorities sustaining the principle stated, and the same was thereafter followed by the Supreme Court of the territory in the cases of Morrill v. Casper et al., 13 Okl. 335, 73 Pac. 1102; Rogers v. Brown, 15 Okl. 524, 86 Pac. 443; Carle et al. v. Oklahoma Woolen Mills et al., 16 Okl. 515, 86 Pac. 66; Board of Com'rs of Garfield County v. Beauchamp, 18 Okl. 1, 88 Pac. 1124.

It therefore follows that the petition in error presents merely a hypothetical question such as this court has frequently declared it would not consider. Hodges et al. v. Schafer, 23 Okl. 404, 100 Pac. 537, and cases therein cited.

TURNER, C. J., and WILLIAMS, KANE, and HAYES, JJ., concur.

(33 Okl. 342)

CHEROKEE NAT. BANK v. UNION TRUST CO.

(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 149*)—FORGED CHECK—PAYMENT—RIGHTS OF BONA FIDE HOLDERS.

Where a bank, in good faith and for value, purchases from an indorser a check upon another bank, and thereupon indorses and forwards the same to its collection agency for collection, and the same is presented by the collection agent to the drawee bank, and is paid by the drawee bank, the drawee bank, upon thereafter discovering the check to be a forgery, cannot, by reason of the negotiable instruments law (sections 4496 and 4622, Comp. Laws 1909), recover the money back from the bank to whom it was paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 453, 454; Dec. Dig. § 149.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indorsed

2. BANKS AND BANKING (§ 147*)—FORGED CHECK—RIGHTS OF BONA FIDE HOLDERS.

A drawee, who pays to a bona fide holder a check to which the drawer's name has been forged, cannot recover the amount of such payment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-454; Dec. Dig. § 147.*]

3. GUARANTY (§ 36*) — CONSTRUCTION OF CONTRACT—INDORSEMENT OF CHECK.

The guaranty of an indorsement on a check applies only to the indorser, and does not protect the drawee against the risk of cashing a check to which the maker's name is forged.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 38-45; Dec. Dig. § 36.*]

Error from Craig County Court; N. J. Gubser, Judge.

Action by the Cherokee National Bank against the Union Trust Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Seymour Riddle, of Vinita, and Biddison & Campbell, of Tulsa, for plaintiff in error. Chas. J. Wrightsman and Chas. E. Bush, both of Tulsa, for defendant in error.

HAYES, J. Plaintiff in error was plaintiff in the court below, and defendant in error was defendant. Both parties are domestic corporations, engaged in the banking business in Craig county and Tulsa county, respectively. This proceeding in error is prosecuted from an order of the trial court, sustaining a demurrer to plaintiff's petition and dismissing its cause of action, and the sole question presented in this court for determination is whether plaintiff's petition states a cause of action.

It alleges, in substance, that on the 3d day of January, 1910, one C. Caldwell, who was a customer and depositor of the bank of plaintiff presented to defendant, Union Trust Company, a check for the sum of \$325, payable to the order of Oliver Smith, drawn on the plaintiff bank. At the time the check was presented to defendant and paid by it, the same was indorsed by Oliver Smith, the payee therein, J. W. Sanders, and J. E. Temples, for whom defendant cashed the check. Immediately after purchasing the check, defendant forwarded it for collection through its collection agency, the National Bank of Commerce of Kansas City, Mo., with the following indorsement thereon in writing: "Pay Nat'l Bank of Commerce. Previous indorsements guaranteed. Kansas City, Mo. OK123, Jan. 14, 1910. Union Trust Company, Tulsa, Oklahoma." On the 15th day of the same month, the National Bank of Commerce received the check and forwarded it to its collection agent at Vinita. Its collection agent, upon receiving the check, presented the same to plaintiff and received payment thereon in full, which sum was duly remitted to and received by defendant in full payment of the check. Afterwards, on the 22d day of January, 1910, plaintiff discovered that the sig-

nature of the drawer upon said check was not the real signature of the pretended drawer, but was a forgery. Plaintiff immediately, upon said discovery, notified defendant bank that the check was a forgery, and demanded defendant to repay to plaintiff the money it had received on the check from plaintiff, which defendant refused to do. Plaintiff alleges that in paying the check it relied upon the indorsements of defendant as written upon said check, and relied upon and believed that all the indorsements upon the check, as they appeared thereon, were genuine, and true indorsements. It thereupon prayed judgment in the amount of said check, being the sum of money paid thereon by plaintiff to defendant, and for costs.

[1, 2] The court, in *American Express Co. v. State National Bank*, 27 Okl. 824, 113 Pac. 711, 33 L. R. A. (N. S.) 188, held the circumstances under which a payee receiving money from a bank, purporting to be drawn upon it by one of its depositors, but the signature upon which was in fact forged, is entitled to retain the money to be as follows: "First, that the payee was not negligent in receiving the check; second, that the payor was lacking in due care in paying the same; and, third, that upon the payor's action the payee has changed his position, or would be in a worse condition if the mistake was corrected than if the payor had refused to pay the check at the time of its presentment."

In that case the bank upon which the check was drawn paid the same upon its presentment to the bank by the payee, and thereafter discovered that the name of the purported drawer had been forged to the check. The check was signed in the manner that was customary for the drawer to sign its checks; but it was not shown that the payee, on account of the payment of the check when presented, had been put in a worse position than if payment had been refused. This court affirmed a judgment of the trial court, holding that the bank was entitled to recover. The transaction involved in that case arose long before the adoption of the uniform negotiable instruments law, enacted in this state on the 20th day of March, 1909 (Sess. Laws 1909, p. 387); and this court, in departing from the old doctrine that a bank is bound to know its depositors' signatures, and cannot recover money paid upon the forgery of the drawer's name, when the forgery is discovered, and in adopting the rule announced therein as the one supported by the sounder reason, although not supported by the weight of authority, stated in the opinion that: "The old rule has not become a part of our common law by general usage or custom; nor has it been expressly or impliedly made part of our law by statute."

It will serve no useful purpose to review,

in this opinion, the authorities supporting the respective rules, and the reasons that have been given in support thereof; for the question before us now is: Has a drawee, who, without knowledge on its part of the forgery, has paid a check, a right to recover money paid on a depositor's forged check, in the absence of any negligence or fraud on the part of the holder to whom the check was paid?

Section 62 of the act of the Legislature approved March 20, 1909 (Comp. Laws 1909, § 4496), provides: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits: 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and, 2. The existence of the payee and his then capacity to indorse."

The uniform negotiable instruments law has been enacted in Missouri, and constitutes part of the statute of that state. In *National Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513, the facts presented the question now under consideration, including the construction of the statute above quoted. In the opinion it was said: "The adoption in this and other states of our negotiable instruments law, was for the purpose of having in the statutory laws of the states a uniform law in regard to commercial paper. A confusion was known to exist on many of the everyday transactions concerning such paper, and it may be said that there was no question upon which the courts were more in conflict than upon the question involved in this case. After a careful examination of the new law, we are inclined to believe that it was intended to adopt the law as declared in *Price v. Neal*, supra [referring to *Price v. Neal*, 3 Burr. 1354]. See, also, *Nat. Bank of Commerce v. Mechanics' American Nat. Bank*, 148 Mo. App. 1, 127 S. W. 429.

In *Title Guaranty & Trust Co. v. Haven*, 126 App. Div. 802, 111 N. Y. Supp. 305, the Supreme Court of that state, in its First Appellate Division, construing the same statute, said: "A bank which pays a check purporting to be drawn on it by one of its depositors guarantees the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and, where such signature is forged, cannot recover back the amount from the person to whom it was paid, although the position of the parties to such person has not changed in any respect."

This case was, on appeal, reversed by the Court of Appeals, and it was held that the foregoing statute did not apply in the case; but the construction of the statute was approved. *Title Guaranty & Trust Co. v. Haven*, 196 N. Y. 487, 89 N. E. 1082, 1085, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131.

Referring to the negotiable instruments law, the Supreme Court of Oregon, in which

state the law has also been enacted, in the recent case of *Lumbermen's Nat. Bank of Portland v. Campbell*, 121 Pac. 427, said: "The act from which these excerpts are taken was designed to harmonize the decisions of courts of last resort in respect to commercial paper, and to give to negotiable instruments a degree of certainty that would be universal in its application in the states enacting the law."

That the foregoing excerpt states the chief purpose of the negotiable instruments law is familiar knowledge to the courts and to the bar. Of course, it is fundamental that the court of no state in which the law is enacted is bound by the construction of the statute by the courts of other states; but courts, with full knowledge of the history of this legislation, and knowing that its chief purpose is as stated above, should, we think, upon all questions of construction, where the rule adopted by other states is not plainly erroneous, be disposed to follow the construction given to the act by the courts of the state in which the act has heretofore been adopted and construed; and particularly should this be true where the statute involves a question upon which the authorities, independent of a statute, are so greatly divided as they are upon the question presented in the case at bar, for by no other course may uniformity be obtained; and, if the statute, thus construed, works a hardship in any locality, it may be corrected by legislation.

Other cases construing this statute, in harmony with the foregoing decisions from New York and Missouri, are: *First National Bank v. Bank of Cottage Grove*, 59 Or. 388, 117 Pac. 293; *Farmers' & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 86 S. W. 939, 112 Am. St. Rep. 817; *Times Square Automobile Co. v. Rutherford Nat. Bank* (N. J.) 73 Atl. 479.

Dean James Bar Ames, in an article in 14 *Harvard Law Review*, 442, commenting upon the effect of the different provisions of the negotiable instruments law, said of the section now under consideration: "Since an acceptor, by section 62, engages to pay the bill 'according to the tenor of his acceptance,' he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer. A bank certifying a raised check is in the same case, since section 87 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, a fortiori a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this coun-

try into harmony with the law of nearly, if not, indeed, all, of the European states."

Under the rule of these authorities, had plaintiff merely accepted the bill drawn upon it, it could not be heard thereafter to deny that the signature of the drawer was genuine, but it would have been held bound upon its promise to pay the check, and to pay it in accordance with the tenor thereof; so, by paying the check, plaintiff is bound to the same effect, for payment is more than acceptance, in that it discharges the indebtedness represented by the check; after it is accepted. *Bank v. Bank*, 109 Mo. App. 665, 83 S. W. 537; *First Nat. Bank v. Bank of Cottage Grove*, supra.

[3] Nor can plaintiff recover by reason of the indorsement upon the check: "Pay National Bank of Commerce; previous indorsements guaranteed; Kansas City, Mo., Union Trust Company; Tulsa, Oklahoma"—for the guaranty applies only to the indorser, and does not protect the drawee against the risk of cashing the check to which the maker's name is forged. *National Bank of Rolla v. First National Bank of Salem*, supra. Nor can defendant be held as an indorser upon the check, because by section 188 of the act of the Legislature approved March 20, 1909 (section 4622, Comp. Laws 1909), it is provided: "Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon." See authorities cited on first point in this opinion.

It follows from the foregoing views that the judgment of the trial court should be affirmed.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. DUNN, J., absent, and not participating.

CALDWELL et al. v. BOARD OF COM'RS OF NOBLE COUNTY et al.

(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

TAXATION (§ 611*)—REMEDIES OF TAXPAYERS—INJUNCTION.

Where a party seeks to enjoin the collection of taxes levied pursuant to an alleged unlawful and void raise by the board of equalization, where the only ground for equitable relief is that the property is assessed beyond its fair cash value, and the petition contains no allegation that the property was assessed beyond its fair cash value, a demurrer to such petition is properly sustained.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Noble County; W. M. Boles, Judge.

Action by W. E. Caldwell and others, partners under the name of Perry Milling Company, against the Board of County Commis-

sioners, Treasurer, and Sheriff of Noble County. Judgment for defendants, and plaintiffs bring error. Affirmed.

Harris & Wilson and Glad Nowlin, all of Oklahoma City, for plaintiffs in error. Chas. R. Bostick, of Perry, for defendants in error.

HARRISON, C. This action was originally begun in the district court of Noble county in November, 1907, to restrain the collection of taxes alleged to have been levied against property which had been unlawfully assessed for taxation for the year 1905; the property in question being situated in the city of Perry, said county, consisting of certain real estate and personal property described in the petition.

The petition alleged: That the qualified and acting assessor of the city of Perry had regularly assessed plaintiff's property for the said year and made due return of said assessment. That the board of equalization of the city of Perry met on April 17, 1905, the same being the day prescribed by statute for said board to meet as a board of equalization, but that no equalization of the assessment rolls of said city was made on said date, but that the mayor of said city being absent, the city clerk adjourned said meeting to May 5th, at which time the board met for the purpose of equalizing assessments in the city for said year, and at said meeting said board disregarded the city assessor's return of assessment against plaintiffs and assessed the personal property of plaintiffs at \$10,000 instead of \$3,000 as returned by the assessor; and assessed lots 10 and 11 of block 41 at \$5,000 each, instead of \$2,000 each, as shown by the assessor's returns; and lot 12 in said block at \$3,000 instead of \$1,500; and lot 13 in said block at \$2,000 instead of \$1,000 as shown by the assessor's returns. That in December, following, plaintiffs brought before the board of county commissioners a written statement from the said board, setting forth their action in the assessment of plaintiffs' property, and advising the board of county commissioners that \$10,000 for both personal and real property was a reasonable and fair valuation of same. Whereupon the board of county commissioners agreed that said sum was a fair valuation of the property in question and directed the county treasurer to correct the tax rolls to conform to such amounts and to credit same with the amount of excess of said irregular assessment over the assessment returned by the city assessor.

The petition does not show whether such correction was made or not, but alleges that they had paid all the taxes due under the original assessment returned by the city assessor, and as determined in the compromise with the board of county commissioners; but alleges that, notwithstanding such payment, the board of county commission-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

ers, the county treasurer, and the sheriff of said county, in their respective capacities, are threatening and are about to levy a tax warrant upon the property of plaintiff to satisfy the levy made on the alleged erroneous assessment. Copies of the assessment as returned by the city assessor, copies of the proceedings of the city board of equalization, copy of the statements made by the city board to the board of county commissioners in reference to said assessment, and copy of the order of the county commissioners directing the treasurer to correct his tax rolls, are attached to and made a part of the petition.

The county attorney demurred to the petition for the reason that it failed to state a cause of action, that the verification was insufficient, and that said petition did not show equity. The demurrer being sustained, the plaintiffs elected to stand on their petition, and the cause was brought here by appeal.

The authority of the board of county commissioners to make the order above referred to was settled in *Bostick v. Board of Co. Com.*, 19 Okl. 92, 91 Pac. 1125. Hence there is but one question involved in the case, namely, whether or not the petition states grounds for equitable relief. This, of course, is to be determined from the wrongs complained of in the petition. Are they such wrongs as, under the circumstances, will be redressed in a court of equity? Briefly, the facts which constitute the wrongs complained of herein are that plaintiffs' property was regularly assessed and duly returned by the city assessor, and that the city board of equalization raised this assessment at an adjourned meeting instead of the regular day fixed by statute. The petition states: That the board met on the regular day, April 17th, but, without transacting further business, adjourned to May 5th, at which time the raise complained of was made; the gravamen of the wrong complained of being that the raise was irregularly made; that it was made at an adjourned meeting without notice to plaintiff, and therefore unlawful and void. This, of itself, is not sufficient to entitle plaintiff to equitable relief. The law fixing April 17th as the day on which the city board shall meet to equalize the assessments is notice to all parties interested. This law does not require that the labors of the board shall be completed on that day, nor does it intend to invalidate work of equalization completed at an adjourned day, especially if made pursuant to adjournment. And, if the records of the board show that it met on the regular day and adjourned to a subsequent date, then such record is notice to parties interested in the equalization. And if they fail to appear and make their complaint and avail themselves of their statutory remedy, they will not be relieved in a court of equity, unless it be reasonably

apparent from the petition that the property had been raised above its fair cash value. But if it appear from the averments in the petition that property has been raised above its fair cash value, a court of equity will take cognizance of the question, and, if the averments be supported by evidence, will grant relief, although the parties affected may have failed to appear on the day of equalization. This is true on the theory that officers are presumed to do their duty, presumed to do justice to all alike, and that taxpayers, having rendered their property at its fair cash value, have the right to assume that the officers of the law will not do them an injustice.

Therefore the decisive point in the case at bar is whether the property in question was rendered at its fair cash value, or whether it was raised above such fair cash value. We cannot say from the petition whether this is true or not. Conceding the truth of every allegation in the petition, and on demurrer the averments therein are to be treated as true, we could not feel justified in saying that the property was rendered at its fair cash value in the original assessment as returned by the city assessor, nor that it was raised above its fair cash value by the city board of equalization. The petition does not allege either to be true. If the demurrer had been overruled and defendant had elected to stand on the demurrer, there is no allegation or statement of fact in the petition from which the court below could have reasonably concluded that the property was rendered at its fair cash value to the city assessor, and raised above such value by the board of equalization and upon such conclusion render judgment. The petition refers to the original assessment as the "lawful assessment," "true assessment," "true and lawful assessment," and "valid assessment," and refers to the action of the board of equalization as the "void assessment," "unlawful assessment," "void and unlawful assessment," and "false and pretended assessment"—thus indicating a reference to the manner of making the raise as void, and not indicating a reference to the fair cash value of the property. Hence, inasmuch as plaintiff is not entitled to equitable relief in this action upon any other ground than that the property had been assessed beyond its true cash value, we think the demurrer was properly sustained.

The rule announced by the Supreme Court of the territory in *Alva State Bank v. Renfrew*, 10 Okl. 28, 62 Pac. 285, and *Streight v. Durham*, 10 Okl. 361, 61 Pac. 1096, is: "Where a party seeks to enjoin the collection of a tax which he claims is illegal and excessive arising from the action of the board of equalization in raising the valuation of the property above the returned valuation by the assessor to the board, it devolves upon him not only to allege in his

petition, but to prove, that the property was listed and returned for assessment at its true cash value before a court of equity will interfere and enjoin the collection of the excessive tax."

This rule has been followed in *Garfield Co. v. Garfield Exchange Bank*, 126 Pac. —, a recent case decided by this court, not yet officially reported. In the case at bar it is not even alleged that the assessment was excessive. The plaintiff seems to rely for relief solely upon the technical irregularity in the raise of assessment.

Therefore, in view of the allegations in the petition, and of the foregoing authorities, we think the plaintiff failed to state facts sufficient to entitle him to equitable relief, and that the demurrer was properly sustained.

The judgment of the court below is affirmed.

PER GORIAM. Adopted in whole.

(33 Okl. 223)

EVANS et al. v. BROWN et ux.

(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

1. BROKERS (§ 102*) — AUTHORITY — Acting for BOTH PARTIES.

A sale of real estate from which a substantial advantage has been derived cannot be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when in reality he was the secret agent of the purchaser, unless it appears that the principal after full knowledge of all the facts confirmed the acts of the agent.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 146; Dec. Dig. § 162.*]

2. BROKERS (§ 106*) — UNAUTHORIZED ACTS — RATIFICATION — EVIDENCE.

Evidence examined, and held sufficient to support the finding of the court below as to the scope of the agency, and that there was no confirmation by the principal after full knowledge of all the facts.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 146-153; Dec. Dig. § 106.*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by W. F. Evans and another against C. S. Brown and wife. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. F. Evans, of St. Louis, R. A. Kleinschmidt, of Oklahoma City, and J. H. Grant, for plaintiffs in error. Burwell, Crockett & Johnson, of Oklahoma City, for defendants in error.

KANE, J. This was a suit commenced by the plaintiff in error, W. F. Evans, against the defendants in error, to reform a deed to a certain piece of real estate. The parties hereafter will be designated "plaintiff" and "defendants" as they were designated in the court below. By way of answer and cross-petition the defendant C. S. Brown set up

fraud on the part of his agent who negotiated the sale of the realty out of which the controversy arose, and prayed that the deed sought to be reformed be canceled and his title to the land cleared. Upon trial to the court a decree was entered in conformity with the prayer of the defendant, to reverse which this proceeding in error was commenced.

The court below made general findings in favor of the defendants, and therefore every allegation of their cross-petition which is reasonably supported by the evidence must be resolved in their favor. The defendants C. S. Brown and Margaret Brown were husband and wife, the husband being the owner in fee simple of the lot involved. Some time prior to the execution of the deed sought to be canceled, Brown and one Poole, the local agent of the St. Louis & San Francisco Railroad Company, in Oklahoma City, had entered into an oral agreement, whereby Poole was to secure a purchaser for the land for which service Brown was to pay the usual commission. Brown was unfamiliar with the value of properties in Oklahoma City, and in settling upon a price for the land he suggested to Poole that the land was worth \$5,000, whereupon Poole said that in his judgment it was not worth over \$4,000, and recommended that Brown take that amount for it, which proposition Brown finally accepted. Some four or five months before the execution of the deed, but subsequent to the agency of Poole, the general right of way agent for the St. Louis & San Francisco Railroad Company, upon the suggestion of Poole, advised his company to purchase the land for depot and terminal purposes. Several days prior to the contract of sale, Mr. Gray, vice president of the company, instructed Mr. Poole, its local agent, and the agent of Brown for the purpose of negotiating the sale, to purchase the land for the railroad company, to be used for terminal and depot facilities. Shortly after the instructions of the vice president, the right of way agent appeared in Oklahoma City, and had a conversation with Mr. Poole in relation to the purchase of the land. At this conference Poole and Williams, the right of way agent, agreed that they would tell Brown they wanted the property for a broom corn warehouse. Poole then telephoned Brown that the man who wanted to purchase his property for a broom corn warehouse was in town. Brown inquired where he could meet the prospective purchaser and talk with him. Poole answered that it would not do for Brown to see the purchaser, because he might "queer the whole deal; that he (Poole) would arrange a meeting at the Indian Club at, or a little after, noon of that day. Pursuant to this arrangement, Brown and the right of way agent were introduced by Poole, whereupon Brown asked the right of way agent what his business was, who answered that "he had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Rehearing pending Sept. 27, 1912.

no particular business now; that he was a retired capitalist." Brown then asked him what he desired this property for, and he said he wished to acquire it for the purpose of building a broom corn warehouse upon it. They (Brown, Poole and the right of way agent) discussed the price and other details of the trade, and Brown agreed to take \$4,000, whereupon the right of way agent then suggested that they go to the office of his attorneys for the purpose of having the necessary papers prepared. On the way to the office of the attorneys, who, it transpires, were also the attorneys of the railway company, Brown again asked Williams what he wanted this property for, and was again assured that he wanted it for the purpose of building a broom corn warehouse thereon. When they reached the attorneys' office, Brown was left sitting in the reception room, and Poole and the right of way agent retired to one of the private offices, and after consulting with a member of the firm came out with a contract drawn, prepared for signature, wherein it was agreed that Brown should sell the property to one Enderline, who was at that time a clerk in the attorneys' office. Poole had with him cash belonging to the railroad to the amount of \$200, which money was paid to Brown. A draft was drawn by Williams as the general right of way agent for the St. Louis & San Francisco Railroad Company, and handed to Brown with the request that he indorse the same, which he did, taking it, according to his testimony, to be simply a receipt for the money paid at that time. While they were in the attorneys' office, and before the money was paid, Brown again asked Williams what he wanted this property for, and insisted that he desired to know absolutely what the property was to be used for, and was again assured that the property was going to be used for the purpose of building a broom corn warehouse thereon. Poole was present during this conference and confirmed all the right of way agent said pertaining to the purpose for which the property was being purchased. Several days after this Poole telephoned Brown that he had the draft to pay the balance of the purchase price, whereupon Brown went to a bank designated by Poole for the purpose of closing the deal, where the deed was delivered to Poole, who executed the deed and laid it down on the desk. Poole delivered to Brown a voucher issued by the St. Louis & San Francisco Railroad Company with a draft for \$3,800. Poole's version of what took place at that meeting is hereinafter set out in full. The deed executed by Brown and delivered to Poole conveyed the property to L. F. Parker, who at that time was at the head of the legal department of the railroad company. Subsequently Parker died, and W. F. Evans, his successor, caused the suit to be revived in his name.

The evidence also tends to show that at

the time of the sale of the land its reasonable value was in the neighborhood of \$10,000.

The cross-petition of the defendants substantially set up the foregoing facts. Originally the railroad company filed a disclaimer and afterwards admitted that it was the real purchaser of the land, and that it was being held for its use and benefit by Mr. Evans, its general counsel.

Counsel for plaintiffs in error present their contentions under three subheads, as follows: "(1) The alleged false representations complained of, and which were to the effect that the property was being purchased for a broom corn warehouse, and that Williams was a capitalist and the purchaser, were not material. (2) Poole's employment did not constitute him anything more than a mere middleman, whose duty it was to find a purchaser. He was not clothed with any discretion in the premises, and his employment by plaintiffs herein was not fraudulent or against public policy. (3) Conceding, for the purposes of this argument, that everything defendants have alleged is true, still they are not entitled to the relief prayed for by them. Having discovered the alleged fraud while the contract was still executory, and having voluntarily elected to complete it, they thereby waived the alleged fraud and are estopped from setting it up in impeachment of said contract."

[(1) A mere statement of what the court considers the established facts practically disposes of the first two assignments of error. No principle is better settled than that a man cannot be the agent of both the seller and the buyer in the same transaction, without the intelligent consent of both. Loyalty to his trust is the most important duty which the agent owes to his principal. Reliance upon his integrity, fidelity, and ability is the main consideration in the selection of agents; and so careful is the law in guarding this fiduciary relation that it will not allow an agent to act for himself and his principal, nor to act for two principals on opposite sides in the same transaction. In such cases the amount of consideration, the absence of undue advantage, and other like features are wholly immaterial. Nothing will defeat the principal's right of remedy, except his own confirmation, after full knowledge of all the facts. Actual injury is not the principle upon which the law holds such transactions voidable. The chief object of the principle is not to compel restitution where actual fraud has been committed, or unjust advantage gained, but it is to prevent the agent from putting himself in a position in which to be honest must be a strain on him, and to elevate him to a position where he cannot be tempted to betray his principal. *Hunter Realty Co. v. Spencer et al.*, 21 Okl. 155, 85 Pac. 757, 17 L. R. A. (N. S.) 622; *Ferguson v. Gooch*, 94 Va. 1, 28 S. E. 397, 40 L. R. A.

234; Conkey v. Bond, 36 N. Y. 427; Davis v. Hamlin, 108 Ill. 89, 48 Am. Rep. 541; Henderson et al. v. Vincent, 84 Ala. 99, 4 South. 180. In Hunter Realty Co. et al. v. Spencer et al., supra, a case similar in principle to the one at bar, it was held: "Where an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is contrary to public policy, and voidable in equity upon the application of either party."

So well settled is the foregoing principle that its soundness is not controverted by counsel for plaintiffs in error. But they contend that the case at bar falls within an exception to the general rule equally well established by the authorities, to the effect that the maxim that "no man shall serve two masters" does not prevent the same person from acting as agent for certain purposes for two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other. Nolte v. Hulbert, 37 Ohio St. 445. A great many cases are cited in support of the exception. Another test for determining whether a case falls within the general rule or the exception is quoted from Southack v. Lane, 23 Misc. Rep. 517, 52 N. Y. Supp. 688, as applicable to the facts in the case at bar: "Where he (the agent) acts simply as a middleman to bring the parties together, and takes no part whatever in the negotiations, there will be nothing illegal in his acting for both parties, and claiming remuneration from each."

None of the foregoing tests apply to the case at bar. In the first place, the evidence tends to prove that the defendant relied upon the judgment of Poole in fixing the price of the lot, and was influenced by his suggestions on that point at the time the contract of agency was entered into and all through the following negotiations. The defendant told Poole that he thought the land was worth \$5,000, which, the evidence discloses, was about one-half its value; but Poole insisted that the land was only worth \$4,000, which value the defendant finally adopted. On this question the defendant testified: "I finally made a price of \$4,000; told him to get over \$4,000 if he could, and left it with him." It is difficult to harmonize this conduct on the part of Poole with loyalty to Brown. Poole undoubtedly knew that the land was worth a great deal more than the price he induced Brown to place upon it. Contrast his conduct with S. H. Brown, another owner of property adjoining the lot in controversy and to whom he owed no duty and his conduct with his principal, the defendant in this case. The day before the meeting of Brown, Poole, and the right of way agent, at which the contract of sale was executed, Poole had a conversation with Mr. S. H. Brown pertaining to the purchase of his property by the railway com-

pany, concerning which Mr. S. H. Brown testified: "He (Poole) says: 'I have known you quite a while, and believe you to be a business man, and you will not impose on us, and I will tell you frankly what we want. We want to buy that property of yours, that storage property in block B.' He says, 'I haven't been so frank with anybody along the line, and I ask that you keep this to yourself,' and then he gave me a little outline of their plans. He wanted to purchase this line of property for the purpose of putting in a depot. The purpose was to come in the block west of us, which would be block C. I said: 'By the way, I know the owner of that property, Mr. Brown, and, if I can be of any service to you, I would be glad to.' He says: 'No, I know him too. The property is listed with me. You don't need to trouble about it.' He says: 'We can get that at a very reasonable price, putting it up to Brown that we are going to put a broom corn warehouse on the property.'"

The evidence further shows that S. H. Brown received \$20,000 for his property, \$2,000 of which was allowed for the buildings thereon. In the face of such evidence, we do not see how it can be said with any show of reason that the interest of the defendant and the railway company were not in conflict, or that the loyalty of Poole to the railroad company did not constitute a grave breach of duty to the defendant. Thus it appears that the first test invoked by counsel for plaintiffs in error falls.

The second one seems to us equally as inapplicable. It seems that, instead of taking "no part whatever in the negotiations," Poole took a very active part therein. The evidence shows that, when the right of way agent arrived to close up the deal, Poole telephoned to defendant of his arrival and warned defendant not to see him alone, "because I might queer the deal." And the evidence further tends to show that Poole was present at all the conferences between the right of way agent and the defendant, and actively participated in deceiving the defendant as to the facts. Instead of forwarding the negotiations between Brown and the railway company in the interest of his principal, he forwarded them in the interest of the railway company. He was bound to disclose to his principal all facts open to his knowledge material to the matter in which he was employed. He not only concealed material facts, but by direct false statements did everything in his power to mislead and deceive the defendant. Paraphrasing a sentence from Young v. Hughes et al., 32 N. J. Eq. 372, a case resembling this in a great many particulars, it is impossible to read the testimony without concluding that the skill and experience of Poole were not exerted for, but rather against, his principal. It is well settled that no sale from which a substantial advantage has been derived can be sustained when he who actively promoted it,

acted as the ostensible agent for the vendor, when in reality he was the secret agent of the purchaser. *Donovan v. Campion et al.*, 85 Fed. 71, 29 C. C. A. 30.

[2] On the next proposition there is considerable evidence tending to support the contention of counsel for plaintiffs in error, but there is also evidence reasonably tending to support the findings of the court thereon. That being so, this court is not called upon to weigh the evidence. It is unnecessary to notice in detail the evidence on this point. It is clear that up to the time the deed was delivered the defendant was deceived as to the true condition of affairs by the false statements of one whom he had a right to believe. After the deed was delivered, the defendant evidently became suspicious that something was wrong, but that he confirmed what had been done after full knowledge of all the facts is not at all apparent. As to what transpired at the time the deed was delivered, Mr. Poole testified: "As I remember, I laid the voucher and draft out on the counter. He laid the deed down also. We stood there and talked a minute or two, and Mr. Brown signed the voucher, and I witnessed it right there, L. T. Poole. I took up the deed, Mr. Brown took up the draft for \$3,800, and Mr. Brown said the property was too cheap; he had been stung."

It is upon the fact that the consideration was paid with drafts of the railway company, and the statement by Brown that he had been stung, that counsel principally base their contention that the defendant elected to waive the alleged fraud after discovering the same, and is therefore estopped from setting it up in impeachment of the deed. We cannot agree with counsel. While it may be true that defendant discovered facts which made him suspicious of the good faith of his agent, there is nothing to show that he had possession of sufficient facts to enable him to determine just how and by whom he had been deceived and what his rights in the premises were. The railway company was at all times denying that it had any interest in the land, and a year and six months after the commencement of the proceedings, and some considerable time after the defendant filed his answer and cross-petition, it solemnly "disclaims any interest in this suit and denies that it is the proper party defendant in this cause." It is apparent that at that time the officers and the legal department of the railway company were of the opinion that what had transpired tending to inform the defendant of the true situation was not sufficient to establish its connection with the transaction. On the whole, we are of the opinion that there is evidence reasonably tending to show that the defendant, in due time after the discovery of the fraud practiced upon him, sought the relief to which he was entitled, and did not by delay and vacillation waive his right to a rescission of

the sale and a cancellation of the deed upon the ground of the fraud of his agent.

The judgment of the court below must therefore be affirmed. All the Justices concur, except Williams, J., absent and not participating.

(34 Okl. 166)

WELCH v. BARNETT et al.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 185*) — REVIEW — TRIAL DE NOVO.

By section 16 of article 7 of the Constitution and section 1982 of Comp. Laws 1909, it is provided that in all cases appealed from the county court to the district court the cause shall be tried de novo upon questions of both law and fact; and when such an appeal is taken, in order that jurisdiction may be conferred upon the district court, a motion for new trial is not required.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 185.* Appeal and Error, Cent. Dig. §§ 102, 3877, 3827.]

2. COURTS (§ 185*)—COUNTY COURTS—TRIAL DE NOVO—"CIVIL CAUSE."

The term "civil causes," as used in Comp. Laws 1909, § 3959, which provides that in the trial of such causes in the county court the pleadings and practice shall be the same as that of the district court, does not include matters arising in the exercise of the probate jurisdiction of the county court. There is a distinction between "civil causes" and cases arising under the probate jurisdiction of the county court under the classification of sections 15 and 16 of article 7 of the Constitution, providing for appeals from the county court to the Supreme Court and to the district court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 185.*

For other definitions, see Words and Phrases, vol. 2, pp. 1183-1193; vol. 8, p. 7603.]

3. WILLS (§ 164*)—UNDUE INFLUENCE—ADMISSIBILITY OF EVIDENCE.

Upon a contested petition for the probate of a will, where the grounds of contest are that the testator did not possess testamentary capacity, and that he was subjected to undue influence by the beneficiaries of the will, evidence should be admitted tending to show the relations existing between the beneficiaries and the testator, which resulted in the procurement by them from him of a deed to a portion of his property, which was executed seven or eight months prior to the date of the will, and all the facts and circumstances connected with said deed and the subsequent relations between the parties.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

4. WILLS (§ 164*)—PROBATE—ADMISSIBILITY OF EVIDENCE.

The beneficiaries of a will executed by a full-blood Indian were two white men, one of whom was a lawyer, who drew the will, and the third was an Indian judge. Evidence was offered tending to show that these same parties were beneficiaries in four other wills made by full-blood Indians, and that this white lawyer prepared these other wills and kept possession of them. This evidence was excluded. *Held*, on account of the relations between the white race and the Indian race, and of the conditions prevailing in portions of the state, that this evidence should have been submitted for con-

sideration in determining the question of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

5. WILLS (§ 164*)—UNDUE INFLUENCE—ADMISSIBILITY OF EVIDENCE.

In trying an issue of undue influence, alleged to have been exerted by the beneficiaries upon the testator in the making of his will, every fact from which the inference might legitimately be drawn that such influence had or had not been exerted, or, if exerted, that it had or had not been effective, is admissible, provided the time of its exertion is not so remote that no effect can reasonably be attributed to it, and that such evidence tends to show that the effect of the influence was operative upon the mind and will of the testator when he executed the instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Hughes County; John Caruthers, Judge.

Petition by David A. Barnett and others for probate of the will of Bunnie Hawkins, deceased, and Ralph Welch, guardian of Addie Hickory, objects on the ground of undue influence, duress, and fraud. From a judgment in favor of the beneficiaries David A. Barnett and others, Welch brings error. Reversed and remanded.

This action originated in the probate court of Hughes county by the filing of a petition by David A. Barnett, praying for the probate of the will of one Bunnie Hawkins, deceased, and the issuance of letters testamentary to the petitioner, the executor named in said will. The probate of this will was resisted by Ralph P. Welch, guardian of Addie Hickory, a minor, and the only heir of Bunnie Hawkins, plaintiff in error, upon the grounds that the will was not executed in accordance with the requirements of the statute, and that it was executed because of the undue influence, coercion, duress, and fraud practiced upon said Bunnie Hawkins by David A. Barnett, James A. Ostrum, and John E. Turner, the beneficiaries named in the will, and for the further reason that Bunnie Hawkins was not possessed of testamentary capacity at the time of the execution of the will. Upon the issues thus made, a trial was had in the probate court, resulting in a finding that the will, while executed by Bunnie Hawkins, was executed at a time when he did not possess testamentary capacity, and because of the undue influence exerted over him by the beneficiaries, and an order was made denying the probate of the will. From this order the beneficiaries, Barnett, Ostrum, and Turner, appealed to the district court of Hughes county, where trial was had and judgment rendered in favor of the beneficiaries, who are the defendants in error here. Thereupon Ralph P. Welch, the guardian of Addie Hickory, brings the case to this court by petition in error.

Lewis C. Lawson, of Holdenville, and James A. Long, of Wetumka, for plaintiff in error. J. R. Witty, of Holdenville, and Jno. E. Turner, of Wetumka, for defendants in error.

AMES, C. (after stating the facts as above). [1] The first question presented is whether, on appeal from the county court to the district court from an order refusing to probate a will, a motion for new trial in the county court is necessary to confer jurisdiction upon the district court. We think not. In *Apache State Bank v. Daniels*, 121 Pac. 237 (not yet officially reported), we held that under the provisions of section 16, art. 7, and section 2, of the Schedule of the Constitution, an appeal lies to the district court in probate matters, as provided by the laws of the territory of Oklahoma. *Wilson's Rev. & Ann. St. 1903*, § 1793; *Comp. Laws 1909*, § 5451. Section 16 of article 7 of the Constitution and section 1982 of *Comp. Laws 1909* (*Statutes 1907-08*, p. 285) provide that, "in all cases appealed from the county court to the district court, the cause shall be tried de novo in the district court upon questions of both law and fact." In probate matters the method of taking the appeal to the district court is set out in *Comp. Laws 1909*, § 5455 (*St. Okla. 1893*, § 1487), and it is as follows:

"The appeal must be made:

"1. By filing a written notice thereof with the judge of the county court, stating the judgment, decree, or order appealed from, or some specific part thereof, and whether the appeal is on a question of law, or of fact, or of both, and, if of law alone, the particular grounds upon which the party intends to rely on his appeal; and,

"2. By executing and filing within the time limited in the preceding section, such bond as is required in the following sections. It shall not be necessary to notify or summon the appellee or respondent to appear in the district court, but such respondent shall be taken and held to have notice of such appeal in the same manner as he had notice of the pendency of the proceedings in the county court."

It is apparent that under this section a motion for new trial is not necessary, because the exact manner of taking the appeal is specified, and no motion for new trial is authorized. *Stewart v. Kendrick*, 12 Okl. 512, 73 Pac. 299.

The reason for such a motion is even less under the provision of the Constitution referred to, which provides for trial de novo on all questions of both law and fact. As the district court is not a reviewing court under these provisions of the statutes, but is a trial court, the reason for a motion for new trial does not obtain. It is true the district court is an appellate court; but as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

an appellate court it is required to try the cause *de novo*, and therefore does not review the proceedings in the county court.

[2] It is argued, however, that Comp. Laws 1909, § 3989 (Session Laws 1907-08, p. 474, § 7), requires a motion for new trial. That statute is as follows: "For the trial of all criminal cases, now, or hereafter pending, or transferred in or to any county court, and for the trial of all civil cases, now, or hereafter pending in any county court, the pleadings, practice and procedure shall be the same as that of the district court."

Conceding, without deciding, that this statute would require a motion for new trial in cases covered by it, we do not think probate proceedings are included within the term "civil causes," as used in this section. Section 15 of article 7 of the Constitution provides for appeals from the county courts to the Supreme Court; while section 16 of that article provides for appeals to the district court. Those two sections are as follows:

"Appeals and proceedings in error shall be taken from the judgments of the county courts direct to the Supreme Court, in all cases appealed from justices of the peace, and in all criminal cases of which the county court is vested with jurisdiction, and in all civil cases originally brought in the county court, in the same manner, and by like proceedings as appeals are taken to the Supreme Court from the judgments of the district court.

"Until otherwise provided by law, in all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county court to the district court of the county in the same manner as is now provided by the laws of the territory of Oklahoma for appeals from probate to the district court, and in all cases appealed from the county court to the district court, the cause shall be tried *de novo* in the district court upon questions of both law and fact."

It will be observed that section 15 covers three classes of cases, and authorizes appeals in these three cases to the Supreme Court. They are as follows: First, all cases appealed from justices of the peace; second, all criminal cases of which the county court has jurisdiction; third, all civil cases originally brought in the county court. Section 16, providing for appeals to the district court, only applies to all cases arising under the probate jurisdiction of the county court. It is thus seen that the Constitution draws a distinction between civil and probate matters; and, in construing the statute referred to, we think the term "civil action," as therein used, should be construed as applicable to the classification of such causes contained in section 15 of article 7; and that probate causes, which are distinguished from civil cases by section 16, should be excluded. In addition to this, it is significant that the section referred to (Comp. Laws 1909, § 3989)

is found in the chapter on Juries and Jurors, and, in all probability, was intended to provide for the trial of jury cases in the county court, and not intended to refer to probate cases.

[3] Having reached the conclusion that there was error in the exclusion of evidence, it will be unnecessary to pass upon the other assignments of error. In order to correctly understand the bearing of the evidence excluded, a brief statement of the facts is necessary. Turner, one of the defendants in error, the beneficiaries under the will of Bunnle Hawkins, is a practicing lawyer. Ostrum, another of the beneficiaries, is a white man, and he and Turner are the principal stockholders and are officers in the Wetumka Oil, Mining & Development Company. Barnett, the third beneficiary, is a Creek Indian, and judge of the Creek courts of the Creek Nation. Some time in the summer of 1907, the beneficiaries of this will secured a warranty deed from Bunnle Hawkins, conveying to the Wetumka Oil, Mining & Development Company 160 acres of land. The consideration agreed upon was \$600, of which \$10 was paid at the time, and various amounts, aggregating a total of \$33.50, were paid up to the time of the execution of the will; \$12.50 thereof being paid on the day before the will was made. The will was executed on March 21, 1908, and therefore six or eight months after the deed was executed. At the time Bunnle executed the will, he had consumption, which resulted in his death about a month afterwards. By its terms the will conveyed all his property, both real and personal, to the beneficiaries therein named, and therefore included the debt which they owed him. The will was drawn by Turner in his office.

We think the court erred in excluding evidence of two classes: First, evidence tending to show the relations between the testator and beneficiaries during the summer of 1907, when they procured the deed; and, second, evidence tending to show that these beneficiaries were, to a certain extent, engaged in the business of becoming beneficiaries in wills executed by Indians. The nature of the evidence of the first class which was excluded is disclosed by the following quotations: "Q. Going back, did you, or Mr. Ostrum, or the Wetumka Oil, Mining & Development Company, execute any note, mortgage, duebill, or contract and give it to Bunnle Hawkins, showing the amount of indebtedness due him for the unpaid purchase price of that land? By Mr. Witte: We object as incompetent, irrelevant, and immaterial. By the Court: Sustained. Q. You said there was about \$33 paid on this land. What about the purchase price of that land? By Mr. Witte: We object as incompetent, irrelevant, and immaterial. By the Court: Sustained. By Mr. Long: Q. What was done about it, about securing it? By Mr. Witte: Objected to for the same reason. By the

Court: Sustained. By Mr. Long: I offer to show that the purchase price was not paid, except \$33.50, and that there was no security given to the alleged testator for the payment of the purchase price. By the Court: I have sustained that. By Mr. Long: Exception, please. * * * Q. Did you ever see Bunnie Hawkins and John E. Turner and D. A. Barnett and J. A. Ostrum together? By Mr. Turner: Objected to as incompetent, irrelevant, and immaterial. By the Court: Sustained. By Mr. Long: Exception, please. By Mr. Turner: We will admit we were together several times. By Mr. Long: I offer to show by this witness that he was present— By Mr. Turner: I object to the statement; the question shows itself. By the Court: Sustained. By Mr. Long: Q. What were they doing? By Mr. Turner: We object, for the reason that it is incompetent, irrelevant, and immaterial, unless it is about this transaction. By the Court: Sustained. By Mr. Long: Q. What were they doing at any time prior or after the making of this will? By Mr. Turner: We object as immaterial. By the Court: Sustained. By Mr. Long: Exception, please. We offer to prove by this witness that on a certain night during June or July, 1907, this witness was present in a pasture where they had Bunnie Hawkins, and where they entertained a large number of Indians till after midnight, and that on the next morning they secured deeds to several hundred acres of land, including 160 acres from Bunnie Hawkins, for which they did not pay the full value, or anything like 5 per cent. of the value, of the property; that this transaction was again repeated by the beneficiaries named in this will, or alleged will, on the night of the 8th of August, and August 9, 1907. By Mr. Witte: We move to strike the offer from the record. By the Court: No; let it stay in; but I will sustain the objection. By Mr. Witte: We except. By Mr. Long: I except to the ruling of the court."

Two of the objections to the probate of the will were that Bunnie Hawkins was not of testamentary capacity, and that the beneficiaries had exercised undue influence. We think this testimony should have been received by the court and considered in its bearing upon both these issues.

[4, 5] The evidence of the second class which was excluded by the court is disclosed by the following quotation from the testimony of Turner: "By Mr. Long: Q. Is it not a fact that you have now in your possession four other wills made by full-blood Indians to you that you drew in your office, bequeathing to you their allotments and inherited lands, after you had bought their inherited lands and only paid a small price, a small part of the purchase price, in which Turner, Ostrum, and Barnett are beneficiaries? By Mr. Witte: We object as incompetent, irrelevant, and immaterial. By the Court: Sustained. By Mr. Long: Ex-

ception, please. Q. Mr. Turner, have you not now in this court a case pending, wherein you and Barnett and Ostrum are the beneficiaries named by full-blood Indians, in which you drew the will, and which has been contested? By Mr. Witte: We object as not the best evidence, incompetent, irrelevant, and immaterial. By the Court: It is clearly incompetent."

When we bear in mind the relation of these beneficiaries to the testator, and the peculiar facts and circumstances of this case, we believe this evidence should have been considered. If white men are engaged in the business of becoming the beneficiaries of the wills of full-blood Indians, that is a circumstance which, it seems to us, is proper for consideration in ascertaining whether or not they have exerted undue influence upon any particular one of these Indians. The white man belongs to a different race. The Indians in this state, by virtue of the distribution of their tribal property, are all property owners. Many of them are the owners of valuable property. The full bloods, as a general rule, are known to be peculiarly subject to the loss of their property at the hands of designing and unscrupulous white men. The courts should be astute to furnish them protection, and every legitimate rule of law should be most liberally applied in their interest.

It is not natural that one white man should be the beneficiary of the wills of five full-blood Indians. It is not natural that after full-blood Indians have sold to one white man their inherited lands for a mere fraction of their value that they should be under such heavy obligations to him that they would then voluntarily walk into his office and ask him to draw wills for them, creating him the sole heir of all of their allotments, as well as their inherited lands. This is particularly true when it appears that there is doubt in the minds of the white man about the legal right of these full-blood Indians to sell their inherited lands. One cannot help suspect that these wills have something to do with perfecting the title which the white man has purchased for a nominal consideration. Evidence tending to show a series of transactions of this kind strongly leads us toward the conclusion that the wills resulted from the same influence, which induced the Indians to make the deeds for a wholly inadequate consideration; and, if the admissibility of this evidence can be reconciled with established principles of law, it should certainly be admitted.

In the first volume of Wigmore on Evidence, paragraphs 300 to 383, the author discusses at length the admissibility of evidence tending to establish other offenses or similar acts, for the purpose of showing knowledge, design, intent, habit, status, or course of business. In section 302, he says: "Without formulating any accurate test, and without

attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might, perhaps, be present in one instance; but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. Thus, if A., while hunting with B., hears the bullet from B.'s gun whistling past his head, he is willing to accept B.'s bad aim or B.'s accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A. receives B.'s bullet in his body, the immediate inference (i. e., as a probability, perhaps not a certainty) is that B. shot at A. deliberately; because the chances of an inadvertent shooting on three successive, similar occasions are extremely small; or, to put it in another way, because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i. e., discharge towards the same object, A.) excludes the fair possibility of such an abnormal cause, and points out the cause as probably a more natural and usual one, i. e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i. e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent. The general canon of logical inference already examined (ante, sections 31, 32) is here applied and illustrated."

In the same section the author quotes the following from the opinion of Grove, J., in *Blake v. Assurance Co.*, L. R. 4 C. P. D. 94, 98: "When the question is whether an act was or was not fraudulent, acts of a similar kind are given as evidence to show intention. I remember in a housebreaking case in which I was counsel, a man was found, under suspicious circumstances, in a bedroom. It was set up that he was there courting the servant. To show a guilty intention, Earle, C. J., admitted evidence of the fact that he was seen in a house a week before under circumstances equally suspicious, and which rebutted the idea that he was there for the purpose of courting. * * * To take the common instance of fraud committed by means of begging letters: If a single letter to one individual only were

proved, the evidence would probably be insufficient for a conviction; but the particular transaction is shown to be a guilty one by proving that the person charged has done the same thing 20 times before, and that in each case he has told false stories and given fictitious names. Then is there any rule of law to exclude this evidence? I am of opinion that there is not. Where the act itself does not per se show its nature, the law permits other acts to be given in evidence, for the purpose of showing the nature of the particular act, as, for instance, in cases of uttering counterfeit coin, even in some cases of murder, and generally whenever it is necessary to show the intent with which the act was done. * * * (So in this case) if you show similar shams, carried out under the same false name, and that the defendants are the people who put the money in their pocket in each case, the difficulty arising from any possibility of mistake in the case is removed; and the jury may reasonably be called upon to infer that the defendants intended to pocket the money of the plaintiff in the particular case."

He also quotes the following from the opinion of Judge Taft, in *Penn M. L. Ins. Co. v. M. L. B. & T. Co.*, 72 Fed. 422, 19 C. C. A. 295, 38 L. R. A. 33, 70: "It is a well-established rule of evidence that, where the issue is the fraud or innocence of one in doing an act having the effect to mislead another, it is relevant to show other similar acts of the same person having the same effect to mislead, at or about the same time, or connected with the same general subject-matter. The legal relevancy of such evidence is based on logical principles. It certainly diminishes the possibility that an innocent mistake was made in an untrue and misleading statement to show similar but different misleading statements of the same person about the same matter, because it is less probable that one would make innocent mistakes of a false and misleading character in repeated instances than in one instance."

The author concludes this paragraph, at page 894, with the following: "It is just this requirement of similarity which leaves so much room for difference of opinion, and accounts for the bewildering variances of rulings in the different jurisdictions, and even in the same jurisdiction and in cases of the same offense. Some judges incline to treat the judicial test of probative value as identical with the common-sense test, and to admit such instances as bear a similarity liberally interpreted by the standard of everyday reasoning. Other judges set their faces firmly against every instance which is not on all fours with the offense in issue, regardless of the consideration that justice consists quite as much in protecting the public against evil doers as in showing mercy to those whose guilt has been more

or less skillfully concealed. It is hopeless to attempt to reconcile the precedents under the various heads; for too much depends on the tendency of the court in dealing with flexible principle. One court will be certain to exclude everything that is not too clearly probative for even technical quibblers to oppose, and sometimes will exclude even that. Another court will accept whatever has real probative value. Something, however, may, perhaps, be gained by realizing, as to the former, that it is not the law, nor precedent, nor principle, nor policy, that will account for such rulings, but merely a rooted inclination to take the stricter view and a preference to err in favor of criminals and against innocent victims."

In Jones on Evidence (2d Ed.) § 143, it is said: "In criminal cases the conduct of the prisoner on other occasions is sometimes relevant, where such conduct has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intentions in doing the act complained of. Thus, on trials for uttering counterfeit bills or coin and forged instruments, it has long been the practice to admit evidence of the uttering of similar counterfeit money or forgeries to other persons about the same time; for, while in a single case the uttering of counterfeit money might be perfectly consistent with innocence, the probabilities of guilty knowledge rapidly increase on proof of a continued dealing in the unlawful money. On an accusation for receiving stolen property, knowing it to have been stolen, evidence that the accused has frequently received similar articles under like circumstances from the same thief, and stolen from the same person or place, knowing that they were stolen, is relevant to show guilty knowledge. The same rule has been applied in actions for conspiracy; for example, where the proof tended to show that the accused and a deputy collector had conspired to defraud the revenue by entering goods at an undervaluation, evidence of other transactions in furtherance of the common enterprise was held relevant. On the same principle in trials for embezzlement, other previous acts of the defendant of a similar character, so intimately connected with the one under investigation as to show common criminal intent, are relevant."

These same rules are stated with much fullness in Wigmore on Evidence in the sections cited; and at section 370 that author says that the same rules apply in civil as in criminal cases. If evidence of similar transactions is admissible on a trial for uttering counterfeit bills, if evidence of similar transactions is admissible on a charge of receiving stolen property, if evidence of similar transactions is admissible on a trial for conspiracy, if evidence of similar transactions is admissible to determine the fraud-

ulent nature of the transfer of property (Wigmore on Evidence, § 333), then we hold that under the facts and circumstances of this case evidence of similar transactions may be considered as bearing upon the intent of these beneficiaries to commit a fraud against the testator and his heirs.

At section 333 Wigmore says: "Here the question is whether the transfer was made with intent to defraud the transferor's creditors by deceiving, delaying, or hindering them. The act of transfer is conceded; no specific question as to knowledge (except of insolvency) usually arises (ante, section 301); and the inquiry is simply as to the intent accompanying the act. On the intent theory (ante, section 302), other transfers of property may have some bearing on this question by tending to negative the probability of good faith. They will have such a probative value whenever they are made under such circumstances that they cannot be naturally accounted for by the ordinary course of business in which such transfers occur, from time to time, with good faith. The difficulty is to determine what circumstances are essential to produce this improbability that the transfer was in that ordinary course of business which involves good faith. (1) The quantity of property conveyed will have great weight, as where all the debtor's estate is conveyed; but this is not an essential. (2) The persons to whom the transfers are made will have weight, because ordinary transfers are naturally made to various persons, and a multiplicity of transfers to the same person is hardly to be accounted for by good faith. Moreover, the family or friendly relationship of the transferee may strengthen the improbability. But it is not essential that the transferee should be the same person in each case, or should be intimately related. (3) The time of the other transfers has much weight; for in the ordinary course of business a large proportion of the entire property may be casually sold from time to time, but not repeatedly within a short time. But the time is chiefly important so far as the other transfers occur during the period when the transferor is insolvent, because the singularity of such transfers at that time is less accountable by the ordinary course of business than at any other time. It is usually said that the other transfers offered must have occurred during a time of insolvency, actual or impending; but this should hardly be required as a rule. Subsequent, as well as prior, transfers equally avail to negative good faith. (4) The consideration is material; for a voluntary transfer at such a time is singularly inconsistent with the probability of good faith. On the whole, then, while several sorts of circumstances are significant, their weight may vary in each case, and no one of them is essential, except that of time, and here no fixed rule can be laid down."

The evidence offered and rejected tended to show that these beneficiaries were buying the inherited lands of at least five full-blood Indians; that they were paying for these inherited lands an insignificant proportion of their real value—about 5 per cent.; that they were doubtful about the title which they were acquiring; that these Indians, in addition to their inherited lands, also had allotted lands; that under these circumstances these full-blood Indians voluntarily appeared in the office of one of the beneficiaries, the lawyer, and asked him to write wills, devising and bequeathing to him and his associates all of their property, real and personal, thus disinheriting their lawful heirs and substituting these beneficiaries, two of whom were of a different race, and none of whom were in any way related. The situation is so repugnant to the natural course of events, and to the natural sentiments of humanity, as to almost justify its condemnation as against public policy; and we believe these facts should be considered in determining the right and justice of the case. Indeed, the policy of this state with reference to this subject was expressed by the Legislature of 1909 in an act which took effect on June 11th of that year, providing " * * * that no person who is prevented by law from alienating, conveying or incumbering real property while living shall be allowed to bequeath same by will." Comp. Laws 1909, § 8892.

An extensive note upon undue influence as affecting the validity of wills is found in 31 Am. St. Rep., extending from page 670 to page 691. The author of this note, at page 670 of 31 Am. St. Rep., says: "That undue influence exercised over a testator will invalidate a will executed by him as the result of its domination is everywhere conceded; and it is therefore of the utmost importance that some test be formulated, by the application of which to established facts a correct conclusion may be reached as to whether or not a will is incurably tainted by this vice. We must, however, confess at the outset that such a test has not been, and cannot be, prescribed, and that each case must be left to be decided in the light of its attendant circumstances. *Elkinton v. Brick*, 44 N. J. Eq. 154 [15 Atl. 391, 1 L. R. A. 161]; *Waddington v. Buzby*, 45 N. J. Eq. 173 [16 Atl. 690], 14 Am. St. Rep. 706; *Hartman v. Strickler*, 82 Va. 225. It is not the means employed, so much as the effect produced, which must be considered in determining whether undue influence has contributed to the making of a will; for, no matter what means have been employed for influencing the judgment or overcoming the will of the testator, yet, if he was able to resist them, and, notwithstanding their existence, to make a disposition of his property according to his own desires, that disposition must stand, because the influences were unavailing. Though, on the other hand, the influence ex-

erted over the testator was such as, if applied under ordinary circumstances, or exercised over persons of ordinary powers of resistance, would be regarded as innocent, yet, if, in the particular case, it resulted in a disposition of property contrary to the testator's desire, the influence was undue. *Levett's Heirs v. Carlisle*, 19 Ala. 80."

At page 688 of 31 Am. St. Rep., the author quotes the following from *Lyons v. Campbell*, 88 Ala. 462, 7 South. 250: "While the mere fact that a will is written by a party who takes a benefit under it does not invalidate it, yet, if the benefit is large, and especially if the beneficiary is a stranger to the testator's blood, the instrument will be scrutinized with suspicion, and clear proof that the testator knew its contents will be required to admit it to probate. Proof of testamentary capacity and of formal execution are insufficient. Because of its accuracy and guarded limitations, we quote the statement of the rule made by Baron Parke: 'If a party writes or prepares a will, under which he takes benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. *Barry v. Butlin*, 1 Curt. 637.' Evidence in the shape of instructions for the preparation of the will, or reading or hearing it read, is the most satisfactory, but not the only precise, species of evidence of the testator's knowledge of the will (circumstantial evidence may be sufficient); but the party claiming under the will, whatever mode of proof he may adopt, must satisfactorily establish that the testator knew the contents; onus probandi is on him."

With reference to the admissibility of evidence, at page 686 of 31 Am. St. Rep., the author says: "It is not possible to specify or describe all the evidence which may properly be received, either to prove or disprove the existence of undue influence. Of course, every fact from which the inference might legitimately be drawn that such influence had or had not been exerted, or, if exerted, that it had or had not been effective, is admissible, provided the time of its exertion is not so remote, either from the making of the will, or from the death of the testator, that no effect can reasonably be attributed to it. On the one hand, it may be conceded that it is not essential that the influence be employed at the time of the execution of the will; and, on the other, that it must continue to be operative upon the mind and will of the testator when he executed his last testament, no matter when it was first exercised. In *re Shaw's Will*, 11 Phila. [Pa.] 51; *Davis v. Calvert*, 5 Gill & J. [Md.] 269, 25 Am. Dec. 282; *Hartman v. Strickler*, 82 Va.

225; *Taylor v. Willburn*, 20 Mo. 306, 64 Am. Dec. 186. In other words, if any fraud, coercion, misrepresentation, or other means of undue influence are exercised over the testator, it is not necessary to prove that they were so exercised at the time the will was executed, but the probability of their being effective or influential must ordinarily diminish with the lapse of time; and the time may be so remote as to justify the exclusion of the evidence."

We have no doubt but that the conclusion we have announced regarding the admissibility of the evidence of the relations between these beneficiaries and the testator in the summer of 1907, and from thence continuously up to the execution of the will, is correct. We confess, however, that the admissibility of the evidence tending to show that these beneficiaries were in the habit, and possibly in the business, of becoming the beneficiaries of the wills of other full-blood Indians may be an extension of the well-settled rules of evidence. But, if so, we believe it is justified by the facts surrounding this particular class of cases, on account of the unusual conditions obtaining in certain parts of this state; and we do not wish to lay down this rule as applicable generally to all cases, but only to those falling within the reason of the rule.

The right of a full-blood Creek Indian to make a will is not questioned in this case.

On account of the rulings on the evidence herein referred to, we think the case should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

PROCTOR v. HARRISON et al.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. FORMER DECISION FOLLOWED.

Same as paragraph 1 of the syllabus in *Welch v. Barnett*, 125 Pac. 472, just decided.

2. FORMER DECISION FOLLOWED.

Same as paragraph 2 of the syllabus in *Welch v. Barnett*, 125 Pac. 472, just decided.

3. WILLS (§ 364*)—PROBATE—APPEAL—TIME FOR TAKING PROCEEDINGS.

In trying the contest over the probate of a will, the county judge filed in the cause findings of fact and conclusions of law. Two days later he entered judgment pursuant to these findings and conclusions. Held, the time within which to appeal commenced to run from the entering of the judgment, and not from the filing of the findings of fact and conclusions of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 828, 829; Dec. Dig. § 364.*]

4. PLEADING (§ 434*)—OBJECTION—CURE BY JUDGMENT.

After a pleading has been treated as sufficient in the trial court, the evidence has all been offered, and judgment rendered, it is too late in this court for the first time to raise the

question that a denial of the answer is not sufficiently pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1478-1480; Dec. Dig. § 434.*]

5. APPEAL AND ERROR (§ 203*)—RECEPTION OF EVIDENCE—OBJECTION.

The failure of the plaintiff to offer certain evidence cannot avail the defendant in this court, when, without objection to the plaintiff's failure to offer this evidence, the defendant himself offers it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. § 203.*]

6. WILLS (§ 108*)—EXECUTION—INDIAN WILL.

Acknowledgment and approval of an Indian will under act of Congress of April 28, 1906, c. 1876, § 23, 34 Stat. 145, as amended by act of May 27, 1908, c. 190, § 8, 35 Stat. 315, examined, and held sufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 249-258; Dec. Dig. § 108.*]

Commissioners' Opinion, Division No. 1, Error from District Court, Hughes County; John Caruthers, Judge.

Petition by B. H. Harrison and another for the probate of the will of Taylor Foley, and Malinda Proctor objects. From a judgment of the district court in favor of the proponents, the contestant brings error. Affirmed.

This proceeding was commenced in the county court of Hughes County by the filing of a petition by B. H. Harrison and Lizzie Fatt for the probate of the will of one Taylor Foley. Notice of the application being given, Malinda Proctor, claiming to be the widow of Taylor Foley, objected to the probate of the will, on the ground that it was not executed in accordance with law; that Taylor Foley was not of sound mind and disposing memory at the time of the execution of the will; and that it was executed by reason of the fraud, misrepresentation, deceit, and undue influence of B. H. Harrison and Lizzie Fatt, the beneficiaries. The county court rendered its decision in favor of the contestant. On appeal to the district court, the judgment was rendered in favor of the proponents of the will, and the contestant brings the case here by petition in error. Affirmed.

Lewis C. Lawson, of Holdenville, and James A. Long, of Wetumka, for plaintiff in error. J. L. Skinner, of Holdenville, for defendants in error.

AMES, C. (after stating the facts as above). [1, 2] The first question argued is that no motion for new trial was filed in the county court, and that therefore the district court had no jurisdiction to hear the appeal. This identical question has been determined by us in the case of *Welch v. Barnett*, just decided, where we held that no such motion is necessary.

[3] It is next argued that the district court was without jurisdiction, because the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appeal was not taken in 10 days. This question is raised for the first time in this court; no motion to dismiss the appeal having been presented to the trial court. The point is without merit. The county judge filed in the cause his findings of fact and conclusions of law. Two days later he entered judgment in the cause. The appeal was taken within 10 days after the judgment was entered. The argument is made that the findings of fact and conclusions of law, as first filed, were the judgment of the court; but we do not concur in this position.

[4] It is next argued that the denials by the proponents of the allegations of fraud made by the contestant are insufficient. This is a question of pleading. The case was tried in the county court and district court on the pleadings as filed, and no point was raised that the denials were insufficient. No motion for judgment on the pleadings was filed, and the point was not in any way reserved, and is in fact without merit. *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680.

[5] At the trial in the county court, the three attesting witnesses were examined. Prior to the trial in the district court, Dick Fatt and Cully Yargee, two of the attesting witnesses, died. On the trial in the district court, the proponents of the will offered the testimony of the living witness, introduced the will, and rested. It is now argued by the contestant that it was necessary for the proponents to offer the testimony of these deceased attesting witnesses as it was given in the county court. Conceding, without deciding, that this position is true, it is of no avail to the contestant, as immediately after the proponents rested the contestant, without demurring to the evidence, offered the testimony of these deceased attesting witnesses, and this testimony was admitted, without objection, and considered by the court.

[6] It is next argued that the acknowledgment of this will before the United States commissioner was insufficient. The act of April 28, 1906, c. 1876, § 23, 34 Stat. 145, as amended by the act of May 27, 1908, c. 199, § 8, 35 Stat. 315, is as follows (1909 Supplement to Fed. Stat. Ann. p. 200): "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States commissioner or a judge of a county court of the state of Oklahoma." The acknowledgment

taken by the United States commissioner is as follows: "State of Oklahoma, County of Hughes—ss.: Be it remembered, that before me, L. S. Fawcett, a United States commissioner in and for the Eastern district of the state of Oklahoma, duly appointed and acting as such, on this 21st day of July, 1908, personally appeared Taylor Foley, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth, and he stated and declared to me that said instrument was his last will and testament, and that the same was read over to him, and that he fully understood its contents prior to the execution thereof, and said will is now by me approved. In witness whereof, I have hereunto set my hand and official seal the day and year above written. L. S. Fawcett, United States Commissioner for the Eastern District of the State of Oklahoma." It is not necessary to say anything further concerning this position, as it is so manifest that the acknowledgment comes within the purpose of the statute that argument cannot make it clearer.

It is next argued that the proof did not show that the testator declared to the attesting witnesses that the instrument was his last will and testament. On this point counsel for both sides have overlooked the following testimony of a witness who was present when the will was executed, and who testified to the manner of its execution: "Q. How long after that before the other witnesses came in? A. He asked me where the other two boys were, and he said, 'Call them in,' and they were called, and he said, 'This is my last will, and I want you to witness it.'" It is argued at great length that the evidence shows fraud in the procurement of the will. We have examined the evidence with care, and some of it tends to establish fraud, while some of it tends to establish the absence of fraud. The case was tried without a jury. The court found the issue in favor of the proponents, and we are not able to say that there was no evidence reasonably tending to support his finding.

We have examined the objections to the rulings of the court on the introduction of evidence, and have read all the evidence in the case. It would accomplish no useful purpose to set out these objections seriatim. None of them involve any new or interesting or uncertain rules of evidence; and it is sufficient to say that, in our opinion, the trial court committed no reversible error in his rulings.

We think the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

LUCAS et al. v. LUCAS.

(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 202*)—APPELLATE JURISDICTION—PROBATE CASES.

An appeal from a judgment, decree, or order of the county court in probate cases will not lie direct from such court to the Supreme Court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

2. COURTS (§ 202*)—APPELLATE JURISDICTION—PROBATE CASES.

Under the provisions of section 16, art. 7, and section 2, of the Schedule of the Constitution, an appeal lies to the district court, in probate matters, in those cases in which an appeal was allowed by the Statutes of Oklahoma Territory (Wilson's Stat. § 1793; Snyder's Stat. § 5451).

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 480-486; Dec. Dig. § 202.*]

Commissioners' Opinion, Division No. 2. Error from Pawnee County Court; N. E. McNell, Judge.

Petition by Clayton Lucas and others, contesting the will of Rus Lucas and asking that its probate be annulled. From a judgment sustaining the demurrer of W. R. Lucas to the petition, the petitioners bring error. Dismissed.

E. M. Clark, of Pawnee, for plaintiffs in error. W. L. Eagleton, of Norman, for defendant in error.

BREWER, C. On September 9, 1909, the plaintiff in error filed in the county court of Pawnee county a petition, contesting the will of Rus Lucas, who died April 5, 1904, and which was probated December, 1904, asking that the will be declared void and held for naught, and that its probate, and all proceedings and orders prior and subsequent to the order of probate, be vacated, annulled, and held for naught; that the plaintiffs in error be decreed to be heirs, and entitled to participate as such, in the estate of the said Rus Lucas, deceased. A demurrer was sustained to this petition, from which action of the court this appeal was brought direct to this court.

[1] A motion to dismiss has been filed by the defendants in error, assigning numerous reasons why the appeal should be dismissed. One of the grounds being that appeals in probate matters in the county court must be taken, to the district court, and cannot be taken direct from the county court to this court. This contention is sound, and goes to the jurisdiction of this court.

[2] Section 16, art. 7, of the Constitution, is as follows: "Until otherwise provided by law, in all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county court to the district court of the county in the same manner as is now provided by the laws of the territory of Oklahoma for ap-

peals from the probate court to the district court, and in all cases appealed from the county court to the district court, the cause shall be tried de novo in the district court upon questions of both law and fact." The law of the territory of Oklahoma in force at the time of the adoption of the Constitution, providing for appeals from the county to the district court, is section 5451, Comp. L. 1909: "An appeal may be taken to the district court from a judgment, decree or order of the county court, * * * against or in favor of the validity of a will or revoking the probate thereof."

That this is a probate proceeding, one involving, and wholly depending upon, the probate jurisdiction of the county court, cannot be doubted. The constitutional provision relative to such appeals affords its own interpretation. The framers of the Constitution provided, with care, just how appeals from the county court might be taken. Section 15 of article 7 allows appeals from the county court direct to the Supreme Court in criminal cases, cases appealed from justice of the peace courts, and in civil cases originally brought in the county court. The next section (16, supra) deals entirely with appeals from county courts in probate matters, thus making the distinction between civil and probate cases clear. That such appeals are properly taken to the district court has been decided here in numerous cases. *Apache State Bank v. Daniels*, 121 Pac. 237; *Burdett v. Burdett*, 26 Okl. 416, 100 Pac. 922, 35 L. R. A. (N. S.) 964; *Burnett v. Jackson*, 27 Okl. 275, 111 Pac. 194; *Welch v. Barnett*, 125 Pac. 472. In *Apache State Bank v. Daniels*, supra, it is said: "Under the provisions of section 16, art. 7, and section 2 of the Schedule of the Constitution, an appeal lies to the district court, in probate matters, in those cases in which an appeal was allowed by the Statutes of Oklahoma Territory (Wilson's Stat. § 1793; Snyder's Statutes, § 5451)." In the *Welch Case*, supra, it is held that: "Probate proceedings" are not included in the term 'civil causes,' as used in section 15, art. 7, of the Constitution."

Without going into the other grounds urged for dismissal, we think it is clear that this court is without jurisdiction in this case, and that the appeal should be dismissed.

PER CURIAM. Adopted in whole.

MUSKOGEE ELECTRIC TRACTION CO. v. STAGGS.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 692*)—PRESENTING QUESTIONS IN TRIAL COURT—OFFER OF EVIDENCE.

In order that this court may consider assignments of error relating to the exclusion of

evidence, there must be a showing in the record as to what the excluded evidence would have been, before this court can say that there was error in the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

2. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO CASE.

An instruction, not supported by the evidence, but which requires a finding by the jury on a material issue raised by the pleadings, is erroneous, and should not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Millie Staggs against the Muskogee Electric Traction Company for personal injuries. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

N. A. Gibson and H. C. Thurman, both of Muskogee, for plaintiff in error. Bert G. Wood and O. T. Gilbertson, both of Muskogee, for defendant in error.

ROBERTSON, C. [1] It is essential to a correct determination of the issues involved herein that the record show whether or not the accident occurred on a public highway or street, or on private property. Plaintiff alleged in her petition that the accident occurred on a public street in the city of Muskogee; while the defendant alleged in its answer that the point where the accident occurred was on its private property, and that plaintiff, at the time she was injured, was a trespasser. It can readily be seen that wholly different rules covering the admission of testimony and fixing the rights, duties, and liabilities of the parties would apply in the one case from those applicable to the other. The plaintiff at the trial attempted to introduce certain plats, whether for the purpose of showing that the scene of the accident was within the limits of the city of Muskogee, or that the street had been regularly surveyed and laid off, or for both, or for some other purpose, we are unable to say, as counsel for plaintiff failed to incorporate in the record his reasons for offering the same. Objection was made by the Traction Company to the introduction of these plats in evidence, such objection being sustained by the court, and an exception taken by the plaintiff to such ruling; but plaintiff did not incorporate these plats in the record, nor did he prove that the scene of the accident was within the limits of the city of Muskogee, or in a regularly platted and laid off, or dedicated, or used, street or public highway, and

we are therefore unable to say whether or not there was error in the ruling of the court on this subject. "In order that this court may consider assignments of error relating to the exclusion of evidence, there must be a showing in the record as to what the excluded evidence would have been, before this court can say that there was reversible error in the ruling." *Fred H. Turner et al. v. Moore*, 126 Pac. —,† not yet officially reported; *Hutchings v. Cobble*, 120 Pac. 1013.

[2] The evidence in this case, however, did not authorize the giving of instruction No. 2, and the issue thus submitted to the jury was not sustained by proof. In fact, there was no competent evidence in the case tending to show that Twenty-First or Harsha street was a public highway within the limits of the city of Muskogee on October 6, 1909, or that it had ever been laid off, by any act of the owner, granting the same to the public, or that the same was on a section line, or any part of the government town site, or that it had become a public highway by prescription, or otherwise. The record is free from any evidence, or offer of evidence, which tends to establish these facts. If the place where the accident occurred was not on a public highway, but, on the contrary, was on private property, as the Traction Company insists, then it necessarily follows that wholly different rules would apply in the conduct of the trial of the cause, especially as affecting the rights, duties, and liabilities of the parties concerned. An instruction, not supported by the evidence, but which requires a finding by the jury on a material issue raised by the pleadings, is erroneous, and should not be given.

We would therefore be warranted by the condition of the record in reversing this case on the refusal of the trial court to sustain defendant's motion for a peremptory instruction in its behalf; but, perceiving the importance of the questions involved, as well as recognizing the fact that the error complained of can be remedied by a new trial, if the facts really exist as alleged by defendant in error in her petition, we are constrained to remand the cause for another trial, where the errors now complained of may be corrected, if such correction is possible.

The other questions raised in the assignment of error do not require further consideration, inasmuch as the cause must be remanded for a new trial.

For the reasons above given, the judgment of the superior court of Muskogee county should be reversed and the cause remanded, with instructions to grant a new trial.

PER CURIAM. Adopted in whole.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing pending.

(14 Ariz. 107)

CHAVEZ v. TERRITORY.

(Supreme Court of Arizona. June 25, 1912.)

CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—SCOPE AND CONTENTS.

Under Pen. Code 1901, § 983, providing that the statute relating to exceptions, what constitutes the record, and the manner of making oral proof a part of the record in civil cases is applicable to criminal cases, rulings on the admissibility of evidence on a criminal trial cannot be reviewed on appeal, in the absence of a bill of exceptions, unless the reporter's transcript is certified by the trial judge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

Appeal from District Court, Yavapai County; before Justice Edward M. Doe.

N. B. Chavez was convicted of murder in the first degree, and he appeals. Affirmed.

E. J. Mitchell, of Prescott, for appellant. Attorney General Bullard, for the Territory.

FRANKLIN, C. J. N. B. Chavez was indicted for murder and under the indictment a verdict of murder in the first degree, fixing the penalty at death, was returned by the jury. The prisoner was sentenced to suffer death, and appeals.

The brief of appellant, and the two assignments of error therein, relate exclusively to alleged errors of the trial court with respect to its rulings on the admission of evidence. There is no bill of exceptions, and the reporter's transcript is not certified to by the trial judge.

However much we may dislike to refrain from passing upon the merits of an assignment of error, this court cannot disregard the plain provisions of the law with reference to what constitutes the record, and what may be considered on appeal to the Supreme Court. Paragraph 983 of the Penal Code provides: "The statute relating to exceptions, what constitutes the record, and the manner of making oral proof a part of the record in civil cases is hereby made applicable to all criminal cases." The statutes relating to the matters mentioned in the foregoing provision of the Penal Code will be found in paragraph 874, Revised Statutes of 1887 (chapters 17 and 19, tit. 17, Revised Statutes of 1901; section 15, c. 74, Laws of 1907), and have been in force and effect for many years. The Supreme Court of the territory has repeatedly held, and we think correctly, that under these statutes the rulings of the trial court with respect to the introduction or exclusion of evidence cannot be reviewed on appeal to this court in the absence of a bill of exceptions, unless the trial judge certifies to the reporter's transcript, and that such statutes are as binding upon appellants and the court in criminal cases as in civil cases. *Romero v. Territory*, 12

Ariz. 10, 95 Pac. 101; *Molina v. Territory*, 12 Ariz. 14, 95 Pac. 102. That the reporter's transcript may import absolute verity as to the matters complained of, the law requires the authentication thereof by the trial judge. This court is therefore precluded from considering the assignments of error urged in appellant's brief.

This being a criminal case where the death penalty was awarded, we have most carefully scrutinized the record as it is presented to us. The indictment is sufficient, and the evidence in the case is ample to support the conviction. The instructions are a good exposition of the law applicable to the facts of the case. No error of a material character appearing in the record which we can consider, the judgment of the lower court is in all things affirmed. The case is remanded to the superior court of the state of Arizona in and for the county of Yavapai, with instructions to carry the judgment of the district court of the Fourth judicial district of the territory of Arizona in and for the county of Yavapai into execution.

CUNNINGHAM, J., and **DUFFY**, Superior Court Judge, concur.

ROSS, J., being disqualified and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. E. J. DUFFY, judge of the superior court of the state of Arizona in and for Santa Cruz county, to sit with them in the hearing of this case.

(14 Ariz. 103)

PEREZ v. TERRITORY.

(Supreme Court of Arizona. July 11, 1912.)

1. GRAND JURY (§ 19*)—OBJECTIONS—TIME FOR MAKING WAIVED.

Where a statute prescribes a particular way to raise an objection, a failure to pursue that method will amount to a waiver, where the objection is one which could have been cured, had attention been called to it, so that, as under Pen. Code 1901, § 797, a person held to answer to a charge for a public offense cannot object "to the panel or to an individual grand juror by any other mode than by challenge," a failure to challenge the panel of the grand jury, or to move to quash the indictment for irregularity in its organization, amounts to a waiver.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 53-55; Dec. Dig. § 19.*]

2. CRIMINAL LAW (§ 1090*)—APPEAL—BILL OF EXCEPTIONS—CERTIFIED TRANSCRIPT.

The rulings of the trial court in a criminal prosecution on the introduction or exclusion of evidence cannot be reviewed on appeal, in the absence of a bill of exceptions, unless the trial judge certifies the correctness of the reporter's transcript.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2808-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. HOMICIDE (§ 142*)—INDICTMENT—ISSUES, PROOF, AND VARIANCE.

Where, in an indictment for murder, the name of the deceased was given as Felicio C., and there was proof that the true name of the person killed was Feliciano C., the variance, if any, was immaterial, as the one name is evidently a contraction of the other, and the direction of an acquittal would not be justified.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. § 142.*]

4. HOMICIDE (§ 268*)—QUESTION FOR JURY—VARIANCE.

In a prosecution for murder, whether there was material variance between the proof and the allegations of the indictment as to the name of the deceased, was a question for the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 562; Dec. Dig. § 268.*]

Appeal from District Court, Yavapai County; before Justice Edward M. Doe.

Eduardo Perez was convicted of murder in the first degree, and appeals. Affirmed.

Clark, Haworth & Stewart, of Prescott, for appellant. G. P. Bullard, Atty. Gen., for the Territory.

GUNNINGHAM, J. The defendant was indicted for the killing of Felicio Chacon on August 14, 1910, at or near Congress Junction, Yavapai county, Ariz., to which indictment he pleaded not guilty. A trial was had, and the jury returned a verdict of guilty of murder in the first degree and fixed the death penalty. The judgment of the court followed the verdict, from which judgment, and from an order denying the defendant's motion in arrest of judgment, and from an order denying the defendant's motion for a new trial, he prosecutes this appeal.

The defendant assigns a number of errors, which we shall consider, but not in the order of their assignment.

[1] Defendant's seventh assignment of error is based upon the order overruling his motion in arrest of judgment. This motion alleges irregularities in the drawing and impaneling of the grand jury which returned the indictment upon which the trial was had, contending that such irregularities render the trial and conviction upon an indictment by said grand jury wholly void, and alleges that the trial jury which convicted the defendant was illegally drawn and impaneled.

The record filed in this court by the defendant fails to incorporate the minutes of the drawing of the grand jury, but the alleged record is presented in the form of appellant's motion in arrest of judgment, supported by affidavits. The record discloses no challenge to the panel of the grand jury, nor any motion to quash the indictment by reason of any irregularities committed in the organization of the grand jury.

A person held "to answer to a charge for a public offense can take advantage of any objection to the panel or to an individual grand juror in no other mode than by challenge." Section 797, Penal Code of Arizona 1901.

When, by statute, a particular way is prescribed to raise an objection, and the party neglects to pursue the statutory way, and the objection is one which could have been cured at the time, if attention had been called to it, he must be adjudged to have waived such objection. He must assert his privilege in the proper way and at the proper time, or he is deemed to have waived it. *Montgomery v. State*, 3 Kan. 263; *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513; *Thomas v. Territory*, 11 Ariz. 184, 89 Pac. 591.

The appellant is likewise deemed to have waived the objections raised to the impaneling of the trial jury, under the authorities cited above.

[2] A number of assignments are based upon alleged error committed by the court in its rulings upon the admission and exclusion of evidence upon the trial of the case. The correctness of the reporter's transcript of the testimony is not certified to by the trial judge, and no bill of exceptions, other than the reporter's transcript, appears in the record.

This court held, in the case of *Chavez v. Territory*, 125 Pac. 483, recently decided, that under the statutes now in force the rulings of the trial court with respect to the introduction or exclusion of evidence cannot be reviewed upon appeal to this court, in the absence of a bill of exceptions, unless the trial judge certifies to the correctness of the reporter's transcript. *Romero v. Territory*, 12 Ariz. 10, 95 Pac. 101; *Molina v. Territory*, 12 Ariz. 14, 95 Pac. 102. This court is therefore precluded from considering the assignments of error alleged by appellant, based upon the introduction and exclusion of testimony.

[3] The name of the deceased, as laid in the indictment, is Felicio Chacon, and some evidence was produced on the trial tending to prove that the true name of the person killed by the defendant on the 14th day of August, 1910, was Feliciano Chacon, and upon this state of the case, at the close of the testimony for the prosecution, the appellant moved the court to instruct the jury to acquit on the grounds of a variance, which motion was denied, and such ruling is assigned as error. We think the variance, if any, immaterial. Felicio and Feliciano evidently have the same derivation, the one a contraction of the other. It was not a misnomer to designate the deceased as Felicio Chacon, when his correct name was Feliciano Chacon; and the jury, under the evi-

dance in the case, when the question contested was the name, were justified in considering the two names one and the same. *Alsop v. State*, 36 Tex. Cr. R. 535, 38 S. W. 174; *Walter v. State*, 105 Ind. 589, 5 N. E. 735; *State v. Watson*, 30 Kan. 281, 1 Pac. 770.

[4] "Whether there is a material variance between the proof and the allegations of the indictment as to the names of persons, or any other facts, is a question for the jury." 12 Cyc. 590.

The question was fairly and properly submitted to the jury, and the jury found the fact against appellant's contention. We think no error was committed by the court in denying the motion and submitting the question to the jury.

We have carefully examined the entire record presented. We think the instructions of the court fairly placed the law of the case before the jury, and we think the substantial evidence supports the verdict. While we regret the necessity, we must affirm the judgment of the trial court, and order that the sentence be carried out in accordance with the law in such cases provided.

FRANKLIN, C. J., and DUFFY, Superior Court Judge, concur. ROSS, J., being disqualified and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. FRANK J. DUFFY, Judge of the superior court of the state of Arizona in and for the county of Santa Cruz, to sit with them in the hearing of this cause.

EX PARTE RIGGERT.

(Supreme Court of Oklahoma. July 20, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 994*)—JUDGMENT—CORRECTION.

Where a defendant is tried, convicted, and sentenced to imprisonment, but, by the error of the clerk, the judgment is not entered on the records of the court, the error may be corrected at any time by an order nunc pro tunc. Following *Ex parte Lydia Howland*, 3 Okl. Cr. 142, 104 Pac. 927, Ann. Cas. 1912A, 840.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2532-2535; Dec. Dig. § 994.*]

2. CRIMINAL LAW (§ 1217*)—EXECUTION OF SENTENCE—IMPRISONMENT.

The prisoner having been formally convicted, and not having served his sentence, and the judgment of conviction not being stayed as provided by law, he may be apprehended as on escape and placed in custody on the unexecuted judgment.

(a) Expiration of time, without imprisonment, is in no sense an execution of the sentence. Following *Ex parte John Eldridge*, 3

Okl. Cr. 499, 106 Pac. 980, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3269; Dec. Dig. § 1217.*]

Original petition by H. Riggert for writ of habeas corpus. Petition denied.

Brissett, Sniggs & Wilson, of Oklahoma City, for petitioner. Smith C. Matson, Asst. Atty. Gen., opposed.

WILLIAMS, J. On June 4, 1912, the petitioner petitioned this court for his discharge under writ of habeas corpus. The facts appear to be as follows:

In *State of Oklahoma v. H. Riggert*, No. 1-835, in the county court of Oklahoma county, the defendant was proceeded against by information for the crime of selling intoxicating liquor. In February, 1910, he was duly tried before said court, and the jury returned a verdict of guilty thereon. On April 21, 1910, he was sentenced to confinement in the county jail of Oklahoma county for a period of 60 days, and adjudged to pay a fine of \$200 and costs, all of which appears from the journal entry. Afterwards an appeal was prosecuted to the Criminal Court of Appeals. On November 11, 1911, said appeal was dismissed. 6 Okl. Cr. 338, 118 Pac. 616.

[1] On May 22, 1912, an order of commitment was issued, and the petitioner was incarcerated under said sentence. Prior to said date, both by the district court of Oklahoma county and the Criminal Court of Appeals, on an application for habeas corpus, upon the ground that no proper entry had been made of the judgment sentencing the prisoner in accordance with the verdict, the petitioner was released upon habeas corpus; but thereafter, by a nunc pro tunc order, such judgment was duly entered in said county court in accordance with the verdict of the jury. The petitioner having been apprehended, after the entering of said judgment nunc pro tunc, said commitment was issued.

In *Ex parte Lydia Howland*, 3 Okl. Cr. 142, 104 Pac. 927, Ann. Cas. 1912A, 840, it was held by the Criminal Court of Appeals: "Where a defendant is tried, convicted, and sentenced to imprisonment, but, by error of the clerk, the judgment is not entered on the records of the court, the error may be corrected at any time by an order nunc pro tunc."

[2] In *Ex parte John Eldridge*, 3 Okl. Cr. 499, 106 Pac. 980, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967, it was held by the same court that "Where a convicted defendant is at liberty and has not served his sentence, and the same is not stayed as provided by law, he may be arrested as on escape and ordered into custody on the unexecuted judgment." And, further, that "Expiration of time, without imprisonment, is in no sense an execution of the sentence."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

These decisions by the Criminal Court of Appeals, under the rule announced in *Ex parte Tom Anderson*, 124 Pac. 980, decided by this court on June 11, 1912, but not yet officially reported, will be followed by this court.

It is insisted that the rule announced in *Ex parte John Eldridge*, supra, is in conflict with that announced by this court in *Ex parte Clendenning*, 22 Okl. 108, 97 Pac. 650, 19 L. R. A. (N. S.) 1041, 132 Am. St. Rep. 628. It is not essential here to determine whether such conflict exists; for, under the rule announced in *State ex rel. Ikard v. Russell*, Judge, 124 Pac. 1092, decided by this court on May 14, 1912, but not yet officially reported, as to all such matters we follow the construction of the Criminal Court of Appeals.

The petition for writ of habeas corpus is denied.

HAYES and KANE, JJ., concur. TURNER, C. J., and DUNN, J., absent, and not participating.

(24 Okl. 317)

WILLIAMSON et al. v. ADAMS.
(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 549*)—RECORD—SCOPE AND EXTENT.

Motions presented in the trial court, the rulings thereon, and exceptions are not properly part of the record, and can only be preserved and presented for review on appeal by incorporating the same into a bill of exceptions or case-made. The record proper in a civil action consists of the petition, answer, reply, demurrers, process, rulings, orders, and judgment; and incorporating motions, affidavits, or other papers into a transcript will not constitute them a part of the record, unless made so by a bill of exceptions. Motions and proceedings which are not part of the record proper can only be presented for review by incorporating them into a case-made, or by preserving them by bill of exceptions and embracing them in the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2441-2451; Dec. Dig. § 549.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Louisa Adams against J. C. Williamson and another. From an order confirming a sale under execution, defendants bring error. Dismissed.

See, also, 122 Pac. 499.

Black, Kiskaddon & Toney, of Oklahoma City, for plaintiffs in error. Wright & Blinn, of Oklahoma City, for defendant in error.

BREWER, C. On August 1, 1911, an execution was issued out of the district court of Oklahoma county in favor of Louisa Adams, as plaintiff, against J. C. Williamson and Emma Williamson, as defendants, which was levied by the sheriff of said county upon

certain real estate, and, after notice, sale was had thereon. On September 8, 1911, the plaintiffs in error, J. C. Williamson and Emma Williamson, filed a motion in the lower court to set aside said sale, and in opposition to the confirmation thereof. On September 14, 1911, motion for confirmation of the sale was filed. On October 28, 1911, after hearing evidence on the motion to set aside the sale, and in opposition to its confirmation, the court overruled same, and entered an order confirming the sale.

There were three grounds stated in the motion to vacate the sale and against its confirmation; but two of them were expressly abandoned in the trial court. The remaining ground depended on oral evidence, and the same was introduced in support thereof. Therefore the only question upon which the views of this court are sought is the decision of the court upon the oral evidence offered at the hearing of the motion.

To accomplish this purpose, this case was originally brought to this court on a case-made, which incorporated such evidence. That appeal was No. 8,360, and was dismissed in an opinion by Justice Williams on March 12, 1912, upon the ground that the case-made was not served upon the adverse parties within the time allowed by law. That case is reported in 122 Pac. 499.

After the dismissal of the case brought here on case-made, the plaintiffs in error, on April 20, 1912, procured a certification by the district clerk to the case-made, previously dismissed, and on the same day files it here under its present number as a transcript of the record.

On May 8, 1912, a motion to dismiss this appeal was filed, stating a number of reasons therefor, among them the following: "(4) The attempt to appeal this case is upon transcript, and there is no bill of exceptions, and the evidence shown in the record is the stenographer's notes, which is no part of the record or transcript; and hence there is nothing before the court to be considered." This position is correct, and the case must be dismissed. The only error complained of being an alleged erroneous judgment of the court upon oral evidence introduced on the trial of the motion, and that as evidence was not incorporated into the record by bill of exceptions, or by case-made, there is nothing here for this court to consider. *Tribal Development Co. v. White Bros.*, 28 Okl. 525, 114 Pac. 736; *McCoy v. McCoy*, 27 Okl. 871, 112 Pac. 1040; *School District, etc., v. Vinsant*, 27 Okl. 781, 113 Pac. 714; *Menten v. Shuttee et al.*, 11 Okl. 381, 67 Pac. 478.

In *Tribal Development Co. v. White Bros.*, supra, the court quotes with approval from *Menten v. Shuttee*, supra, as follows: "Motions presented in the trial court, the rulings thereon, and exceptions are not properly part of the record, and can only be pre-

served and presented for review on appeal by incorporating the same into a bill of exceptions or case-made. The record proper in a civil action consists of the petition, answer, reply, demurrers, process, rulings, orders, and judgment; and incorporating motions, affidavits, or other papers into a transcript will not constitute them a part of the record, unless made so by a bill of exceptions. Motions and proceedings which are not part of the record proper can only be presented for review by incorporating them into a case-made, or by preserving them by bill of exceptions and embracing them in the transcript.

The appeal should therefore be dismissed.

PER CURIAM: Adopted in whole.

SCHILLING v. MOORE et al.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 73*)—CONTRACTS ENFORCEABLE—EMPLOYMENT OF REAL ESTATE AGENT.

A contract appointing an agent to sell real estate, and agreeing to deliver deeds therefor as sold, and providing that the real estate agent retain all the proceeds in excess of the amount specified, is not one which can be enforced by a decree of specific performance. Such a contract is a contract of employment, and conveys no interest in the real estate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.*]

2. PRINCIPAL AND AGENT (§ 84*)—CONSTRUCTION OF CONTRACT—POWER COUPLED WITH INTEREST.

An interest in the property upon which the power is to operate, and not merely an interest in the exercise of the power, is essential to make a power of attorney one coupled with an interest.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 55; Dec. Dig. § 34.*]

3. PLEADING (§ 34*)—ALLEGATIONS IN GENERAL—PRESUMPTIONS.

After a party has amended his petition three times, and a demurrer is again sustained to it, no presumption will be indulged in favor of the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 68-74; Dec. Dig. § 34.*]

4. PLEADING (§ 193*)—DEMURRER—GROUNDS.

While an action which is improperly brought for specific performance may be retained by the court for the purpose of rendering damages for breach of the contract, yet, if the petition, after repeated amendments, neither states a cause of action for specific performance, nor for damages for the breach of the contract, a general demurrer thereto should be sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Oklahoma County. A. N. Munden, Judge.

Action by H. C. Schilling against Mattie J. Moore and another. Judgment for defendants, and plaintiff brings error. Affirmed.

W. A. Smith, of Oklahoma City, for plaintiff in error. S. A. Horton, of Oklahoma City, for defendants in error.

AMES, C. [1] This action was brought for the specific performance of the following contract: "Capitol Hill, Okla., December 21, 1908. We, the undersigned, this day appoint H. C. Schilling, or his assignees, exclusive agent for a period of twelve months, to sell and dispose of lots 1, 2, 3, 4, 5, 88, 39, 40, 41 and 42, in block 35, Schilling's addition, supplemental plat, to Oklahoma City, Oklahoma, and we agree to deliver a warranty deed for the same at the rate of \$150.00 per each lot, or its portion, at his request, at any time without delay, and that the said H. C. Schilling agrees to use quick and speedy means to bring about said sale, and should it become necessary to subdivide the said lots that extra expense shall be paid by H. C. Schilling, such as survey, replating and filing said plats, etc. At the expiration of the time stipulated, if the property is not all sold he may continue said agency by paying eight (8) per cent. interest upon the parts unsold, and should it become subdivided we agree to make deeds to the same pro rata upon prices stipulated above. [Signed] Mattie J. Moore, Samuel D. Moore, H. C. Schilling."

An examination of this contract discloses that there was a mere employment of the plaintiff as a real estate agent, and that his compensation for services rendered in the sale of the lots was to be that portion of the purchase price in excess of the amount to be paid the defendants. Such a contract does not convey any interest in the land; and therefore is not one which is required to be in writing. Hancock v. Dodge, 85 Miss. 228, 37 South. 711; Friedman v. Suttle, 10 Ariz. 57, 85 Pac. 726, 9 L. R. A. (N. S.) 983, and the authorities cited in the note following this report.

[2] It is not a power of attorney coupled with an interest. The test to be applied is stated in Taylor v. Burns, 203 U. S. 120, 27 Sup. Ct. 40, 51 L. Ed. 116, as follows: "An interest in the property upon which the power is to operate, and not merely an interest in the exercise of the power, is essential to make a power of attorney one coupled with an interest, so as not to be subject to revocation." To the same effect are Hunt v. Rousmaniere, 8 Wheat. 174, 5 L. Ed. 589; Durkee v. Gunn, 41 Kan. 493, 21 Pac. 637, 13 Am. St. Rep. 360; Taylor v. Burns, 8 Ariz. 463, 76 Pac. 623. The facts in Taylor v. Burns, supra, were stronger than in this case, as appears from the statement thereof in the first paragraph of the syllabus:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"No transfer of title was effected by an instrument which recites that the party of the first part 'sells' certain mining claims to the party of the second part for a specified consideration, and 'upon the terms and consideration following,' and which, in its subsequent provisions, authorizes the party of the second part to sell and negotiate the mines for any sum above \$45,000, and retain out of the purchase price seven-eighths of the excess; the party of the first part agreeing to execute any conveyance thereafter necessary to convey a good title, and the party of the second part assuming no obligations except a general one by which both parties mutually agree to aid each other in the negotiation and sale. Such document is not a deed, but simply a power of attorney, and, as such, subject to revocation." As the plaintiff by this contract acquired no interest in the real estate, he was not entitled to a decree for specific performance.

In *Kimmel v. Powers*, 19 Okl. 339, 91 Pac. 687, action was brought by Kimmel against Powers to secure the specific performance of a contract by which Kimmel was appointed as exclusive agent for the sale of the Woods addition to the city of Lawton, for a period of 10 years, under an agreement by which he was to receive as compensation for his services a percentage of the net proceeds of sales and 25 per cent. of the unsold portions of the addition at the expiration of the contract. The court held that this contract created the relation of principal and agent; that it did not vest in the agent any interest in the real estate itself; and that therefore he was not entitled to a specific performance.

In *Cloe v. Rogers*, 121 Pac. 201, the rule is stated in the syllabus (paragraph 2) as follows: "Where an agency is uncoupled with an interest, it may be revoked by the principal at will, without liability for damages; but where it is for a fixed time, and contemplates on the part of the agent the expenditure of time and money to carry it out, and is accepted and the duties imposed are entered upon by the agent, and money and time are expended in the pursuit of the object of the agency, although the principal has the power to revoke and bring to a termination the contract, yet he lacks the right of so doing, except upon the burden of responding to the agent for such damages as he may suffer by reason thereof."

[4] But the plaintiff claims that even if it be true that he is not entitled to a specific performance, his petition stated a cause of action for damages for the breach of the contract; and that therefore the trial court erred in sustaining a general demurrer to the petition. Conceding that this may be done. (*Superior Oil & Gas Co. v. Mehlin*, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942), it becomes necessary to examine the petition to ascertain whether it states a cause of action for damages.

[3] In *Atwood v. Rose*, 122 Pac. 929, recently decided and not yet officially reported, this court said in the first paragraph of the syllabus: "In the construction of a pleading, challenged by demurrer before trial, nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case warrant."

In *Emmerson v. Botkin*, 26 Okl. 218, 109 Pac. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953, the second and third paragraphs of the syllabus are as follows:

"In a case where a pleading is challenged before trial by demurrer, its language, where doubtful, will be construed against the pleader, upon the ground that, as he selects the language, he should make his meaning clear; and where in such a case a demurrer is sustained on account of the insufficiency of a pleading, and no application for amendment is made, it will be presumed that the facts to justify it do not exist.

"Essential facts necessary to be shown in order to entitle a party to relief demanded, and to which he supposes himself entitled, should be stated in the pleadings by allegation or averment, and not by way of recital."

This rule applies with particular force to the case at bar. A general demurrer was sustained to the original petition. The plaintiff filed an amended petition, and a general demurrer was sustained to this. The plaintiff filed a second amended petition, and a general demurrer was again sustained. The plaintiff thereupon filed a third amended petition, and a general demurrer was again sustained. Having made four efforts to state his case, nothing should be presumed in favor of the plaintiff; and we therefore examine the allegations of the petition to see whether or not he has stated an action at law for damages. It will be remembered that the contract provides that as compensation for his services he shall receive that portion of the purchase price of the lots which is in excess of the amount to be paid to the defendants. It is manifest, therefore, that his measure of damages is this excess. In his petition he alleges only one sale, and that for the exact sum which the defendants were to receive for the lots sold, and he tenders that amount to the defendants and demands a deed. It is manifest, therefore, that on this sale he has sustained no damages, because there is no excess. He also alleges that he has made and entered into contracts with prospective purchasers for other portions of the property, and that some of them are ready, willing, and able to buy, but that the defendants have refused to execute deeds. This allegation, aside from its utter indefiniteness, fails to allege the price at which these contracts were made, and therefore fails to show any damages sustained by the plaintiff. After four attempts

to state his case, it would seem that, if the plaintiff had sold to others at an advance, he would have been able to say so. He alleges that the lots are worth more than the price to be received by the defendant, and prays as damages the difference between the value of the lots and that price; but that manifestly is not any proper measure of damages, as, before he would be entitled to recover, he must produce a purchaser ready, able, and willing to buy (*Yoder v. Randol*, 16 Okl. 308, 88 Pac. 537, 3 L. R. A. [N. S.] 576, and note); or, at all events, he must allege such facts as bring him within the rule laid down in *Cloe v. Rogers*, 121 Pac. 201, supra. It is manifest that this petition was framed four times on the theory that plaintiff was entitled to specific performance. It is not a suit for damages for breach of the contract; and if the proof sustained every allegation of the petition—and no more—no recoverable damage would be shown.

In the syllabus of *Kimmell v. Powers*, 19 Okl. 339, 91 Pac. 687, supra, it is said: "Where a petition neither states a cause of action in equity nor at law, a demurrer thereto should be sustained." As this petition did not state facts sufficient to entitle the plaintiff to specific performance or damages for breach of the contract, we think the trial court was correct in sustaining the demurrer.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(33 Colo. 325)

ROHRER v. ROSS.

(Supreme Court of Colorado. July 1, 1912.)

1. CHATTEL MORTGAGES (§ 138*)—AGISTER'S LIEN—PRIORITIES.

An agister's lien, created by Mills' Ann. St. §§ 2854, 2855, is limited to the right of the owner in the animals delivered for keeping at the time of the delivery, and is subject to a prior chattel mortgage executed by the owner.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. § 138.*]

2. BAILMENT (§ 18*)—REPAIR OF PERSONALTY—RIGHT TO LIEN.

One seeking to enforce a lien for repairs on personal property must show that the property was delivered to him for repairs.

[Ed. Note.—For other cases, see *Bailment*, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. § 18.*]

3. PLEADING (§ 345*)—MOTION FOR JUDGMENT.

A motion for judgment for defendant on the pleadings cannot be granted, though the complaint is defective in not stating facts, since a motion for judgment cannot be converted into a general demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

4. PLEADING (§ 345*)—MOTION FOR JUDGMENT—DEFECT IN COMPLAINT.

A complaint in replevin by the owner of a chattel mortgage against one claiming an agister's lien, which alleges that the lien of the mortgage has been extended by filing with the proper county clerk sworn statements extending

its lien as by law required, sufficiently shows the extension of the lien by affidavit, as against a motion for judgment for defendant on the pleadings; the defect, if any, in the complaint going only to its sufficiency.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

Error to District Court, Boulder County; Harry P. Gamble, Judge.

Action by W. H. Rohrer against George L. Ross. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

C. A. Irwin, Isham R. Howze, and John A. Deweese, all of Denver, for plaintiff in error. J. J. McFeeley, of Denver, for defendant in error.

GABBERT, J. Plaintiff in error brought a suit in replevin against the defendant in error to recover the possession of two horses, one ore wagon, and one set of doubletrees, and a neckyoke. He based his right to the possession of this property upon the ground that he was the owner, by assignment, of a chattel mortgage and note secured thereby, which had been executed by the Champion Mining & Milling Company upon the property involved; that the chattel mortgage had been duly filed for record; that there was due and unpaid on the note thereby secured the sum of \$344.50; and that this note had been extended from time to time, and the lien of the chattel mortgage preserved by filing with the county clerk of the county where the mortgage was recorded affidavits, or sworn statements, as by law required.

The defendant answered, to the effect, so far as material to consider, (1) denying the averments of the complaint; and (2) that the property in controversy, subsequent to the date the mortgage mentioned in the complaint was executed and recorded, had been delivered to him by the mortgagor, with instructions to feed and care for the same; and that in so doing he had incurred an expense in feeding the animals and repairing the wagon of something like \$275, under which he claimed a lien, as provided by the statute. Thereafter, on motion of counsel for defendant, the court entered the default of plaintiff for failure to plead to the affirmative defense. Upon entry of this order, counsel for defendant then made an oral motion for judgment on the pleadings, which was sustained, and judgment rendered, dismissing the action. Plaintiff brings the case here for review.

[1] The first question is whether or not, under our statutes (sections 2854 and 2855, Mills'), which provide that an agister to whom any horses shall be intrusted for the purpose of feeding or keeping, or any mechanic or other person who shall repair any article of personal property at the request of the owner of such property, is entitled to a lien upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

such animals or personal property superior to the lien of a chattel mortgage thereon, duly recorded, before the delivery of such property to either of such persons for either of the purposes named, and the lien thereof preserved in the manner required by law. Upon this subject, with respect to the lien of the agister, the authorities are in conflict. The weight of authority, however, appears to be that, as the lien for agistment is purely statutory, no lien existing therefor at common law, the agister's lien is limited to the right of the owner in the property delivered for feeding, herding, pasturing, or keeping, at the time of such delivery. *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208; *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. 70, 11 L. R. A. 61; *Reynolds v. Case*, 60 Mich. 76, 26 N. W. 838; *Ingalls v. Vance*, 61 Vt. 582, 18 Atl. 452; *McGhee v. Edwards*, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654; *Miller v. Anderson*, 1 S. D. 539, 47 N. W. 957, 11 L. R. A. 317; *Wright v. Sherman*, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792; *Sullivan v. Clifton*, 55 N. J. Law, 324, 26 Atl. 964, 20 L. R. A. 719, 39 Am. St. Rep. 652.

[2.] With respect to the lien for repairs on the wagon, we think it is sufficient to say that, under the averments of the answer, the defendant did not state facts from which it appeared that he was entitled to a lien, either under the statute or at common law, if, under the rules of the latter, a mechanic to whom an article of personal property has been delivered for repairs is entitled to a lien, for the reason that it does not appear from his answer that the wagon was delivered to him for that purpose.

[3, 4.] On behalf of the defendant, it is urged that the judgment should not be disturbed, because it appears from the averments of the complaint that the chattel mortgage is void and of no force or effect. This contention is based upon the ground that the complaint does not show that the mortgage indebtedness, or, rather, the lien thereof, had been extended by affidavits, as required by law. The complaint alleges that the lien of the chattel mortgage had been extended by filing with the proper county clerk sworn statements extending its lien, as by law required. If this statement in the complaint is defective in not stating facts, it only goes to its sufficiency, which, as we have held many times, cannot be the basis for a motion for judgment on the pleadings. In other words, a motion for judgment on the pleadings cannot be converted into a general demurrer. *Whitehead v. Johnson*, 119 Pac. 472. We think the court erred in rendering a judgment on the pleadings, and for this reason the judgment will be reversed, and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

MUSSER and HILL, JJ., concur.

SPRAGUE et al. v. STRATTON, MASSACHUSETTS GOLD MINES CO. et al.

(Supreme Court of Colorado, July 1, 1912.)

1. JUDGMENT (§ 461*)—ACTION TO VACATE—HEARING AND DETERMINATION—BURDEN OF PROOF.

Under Code Civ. Proc. § 102, providing that no injunction shall be granted to stay a judgment at law in a sum in excess of that which the complainant shall show itself equitably not bound to pay, plaintiff, in an action to set aside a judgment obtained by fraud, need not disprove his liability, in whole or in part, for the indebtedness which was the basis of the judgment, but is entitled to the maintenance of its right to defend against such supposed liability, in an action where the burden is on the adverse party.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 892-893, 895; Dec. Dig. § 461.*]

2. CORPORATIONS (§ 317*)—OFFICERS AND AGENTS—FIDUCIARY RELATION—NATURE.

The president, general manager, treasurer, and director of a corporation stands in such relationship to it that he is bound to protect its rights, and to act openly and aboveboard.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401-1414; Dec. Dig. § 317.*]

Error to District Court, Chaffee County; *Lee Champion*, Judge.

Action by the Stratton-Massachusetts Gold Mines Company and others against Charles L. Sprague, and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

G. K. Hartenstein, of Buena Vista, for plaintiffs in error. M. B. Carpenter, of Denver, for defendants in error.

GABBERT, J. Plaintiff in error Sprague brought a suit against the Stratton-Massachusetts Gold Mines Company on four causes of action: (1) For \$4,750, salary due Sprague as general manager of the company; (2) for \$5,252, money advanced and paid out by him for the use and benefit of the company; (3) for \$2,000 due one Slocum for attorney's fees for services rendered the company, assigned to Sprague; (4) for \$2,000 due one Wood for services as secretary of the company, and assigned to Sprague. Judgment was rendered in favor of Sprague by default for the amount of the several causes of action set out in his complaint. Execution issued on this judgment, under which the property of the company was levied upon and sold to Sprague by the sheriff of Chaffee county. Defendants in error brought an action to restrain the issuance of a sheriff's deed to Sprague, and to set aside the judgment.

The trial court found that at the time the action of Sprague was instituted he was president, general manager, treasurer, and a director of the company; that his suit was brought without knowledge of the other directors of the company, and that service in his action was made upon the secretary of the company, brought here from Massachusetts by Sprague for that purpose, who.

upon his return to his home, denied knowledge of the commencement of the action, or of service of summons upon him; and that the other directors did not know the action had been instituted. The judgment was to the effect that the judgment entered in the Sprague action be set aside and held for naught; that the cause be reinstated on the docket, and 60 days allowed the defendant company to answer the complaint. The defendants have brought the case here for review on error.

By the complaint in the case, it was charged that the Sprague judgment was obtained by collusion and fraud; and that the company was not indebted to Sprague upon the several causes of action set out in his complaint, or, at least, not indebted on either of these causes of action in any material sum.

[1] At the close of the testimony on behalf of plaintiffs, the defendants moved for judgment, based upon the provisions of section 146 of our Civil Code (Mills')—section 162, Code Civ. Proc. (Revision of 1908)—which provides, in substance, that an injunction shall not be granted to stay a judgment at law in a sum in excess of that which the complainant shall show himself equitably not bound to pay, and so much as shall be sufficient to cover costs. This motion was denied. Counsel for the defendants contends this ruling was erroneous, for the reason the testimony did not establish that Sprague was not entitled to a judgment for the full amount awarded him in his action. As previously noticed, the complaint in the case at bar charges that the Sprague judgment was obtained by collusion and fraud. The court so found, and the testimony sustains this finding. In such circumstances, while it may be necessary for a party seeking to set aside a judgment, in an action brought for that purpose, to aver nonliability, in whole or in part for the indebtedness which is the basis of such judgment, he is not required to assume the burden of disproving such liability. In *Wilson v. Hawthorne*, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290, it was held that, in an action by a party to set aside a judgment rendered against him without jurisdiction over his person, he is not required to assume the burden of disproving his liability for the indebtedness which was the basis of the judgment. A judgment obtained against a defendant corporation by collusion and fraud, such as was found to exist by the trial court, is, in effect, the same as though no service of summons had been made on the corporation. In such circumstances we think the corporation is not required to prove nonliability, in an action to set aside such judgment, but is entitled to the maintenance of its right to defend against such supposed liability, in an action wherein its adversary must assume the burden of proof. This is the situation of the parties as fixed by the judgment of the trial court.

[2] Several other propositions are urged by counsel for plaintiffs in error, which we do not deem of sufficient importance to consider in detail. The relationship of Sprague to the company at the time he brought his action was such that it was his bounden duty to protect the rights of the company and act openly and aboveboard. By the judgment of which he complains, he has been given the opportunity to prove the indebtedness sued upon in his action after answer filed by the company. This fully protects his rights; and he will not be heard to complain of rulings or matters occurring at the trial which did not deprive him of any substantial rights, when he has been afforded full opportunity to establish the indebtedness sued upon, and secure a judgment therefor after such defense of the company or those entitled to interpose a defense has been heard.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER and HILL, JJ., concur.

HEPP WALL PAPER & MERCANTILE CO. v. DEAHL.

(Supreme Court of Colorado. July 1, 1912.)

1. LANDLORD AND TENANT (§ 291*)—FORFEITURE OF LEASE—"NOTICE"—REQUISITES.

A notice by a landlord, served on the tenant which demands possession within three days, without stating the ground therefor, and a notice served at the same time which recites that the tenant has forfeited the lease by underletting, without the landlord's consent, must be construed as one notice within Rev. St. 1908, §§ 2603, 2605, defining unlawful detainer, and requiring notice in writing specifying the grounds of demandant's right to possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1217-1269; Dec. Dig. § 291.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4839-4844; vol. 8, p. 7733.]

2. APPEAL AND ERROR (§ 173*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN COURT BELOW.

Where a suit for unlawful detainer was not brought until six days after the service of the notice and the question litigated was whether the lease, under which defendant held possession, was forfeited by an underletting, and whether the landlord had consented to the underletting, or had waived a forfeiture by accepting rent, the sufficiency of the notice would not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

3. LANDLORD AND TENANT (§ 112*)—FORFEITURE FOR SUBLETTING WITHOUT CONSENT—WAIVER.

A landlord who accepts rent without notice of a subletting by the tenant does not thereby waive the right to forfeit the lease stipulating for its forfeiture for a subletting without the consent of the landlord.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

4. LANDLORD AND TENANT (§ 104*)—FORFEITURE FOR SUBLETTING—CONDITION PRECEDENT.

A landlord in a lease stipulating for forfeiture for subletting without his consent may insist on a forfeiture of the lease for a subletting without his consent without first returning to the tenant the rent for the portion of the month remaining after learning of the subletting.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 328; Dec. Dig. § 104.*]

5. LANDLORD AND TENANT (§ 112*)—CONSENT TO SUBLETTING—EVIDENCE.

A consent by a landlord to a subletting of a portion of the premises to a corporation engaged in a specified business is not an annulment of the covenant not to sublet without his consent, and the landlord may insist on a forfeiture for a subletting to another without his consent.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

Error to County Court, City and County of Denver; H. S. Class, Judge.

Action by Rose C. Deahl against the Hepp Wall Paper & Mercantile Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Clay B. Whitford and Henry E. May, both of Denver, for plaintiff in error. Elliott & Bardwell, of Denver, for defendant in error.

WHITE, J. Defendant in error on September 18, 1909, executed a written instrument, whereby she leased to plaintiff in error certain premises in the city and county of Denver until the 1st day of October, 1911. The lease was in the ordinary form. By the terms thereof the rent was made payable in advance on the first day of each month, and the premises were not to be underlet or the lease assigned without the written assent of the lessor, first had and obtained thereto. The lessee, however, on August 1, 1910, underlet one of the storerooms covered by the lease, and the subtenant went into possession thereof. August 4, 1910, the lessee paid, and the lessor accepted the rent of the premises for such month. August 9, 1910, the lessor declared a forfeiture of the lease, because the lessee had underlet the premises without her consent, contrary to the terms of the lease, and served defendant with notice to surrender up possession of the premises to plaintiff within three days after the date of the notice. The lessee refusing to surrender possession, a suit for unlawful detainer was instituted on August 15, 1910, by the lessor against the lessee, resulting in judgment in favor of the former, to which the latter prosecutes this writ of error.

Plaintiff in error contends: (1) That the notice served by the lessor upon the lessee is insufficient under the unlawful detainer act; (2) that the lessor, having accepted and retained the rent for the month of August, thereby waived the forfeiture; (3) that the

court erred in refusing to permit plaintiff in error to prove that it had been authorized by the agent of the lessor to sublet the premises.

[1] The alleged defect in the notice is based upon the "claim that the ground of demandant's right for possession of such premises" is not specified therein, and that it was not "a three days' notice," as required by the statute. Sections 2603 and 2605, R. S. 1908. The record discloses a notice attached to the complaint which was served upon the defendant, demanding the possession of the premises within three days from its date, but does not state "the ground of demandant's right for possession." The complaint, however, alleges "that plaintiff has notified the defendant that by reason of the said underletting the defendant had forfeited the terms of the lease and that the said lease was terminated," and the evidence discloses that at the time of the service of the notice hereinbefore mentioned another notice was likewise served upon defendant, and the answer "admits that on the 1st day of August, 1910, the defendant sublet the storeroom" included in the lease, and "that the plaintiff notified the defendant that because it underlet the store (room) * * * its lease was forfeited and terminated." Under these circumstances, we will presume that the notice met the statutory requirements, and was not subject to the objection under consideration.

It was not essential that the entire notice be written upon one piece of paper; nor does the fact that the one served was in two parts render the notice invalid. The two papers were served at the same time, relating to the same subject, and must necessarily be construed as one instrument.

[2] As the portion of the notice attached to the complaint bears date August 8th, and was not served until the 9th, and demands possession within three days from its date, it is claimed that defendant had but two days in which to surrender possession of the premises. In answer, the plaintiff, in resisting an application for supersedeas, contended that, as the suit was not brought until the 15th day of August, the defendant actually had at least six days after the service of the notice in which to surrender possession of the premises. Whether the date designated in the notice, or the date of service thereof is the true date of the notice, need not be determined herein. The suit was not instituted until at least six days after the service of the notice, and the action of the parties throughout the trial, until the finding of the court in favor of plaintiff, conclusively shows that the sufficiency of the notice as to the time allowed in which to surrender possession was not questioned, but rather conceded. At the commencement of the trial, it was stated that the parties would agree upon certain matters. Counsel

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

for defendant said: "There is no question about the service of the notice. There is a controversy whether we forfeited the lease or not." Thereupon the controversy as to whether the lease was forfeited was confined solely to whether the lessor had consented to the underletting of the premises; or, if she had not so consented, whether she had waived the forfeiture by accepting the rent for the month of August. Such was the limitation placed upon the inquiry by the defendant itself. Having limited the inquiry, neither party can be permitted, after the court or jury has found the facts, to go beyond the issue thus made and controvert that which has previously been confessed in the record.

[3] 2. The acceptance of the rent for the month of August did not constitute a waiver by the lessor of the right to forfeit the lease arising by reason of the subletting of the premises contrary to the terms of the lease. "To make the acceptance of rent a waiver of a forfeiture in a case where the lease provides for re-entry in the event of a breach of the obligation, it must appear that the landlord had knowledge of the fact that the condition was broken at the time he accepted the rent, and it must further appear that the rent which he accepted became due after the breach was committed by the tenant"—is a rule which is well settled and has been approved by this court. *Mageon v. Alkire*, 41 Colo. 333, 343, 344, 92 Pac. 720, 722. We do not think the evidence shows that the landlord had knowledge of the fact that the premises had been underlet at the time she accepted the August rent. It is true she had heard a rumor to that effect, but immediately informed her tenant that under no circumstances would she waive the covenant in the lease, and permit the premises to be sublet to "Japs," the supposed subtenants. Moreover, the answer admits that it was on August 1st the premises were sublet, which is the very day the rent for that month became due and payable, whereas the rumor as to the subletting of the premises did not reach the landlord until the 2d or 3d of the month. Moreover, the lessor testified that she had no knowledge that her tenant had sublet the premises on the date she accepted the August rent. Under these circumstances, we shall not interfere with the finding of the trial court.

[4] Plaintiff in error further contends that the lessor could not forfeit the lease without first returning to the lessee the rent for the proportion of the month remaining after she ascertained that the premises had been sublet, and that the lessee could not be guilty of unlawful detainer prior to September 1st. It is quite true that by payment of the rent to September 1st the tenant thereby acquired the right to remain in possession of the premises until such date. This right, however, was subject to forfeiture by

the express terms of the contract of lease. The rental became due on the 1st of August and was paid, thereby becoming the money and property of the lessor. We find nothing in the lease, nor do we know of any rule of law requiring the lessor to return it as a condition precedent to exercise the right of forfeiture vested in him by the terms of the contract.

[5] 3. As we read the record, the court did not refuse to permit plaintiff in error to prove that it had been authorized by the agent of defendant in error to sublet the premises. On the contrary, the court expressly ruled that, if plaintiff in error could do so, it would be permitted to prove that such agent had been empowered by the lessor to consent to the particular subletting in question. The court did decline to permit the plaintiff in error to show that some seven months prior to the subletting in question the defendant in error had authorized her agent to consent to the subletting of a portion of the premises to a corporation engaged in the picture framing business. We think the court was right in its ruling. A consent to sublet the premises in one instance is not an annulment of the covenant not to sublet without the written assent of the lessor, but is no more than a waiver of the covenant in the particular instance, and in no sense extends to a subsequent underletting to another subtenant. *Farr v. Kenyon*, 20 R. I. 376, 39 Atl. 241.

We are satisfied the judgment of the trial court was right, and it is therefore affirmed.

Judgment affirmed.

MUSSER and BAILEY, JJ., concur.

BANK OF BROMFIELD v. MCKINLAY, et al.
(Supreme Court of Colorado. July 1, 1912.)

1. **BILLS AND NOTES (§ 209*)—TRANSFER—FORM.**

A note payable to order may be transferred by delivery only, without indorsement, so as to vest the transferee with the complete title.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 497, 498, 501; Dec. Dig. § 209.*]

2. **BILLS AND NOTES (§ 443*)—TRANSFER—ACTION BY TRANSFERREOR.**

Where a note payable to a bank had been transferred by it by delivery without indorsement, the bank could not thereafter sue thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1377-1423; Dec. Dig. § 443.*]

Error to District Court, City and County of Denver; Geo. W. Allen, Judge.

Action by the Bank of Bromfield against E. S. McKinlay and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Chas. P. Craft and S. S. Abbott, both of Denver, for plaintiff in error. Frank McDonough, Sr., and Frank McDonough, Jr., both of Denver, for defendants in error.

MUSSEY, J. The abstract in this case is very deficient in many particulars, and especially in that it omits a large part of the testimony that was material on behalf of the defendants. Under the issues presented, the correctness of the judgment here for review depends upon the sufficiency of the evidence to support it. Because of the condition of the abstract, it would be necessary to affirm the judgment without any further discussion, were it not for the fact that the defendants in error have, by a supplemental abstract, supplied some testimony that upon the whole record must be regarded as very material to the issues and makes it necessary to affirm the judgment upon the merits.

One Glover and E. S. McKinlay, one of the defendants, entered into a contract relative to the location and filing upon government lands in Routt county. Upon the performance of the contract, on the part of McKinlay, Glover became indebted to him in the sum of more than \$1,100. When demand was made upon Glover for this money, he asked to be given until the happening of a certain event, which was agreed to. Glover was president of the plaintiff bank. The happening of the event when the payment was to be made was delayed for some reason. It was then arranged that Glover would loan the defendants \$1,000 through Glover's bank. The money was loaned to the McKinlays, and they gave their note therefor. Upon the happening of the event, when Glover was to pay the McKinlays, he put it off still longer until the happening of another event. After that event had happened, Glover put off McKinlay again and requested him to call upon certain parties. After these parties were seen, Mr. Glover was again called upon to pay the money, and he refused to do so. The note given to the bank not being paid, an action was commenced for its collection. To the complaint in this action various defenses were made; one being that the bank had assigned the note to Glover, and that he was the legal owner and holder thereof and the real party in interest, and that he owed the defendant E. S. McKinlay the sum of \$1,120 for procuring the filings on the land. On behalf of the bank the evidence is to the effect that the bank was the owner and holder of the note, and never assigned it to Glover. It was never indorsed. Glover himself did not come from his home in Nebraska to the trial, but sent his son, who was an official of the bank. There was also evidence to show that the bank had delivered the note to Glover, and that it was his, unless the want of an indorsement prevented the passing of the title to him, and there is evidence to show that Glover notified the defendants of the

assignment of the note while it was in his hands.

Upon the whole record, from direct evidence adduced and from various evidentiary circumstances surrounding the whole transaction, the court could draw the conclusion that Glover was the real party in interest and the real owner of the note, and that he was merely using his bank in an effort to defeat the defendants of their claim for the money which they alleged was due from him.

[1] This being so, we are unable to say that the court was wrong or that the judgment is not supported by the evidence, unless it is held that an indorsement of the note was absolutely necessary to vest title in the defendant Glover. The case of Davis v. Johnson, 4 Colo. App. 545, 36 Pac. 887, is exactly applicable to this case. The ownership of the notes was in dispute in that case, and the court said: "The judgment of the trial court upon this disputed question of fact is final, the evidence was ample to support it, and it is absolutely conclusive upon us. The notes were transferred to the purchaser by delivery only, and it is contended that under our statute they could not be transferred in that manner, so as to pass title to the purchaser. It was the question of payment which was in issue, and how a sale followed by an insufficient transfer could tend to support the allegation of payment we confess our inability to see. But it is not true that such transfer of a note does not invest the purchaser with title. At common law he took the equitable title, and at law could sue only in the name of the last holder of the legal title; but this distinction has been abrogated by the requirement of the Code that actions shall be prosecuted in the name of the real parties in interest, so that, subject to defenses in favor of the maker, existing at the time of notice of the transfer, such purchaser now takes a complete title to the note." And this court in Gumaer v. Sowers, 31 Colo. 164, on page 167, 71 Pac. 1103, on page 1104, speaking with reference to the case of Davis v. Johnson, supra, said: "For it was there held that under our law and Code of Procedure a note payable to order may be transferred by delivery only, and without indorsement, so as to vest in the purchaser a complete title, subject, of course, to defenses in favor of the maker existing at the time of notice of the transfer. It is also held that such purchaser can sue in his own name. This case meets with our approval."

[2] As there was evidence enough to support the findings of the court that the note belonged to Glover and not to the bank, certainly the bank could not maintain the action under the circumstances. The judgment is therefore affirmed.

Judgment affirmed.

BAILEY and GARRIGUES, JJ., concur.

VON RICHTHOFEN v. BIJOU IRR. DIST.
(Supreme Court of Colorado. June 3, 1911.
Rehearing Denied July 1, 1912.)

EMINENT DOMAIN (§ 163*)—CONDEMNATION PROCEEDINGS—DAMAGES.

One whose lands were taken under the eminent domain act. (Rev. St. 1908, §§ 2415-2464), to provide land upon which to construct an intake ditch to the reservoir of an irrigation district, was entitled to receive his entire compensation in money and could not be required to accept any part of it in the form of benefits to his land from a seepage ditch in no sense connected with and not a part of the intake ditch.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 436-441; Dec. Dig. § 163.*]

Error to District Court, Weld County; Jas. E. Garrigues, Judge.

Condemnation proceedings by the Bijou Irrigation District against Louise Von Richthofen. From the judgment on assessment of damages, defendant brings error. Reversed and remanded.

Defendant in error, as petitioner, instituted proceedings in the court below under the eminent domain act (Rev. St. 1908, §§ 2415-2464) to condemn a right of way across the lands of plaintiff in error, as respondent, upon which to construct an intake ditch to the reservoir. An order was entered granting petitioner temporary possession of the right of way sought to be condemned pending the final determination of the proceedings. Respondent, by answer, averred that the intake ditch was located through, along, and above land belonging to her, most of which was improved and irrigated and of great value; that the ditch was constructed in a sandy, coarse, and porous soil through which the water would percolate freely, so that, when the ditch was operated, her land below would be greatly damaged by seepage. The hearing was before the court and a jury. At the conclusion of the testimony, the jury viewed the premises, and thereafter returned a verdict in the statutory form, fixing the value of the land actually taken at \$210, damages to the remainder, \$1,600, benefits nothing. Upon this verdict a judgment was entered, which respondent has brought here for review on error.

At the trial petitioner, over the objection of respondent, was permitted to introduce evidence to the effect that, subsequent to the institution of the proceedings in the case at bar, petitioner commenced another proceeding under the eminent domain act to condemn a right of way across the lands of respondent below, the right of way sought to be condemned for the intake ditch upon which to construct a seepage ditch, known as the "Bull Ditch," the purpose of which was to intercept the seepage escaping from the intake ditch, and that it would intercept a large part of such seepage, which would otherwise reach respondent's land

and on account of which she demanded damages. The seepage ditch was an entirely independent structure upon a separate right of way, and in no sense a part of the intake ditch. The evident purpose of this testimony was to establish facts which would lessen the damage to the residue of respondent's land from seepage as the result of the construction and maintenance of its intake ditch. That this was the theory of counsel for petitioner, as well as the view entertained by the trial court, and so understood by the jury, is manifest from the remarks of the judge on the subject of the admission of the testimony relating to the interception of seepage by the Bull ditch, regarding which it was said: "I don't mean this petitioner has a right to make a deduction or get credit because it built a seepage ditch, if it did; but if there is a seepage ditch on the ground which will tend to carry away the seepage, then the land might not be damaged to that extent by seepage. The jury may see the seepage ditch if one is there, and form an opinion as to the effect it may have in carrying away seepage. Would they not have a right to take that into consideration?" * * * I simply hold that everything now on the ground that might either prevent or increase seepage is a matter for the proper consideration of the jury in arriving at the damages to the residue of the land."

Over the objection of respondent, the court gave the following instruction: "The evidence tends to show that petitioner, or some one in its behalf, has constructed a drainage ditch, called during the trial a 'Bull ditch,' across portions of her land not taken. In your award, you cannot allow petitioner any pay or compensation for the construction of this seepage ditch, but in arriving at the damages, if any, to the residue of her land occasioned by the taking on account of the likelihood or probability, if any, of seepage from the said Empire ditch (the intake ditch), you should take into consideration this seepage ditch, as it now exists, and in its present condition, as constructed on the land, but should not consider promises or future plans, if any, of petitioner to enlarge, extend, or maintain the same."

On behalf of respondent the following instruction was requested, which was refused: "The court instructs the jury that, since the construction of the Empire Inlet ditch across the lands of the respondent, under an order of temporary possession, the petitioner has commenced the construction of a drain or seepage ditch upon other portions of the land of respondent. You are instructed that you should not consider said second ditch in any manner in this suit, but are to assess the injury, if any, and the benefit, if any, to the residue of the lands of respondent as though said ditch or portion thereof had not been constructed, or the lands of respondent disturbed thereby."

H. E. Churchill and H. M. Baker, both of Greeley, for plaintiff in error. Stephenson & Work and Robert M. Work, all of Ft. Morgan, and James W. McCreery and Donald C. McCreery, both of Greeley, for defendant in error.

GABBERT, J. (after stating the facts as above). The purpose of the testimony objected to, and the effect of the instruction given, was to permit the jury, in determining the damages to the residue of the land of respondent, to take into consideration the fact that petitioner had constructed the drain ditch, and that thereby seepage water which would otherwise find its way onto the lands of respondent would be intercepted, and thus her damages on that account lessened. On this subject the trial court ruled and instructed to the effect that, while petitioner was not entitled to any compensation for the construction of the drainage ditch, yet, in assessing the damage to the lands of respondent, that would be caused by seepage from the intake canal, the existence of the drainage ditch and its effect in arresting or preventing seepage should be taken into consideration. So that the only question presented for determination is whether or not respondent's damages could be lessened by a consideration of these matters. She is entitled to her damage before the title to her land is taken by petitioner. The damage which she will suffer from this seepage, and the expense necessary for her to incur and continue in order to reduce such damages to the minimum, is what she is entitled to recover and receive in money. In constructing appliances with this money in order to avoid injury to her land from seepage, she is entitled to exercise her own judgment, and cannot be required to accept, in advance, the arrangements which petitioner seeks to make for her by the construction of an independent ditch. If, by the existence of the seepage ditch at the present time, her damages are to be lessened, there is no guaranty on the part of the petitioner that it will be continued and maintained. If it is not, then respondent will be deprived of her land without payment of the damages in advance, which the Constitution and the statutes contemplate shall be done as a condition precedent to depriving her of her title, for she would have naught, in so far as her damages were reduced by the consideration of the existence of the seepage ditch and its likelihood to prevent injury to her lands, with which to compensate her for the expense she must incur in order to prevent damage from seepage in the event the petitioner should abandon the drain ditch or fail to keep it in repair.

The law provides that certain benefits may be considered in assessing damages for land taken under the eminent domain act, but

such benefits are those growing out of the improvement itself, and not those derived from some other independent improvement. Respondent is entitled to have the "just compensation" provided by law paid in money, and she cannot be required, in lieu thereof, to accept, in whole or in part, any benefit except she consents, which the law does not recognize. The money she is entitled to receive as damages she may employ in any way, and for any purpose, she may choose. She is under no obligation to use it in constructing a drainage ditch. She may do so if she chooses, but, if she does not, the petitioner cannot complain. She may prefer to invest it in some other enterprise rather than in expending it in preventing injury to her land. And yet, should the instruction of the court be upheld, she would be deprived of the authority to control her own affairs and exercise her own judgment in matters of this kind. *Central Ohio R. R. Co. v. Holler*, 7 Ohio St. 220; *Chesapeake & O. R. R. Co. v. Patton*, 6 W. Va. 147; *Chicago, M. & St. P. Ry. Co. v. Melville*, 66 Ill. 329; *Railroad Co. v. Halstead*, 7 W. Va. 301.

But it is not necessary to discuss the subject further, because it is clear, from the decisions of this court in *Burlington & C. R. Co. v. Schweikart*, 10 Colo. 178, 14 Pac. 329, and *Great Western Ry. Co. v. Ackroyd*, 44 Colo. 454, 98 Pac. 726, that the trial court erred in admitting the testimony referred to, and in instructing the jury, as also by refusing to give the instruction requested. From these cases, the principle which controls the case at bar is deducible, which is to the effect that the Constitution and the eminent domain statute contemplate a compensation in money to one whose lands are taken under the eminent domain act; that these requirements cannot be satisfied or dispensed with by requiring him to accept a plan, device, or structure of the petitioner designed to lessen his damage, which is no part of, and entirely independent of, the structure or improvement for which the land is taken; but that he is entitled to make such provision for himself, and recover, as an element of his damage, what it would cost him.

Respondent's damages should have been assessed without regard to the seepage ditch. We might add that the case was tried before the opinion in the *Ackroyd Case* was handed down.

Counsel for petitioner call attention to authorities wherein it has been held that any fact which, by reason of the conditions upon which the property is taken, or the character of the improvements, or the manner in which it is made, or the nature and situation of the land taken, or the residue, tends to reduce the damages otherwise accruing to the landowner may properly be considered in favor of the appropriator in the assessment of damage. It is not necessary to go into a discussion of this proposition for the

very obvious reason that the ditch which petitioner contended below should be considered in assessing damages is in no sense connected with, or a part of, the intake canal.

The judgment of the district court is reversed, and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Reversed and remanded.

CAMPBELL and BAILEY, JJ., concur.

VALLERO v. CAMILLA et al.

(Supreme Court of Colorado. July 1, 1912.)

1. INJUNCTION (§ 129*)—HEARING TO DISSOLVE TEMPORARY INJUNCTION—POWER OF COURT.

The court, on hearing a motion to dismiss a temporary injunction, cannot dismiss the bill, though the showing justifies the dissolution of the temporary injunction, since plaintiff has a right to a trial on the merits and to the relief the case made warrants.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 279-287; Dec. Dig. § 129.*]

2. INJUNCTION (§ 129*)—DISSOLVING TEMPORARY INJUNCTION—DISMISSAL OF BILL.

The court, on a motion to dissolve a temporary injunction, cannot dismiss the bill on the ground that it does not state a cause of action, though it is so defective as to justify the dissolution of the temporary writ; but plaintiff must be afforded an opportunity to amend.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 279-287; Dec. Dig. § 129.*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by Catirena Vallero against Bart Camilla, as executor of Bart Ebbl, deceased, and another. There was a decree of dismissal, and plaintiff brings error. Reversed in part, and remanded.

Plaintiff in error brought suit against defendants in error, the sole purpose of which was to enjoin the latter from selling, under an execution on a judgment obtained against her husband, real estate which she claims belonged to her. On filing the complaint a temporary injunction was issued. After the issues were made up, the defendants filed a motion to dissolve the temporary writ. The record recites, in substance, that the cause was heard upon motion to dissolve, the temporary injunction granted, and that the court, having heard the evidence introduced by the respective parties and now being sufficiently advised in the premises, orders that the temporary writ be dissolved and the bill dismissed.

N. Q. Tanquary and Charles Roach, both of Denver, for plaintiff in error. Chase Withrow and William E. Withrow, both of Central City, for defendants in error.

GABBERT, J. (after stating the facts as above). [1] The hearing was solely upon a

motion to dissolve the temporary injunction. For this reason, it was error to dismiss the bill, although the showing made justified the dissolution of the temporary writ, as plaintiff still had the right to a trial of the cause upon its merits, and to such relief as the case then made warranted. Spar Con. M. Co. v. Casserleigh, 84 Colo. 454, 83 Pac. 1058.

[2] On behalf of defendants in error, it is asserted that the complaint does not state a cause of action. Conceding, but not deciding, that this is correct, the defect of the complaint in this respect may have justified the dissolution of the temporary writ; but plaintiff should have been afforded an opportunity to amend, if so advised. She was deprived of this by the judgment of dismissal.

The judgment of the district court, dismissing the action, is set aside, and the case remanded, with directions to reinstate on the docket, and for such further proceedings as will be in harmony with this opinion.

Reversed in part and remanded.

MUSSER and HILL, JJ., concur.

MCCRACKEN v. CONES.

(Supreme Court of Colorado. July 1, 1912.)

TAXATION (§ 832*)—INVALID TAX DEED—ANNULLMENT—RIGHT TO REFUND.

One claiming under a tax deed which is annulled is not entitled to a refund of taxes paid by him on the premises after delivery of the deed, unless he proves the fact and the amount of the payment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1645; Dec. Dig. § 832.*]

Error to District Court, Conejos County; Chas. C. Holbrook, Judge.

Action by George B. Cones against S. D. McCracken and others. Decree for plaintiff, and defendant McCracken brings error. Affirmed.

Cones, defendant in error, brought suit against plaintiff in error, McCracken, and others, to quiet title to certain real estate. McCracken was personally served with summons in the action, but failed to enter an appearance. Default was entered against him, and a decree rendered, quieting title to the real estate involved in the plaintiff, and annulling two certain tax deeds on the premises executed and delivered to McCracken. The decree did not provide for reimbursing McCracken on account of taxes paid by him on the premises. He brings the case here for review on error. The sole proposition urged on his behalf is that the court erred in not making provision in the decree for reimbursing him for taxes paid subsequent to the execution of the tax deeds.

Jesse Stephenson, of Monte Vista, for plaintiff in error. John F. Maff, of Denver, for defendant in error.

GABBERT, J. (after stating the facts as above). One claiming under a tax deed which is annulled is not entitled to a refund of taxes paid by him on the premises subsequent to the delivery of the deed, unless he gives evidence of the fact and the amount of the payment. *Eaches v. Johnston*, 48 Colo. 457, 104 Pac. 940; *McKinley-Lanning Co. v. Varney*, 19 Colo. App. 210, 74 Pac. 338.

Judgment affirmed.

MUSSER and HILL, JJ., concur.

(53 Colo. 541)

MORTON v. LAESCH.

(Supreme Court of Colorado. April 1, 1912.
Rehearing Denied July 1, 1912.)

1. EXCEPTIONS, BILL OF (§ 60*)—MOTION TO STRIKE—DELAY.

A motion to strike a bill of exceptions not interposed until two years and nine months after the case has been at issue on appeal is too late.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 112-115; Dec. Dig. § 60.*]

2. APPEAL AND ERROR (§ 1195*)—REVERSAL—INSUFFICIENCY OF EVIDENCE—RETRIAL.

Where on a prior appeal it was held that the evidence was not sufficient to establish a parol easement, and the evidence on a second trial was no more definite or conclusive than on the first, the court properly found that it was insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

3. APPEAL AND ERROR (§ 1011*)—REVIEW—CONFLICTING EVIDENCE.

A finding by the trial court on conflicting evidence will not be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. TENANCY IN COMMON (§ 22*)—EXCESSIVE USE OF COMMON PROPERTY—ACCOUNTING.

Where a cotenant of a mining tunnel makes use of the common estate for his exclusive benefit, he is liable to recompense his co-owner for what such use of the latter's interest is reasonably worth.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 63; Dec. Dig. § 22.*]

5. TENANCY IN COMMON (§ 38*)—USE OF COMMON PROPERTY—ACCOUNTING.

Where plaintiff and defendant were co-owners of a tunnel through certain mining claims, and defendant used the tunnel to mine rock from other claims belonging to himself individually, beyond those owned in common with plaintiff, and plaintiff was put to no expense in the extension of the tunnel so used or in its use by defendant, proof of the number of tons of rock transported through the tunnel by defendant from such outside claims and the charge made by other companies for tunnel transportation was insufficient to show the reasonable value of the use of plaintiff's interest.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 100-104, 107-118; Dec. Dig. § 38.*]

Appeal from District Court, Clear Creek County; Flor Ashbaugh, Judge.

Action by Margaret Laesch against Jay

Morton. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 38 Colo. 171, 87 Pac. 1081, 120 Am. St. Rep. 106.

A. D. Bullis and F. L. Collom, both of Idaho Springs, for appellant. Morrison & De Soto and Morrison & Bailey, all of Denver, for appellee.

GABBERT, J. The parties to this appeal are joint owners (each an undivided one-half) of the Elida lode mining claim. Mrs. Laesch is the owner of, or interested in, adjoining claims. Mr. Morton owns a group in the vicinity of the Elida, known as the Jo Reynolds. At the time he became interested in the Elida, a tunnel had been run on that claim a distance of about 324 feet. He desired to work the Jo Reynolds group through the Elida, and claims to have made a parol agreement with Mrs. Laesch to the effect that he would repair the old workings, which were then caved in, more or less, improve the grade, and extend the tunnel to the end line of the Elida, lay a track therein at his own expense, and through this tunnel and the extension thereof to the Jo Reynolds work the latter. In consideration of the use of the Elida ground for this purpose, Mrs. Laesch should have the right to utilize the tunnel in the Elida ground to work that property, or those adjoining, in which she was interested, without expense to her. Morton put the old workings in the Elida in good shape at an expense of over \$800, and extended the tunnel through the Elida ground a further distance of 1,076 feet, and laid a track throughout the entire length of the tunnel at his own expense, in the sum of \$10,000. He also extended the tunnel to the Reynolds group, and worked the property through this tunnel and the one through the Elida. All material removed from the Reynolds group was moved at his own expense. Mrs. Laesch, for the period of between two and three months, worked the adjoining properties in which she was interested through the old workings in the Elida which Morton had repaired, using the track which he had placed therein. For this use of the tunnel she paid nothing, nor did she promise to pay anything. After the work on the Jo Reynolds had progressed for a considerable period, she demanded that Morton pay her for the use of the tunnel through the Elida. This he refused to do, and she then brought suit for an accounting, the purpose of which was to compel Morton to pay her a reasonable compensation for the use of the tunnel in working the Reynolds group through the Elida ground.

The trial of the case the first time resulted in a judgment in favor of the defendant, based upon the ground that the parol agreement pleaded as a defense, as above stated, was established. Plaintiff brought the case

to this court for review, where, in 38 Colo. 171, 87 Pac. 1081, 120 Am. St. Rep. 106, we held that an oral agreement for a perpetual right of way over the premises of another constitutes an easement of interest in land, and is within the statute of frauds, and, to take it out of the statute, it must be supported by clear, definite, and conclusive proof, and, as the evidence did not establish this degree of proof, the judgment was reversed and the cause remanded for a new trial. We also held, on the authority of *People ex rel. v. District Court*, 27 Colo. 465, 62 Pac. 206, that an owner of an undivided interest in a mining claim has no right to use the tunnel on such claim to convey ore from an outside claim. A retrial of the cause resulted in a judgment in favor of plaintiff in the sum of \$5,840, from which the defendant has appealed.

Three propositions are advanced by counsel for appellant in support of their contention that the judgment of the trial court should be reversed: (1) That the evidence establishes the parol agreement pleaded; (2) that, under the facts of the case, the plaintiff is estopped from making any claim for compensation; and (3) that the evidence is insufficient to support the judgment rendered.

Counsel for appellee have filed a motion to strike the bill of exceptions, based upon the ground that it was never filed in the district court; that it does not appear to be the original bill or copy thereof; and that it is not certified by the clerk of the court from which the appeal is taken. We shall consider this motion first, for the reason that, if it should be sustained, the grounds upon which the appellant relies for reversal of the judgment are not before us for consideration.

[1] The case was docketed in this court and the bill of exceptions filed April 14, 1908. July 23d following, counsel for appellant filed their abstract of record, and on August 22, 1908, their opening brief. To this brief counsel for appellee filed their brief October 28, 1908, and appellant's reply brief was filed November 21st following. The motion to strike the bill of exceptions was not filed in this court until August 18, 1911. A motion to quash or strike out a bill of exceptions must be seasonably made, or it will not be considered. 3 Cyc. 52. In the case at bar, the motion under consideration was not interposed until two years and nine months after the case was at issue. In such circumstances, the motion was not seasonably made, and for this reason will be overruled. *City of Central v. Wilcoxon*, 8 Colo. 566; *Learned v. Tritch*, 6 Colo. 579; *Reynolds v. Campling*, 21 Colo. 86, 39 Pac. 1092; *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272, 384; *Mackey v. Monahan*, 13 Colo. App. 144, 56 Pac. 680; *Board County Com'rs v. Tuley*, 17 Colo. App. 113, 67 Pac. 346; *Merriener v. Jeppson*, 19 Colo. App. 218, 74 Pac.

341; *Greig v. Clement*, 20 Colo. 167, 37 Pac. 960; *Murphy v. Cunningham*, 1 Colo. 467.

[2] As far as advised, the testimony at the second trial on the subject of the parol agreement, upon which defendant relies, is no different nor any more clear, definite, and conclusive, than it was at the first trial, and we must therefore hold that the finding of the trial court on this subject cannot be disturbed.

[3] Aside from this, the trial court resolved the issue in favor of the plaintiff on conflicting evidence, and for this reason that finding must stand.

In the former opinion it does not appear that the question of estoppel was directly considered, or that it was involved, as our decision at that time appears to have been based upon the two propositions we have mentioned. Plaintiff was not estopped from asserting that an easement was not granted by parol, although it might be that she would be estopped from maintaining an action to enjoin the defendant from using the tunnel through the Elida for the purpose of working the Reynolds group, provided he offered to pay a reasonable compensation for the use of her interest in the tunnel for that purpose; but, as that proposition is not argued by counsel, we shall not attempt to decide it at this time, or express any opinion thereon.

The cause of action stated in the complaint is one for an accounting between tenants in common; the right to the accounting being based upon the ground of the greater use by one cotenant for his benefit than the other of the common estate. Under the law of the case as declared when the cause was here before, the action may be maintained, provided, of course, the evidence is sufficient to sustain it.

[4] We are also of the opinion that in such a case a cotenant making use of the common estate for his exclusive benefit, according to the facts of this case, must recompense his co-owner for what such use of the interest of the latter is reasonably worth. *Whitwham v. Westminster Brymbow C. & C. Co.*, 2 L. R. Ch. Div. 538; *Bunke v. N. Y. Telephone Co.*, 46 Misc. Rep. 97, 91 N. Y. Supp. 390; *Bunke v. N. Y. Telephone Co.*, 110 App. Div. 241, 97 N. Y. Supp. 66, affirmed in 188 N. Y. 600, 81 N. E. 1161; *De Camp v. Bullard*, 150 N. Y. 450, 54 N. E. 26; *McWilliams v. Morgan*, 75 Ill. 473; *Baltimore & Ohio R. R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362.

[5] It was sought to establish the value of this use (1) by showing the number of tons of rock the defendant had transported through the tunnel in the Elida from the Jo Reynolds; and (2) by showing what other tunnel companies in the vicinity charged for such transportation per ton. It is not altogether clear what the number of tons so transported may have been, but we do not regard that as material, in view of the fact,

that the evidence touching what the use of plaintiff's interest in the tunnel was reasonably worth per ton to transport the rock from the Jo Reynolds is wholly insufficient to support the judgment rendered or any judgment whatever against defendant. Inquiry on the subject is, What is fit and proper for defendant to pay for wayleave for the use to which he subjected the tunnel in the Elida ground? It stands undisputed that all rock transported through this tunnel was what is termed waste; that is, did not contain minerals in sufficient quantity to be of any commercial value.

A witness on behalf of plaintiff testified that the company owning the Empress tunnel, which was about 3,000 feet in length, charged 25 cents per car for waste. Another witness for plaintiff stated that the charge made by the Newhouse tunnel, which was something like 8,000 feet in length, was from 45 to 46 cents per ton for waste. It also appears from the evidence that the Big Five tunnel had a schedule for the transportation of waste up to the length of 7,500 feet, but the schedule per ton is not stated. Each of these tunnels was what might be termed "commercial tunnels," and was constructed by the company owning or operating it for the purpose of transporting ore and waste from the mining properties which the respective tunnels intersected. Each of these companies had constructed its tunnels, owned the cars and tracks, and furnished the motive power, and as to one of the companies at least loaded the cars, and in each case transported the loaded cars to the mouth of the tunnel, dumped them, and returned them empty to the place where they were loaded. These facts furnish no basis from which to compute what defendant should pay per ton. He had constructed the tunnel at his own expense, laid the track therein, loaded, moved, and dumped the cars. Plaintiff was at no expense whatever in any respect. The distance the cars were transported through the Elida was about 1,400 feet, as compared with the 3,000 feet haul of the Empress tunnel, 8,000 feet, the length of the Newhouse tunnel, and 7,500 feet, the length of the Big Five tunnel. Clearly, under these facts, what sum per ton plaintiff would be entitled to recover for the use of the Elida tunnel, her interest being but an undivided one-half, could not be computed, and any attempt to do so would rest on mere conjecture.

It is evident that, if reliable data was furnished which would serve as a basis upon which to compute what plaintiff would be entitled to receive per ton, taking into consideration the length of the Elida tunnel, as compared with the length of the haul in the other tunnels mentioned, the cost of construction and operation, and that defendant furnished the cars and track, and moved

them without any expense whatever to the plaintiff, the amount she would be entitled to receive per ton would be very materially reduced from that charged by the commercial tunnels to which we have referred. It also appears that for the space of between two and three months plaintiff utilized for her benefit alone 324 feet of the tunnel for the transportation of ore or waste from the properties in which she was interested. She should certainly account to the defendant for the value of this use for his interest therein.

On the authority of *Hennessey v. Hoag*, 16 Colo. 460, 27 Pac. 1061, it is contended by counsel for appellant that an action for use and occupation cannot be maintained except it appears the relation of landlord and tenant existed between the parties. They also contend that, in the absence of a statute or agreement to the contrary, a tenant in common, while merely in possession of the common property, not excluding his cotenant, nor denying him equal enjoyment, cannot be charged by the latter for use and occupation. For these reasons it is contended the action at car cannot be maintained. We do not deem it necessary to discuss these questions. The law of the case, as declared when the cause was here before, is to the effect that defendant must recompense plaintiff for the use of her interest in the tunnel for transporting rock from an outside property. The determination of this question was essential to a decision of the case, as then presented. Questions of law before the court for decision and by the court decided as essential to a final judgment are conclusively and finally adjudicated, and cannot be changed upon a subsequent appeal.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

MUSSER and HILL, JJ., concur.

BOGOTON v. YOUNG et al.

(Supreme Court of Colorado. April 1, 1912.
Rehearing. Denied July 1, 1912.)

1. TAXATION (§ 752*)—TAX SALES—DEEDS—INJUNCTION.

It is not the province of a court of equity to correct or review the proceedings of officers intrusted with the assessment of property and collection of the public revenue, since, if such officers commit substantial errors that invalidate their proceedings, no title can pass, and the owner has an adequate remedy at law.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1500-1502; Dec. Dig. § 752.*]

2. TAXATION (§ 752*)—TAX SALES—TAX DEED—INJUNCTION—OFFER TO PAY TAXES.

A property owner cannot enjoin the execution of a tax deed unless he himself does equity by paying or offering to pay the taxes justly due, especially where the purchaser offers to permit redemption of the premises or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

any part of them on payment of the amount for which the properties were sold, interest, and costs, at a rate not exceeding 8 per cent.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1500-1502; Dec. Dig. § 752.*]

3. TAXATION (§ 752*)—TAX SALES—DUTY TO PAY TAXES.

If the statute authorizing the county commissioner to assign a certificate of purchase of property bid in for the county at a tax sale, for such sum as the board at any regular meeting may decide, is unconstitutional, * If the published notice of intention to apply for a deed is fatally defective, or if an assignment of certificate of purchase by the county is void, such defects do not remove the duty of the property owner to pay his just proportion of the burdens of taxation, nor will they relieve him from the duty to pay the taxes, as a condition to restraining execution of a tax deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1500-1502; Dec. Dig. § 752.*]

Error to District Court, Boulder County; Harry P. Gamble, Judge.

Action by John T. Bottom against Lewis S. Young and others. Judgment for defendants, and plaintiff brings error. Affirmed.

John T. Bottom and Kelly & Haines, all of Denver, for plaintiff in error. Lewis S. Young, of Boulder, pro se.

WHITE, J. The St. Louis Mining Company, a corporation, owned a lode claim situate in Boulder county, which was subject to and upon which general taxes for the year 1900 were assessed. Such taxes became delinquent, and on October 12, 1901, the lode claim was sold for the nonpayment thereof to the county of Boulder, and a certificate of sale therefor executed and delivered. November 9, 1904, pursuant to an order of the board of county commissioners, the certificate of sale was assigned to the plaintiff in error for the amount of the taxes for which such sale was had, together with accrued interest, penalties thereon, and costs of sale, without reference to or consideration of the taxes assessed on the lode claim for subsequent years. Prior to the date of making assessments for taxes for the year 1901, a mill, belonging to certain individuals, some, but not all, of whom were stockholders in the St. Louis Mining Company and the St. Louis Mining & Reduction Company, another corporation to which reference will hereinafter be made, was moved upon an unpatented mill site situate about 800 feet east of the lode claim. The mill was principally used in treating ore taken from the lode claim, which was accomplished by means of a gravity tramway extending from the mill to an ore bin on the lode claim.

In the assessment roll and tax list for the year 1901, the assessor entered, as belonging to the St. Louis Mining Company, the aforesaid St. Louis lode claim, the St. Louis mill, and the St. Louis tramway, specifying the value of each property separately. In 1903 the property was returned for assessment by the general manager of the St.

Louis Mining & Reduction Company, its then owner, in which he scheduled the St. Louis lode, mill, and tramway, designating the value of the lode claim at \$500, and the improvements at \$3,100. The assessed value of the lode claim for previous and subsequent years was likewise \$500.

November 7, 1902, the taxes assessed as above for the year 1901 not having been paid, the county treasurer sold to the county of Boulder the St. Louis lode mining claim for the sum of \$32.50, the St. Louis mill for \$73.58, and the St. Louis tramway for \$17.47, and executed and delivered to such county a certificate therefor. Upon this certificate of sale, the taxes assessed for subsequent years to and including the year 1905 were indorsed in an aggregate sum for each year.

July 7, 1906, the board of county commissioners, at a regular session, by an order entered of record, authorized the county treasurer and county clerk, in consideration of \$150, to assign to defendant in error, Lewis S. Young, the last designated certificate of sale, having thereon the indorsements aforesaid. Such officers thereupon executed the assignment, reciting therein, however, that it was in consideration of \$148.85, though, as a matter of fact, Young paid to the treasurer the full sum of \$150, from which the latter deducted certain fees to which he claimed to be entitled by reason of the assignment.

In the summer of 1902, or prior thereto, instruments of sale and conveyance from the respective owners of the St. Louis lode claim, the St. Louis mill site, and the St. Louis mill and tramway were made and duly executed to the St. Louis Mining & Reduction Company, for each of said properties. None of these instruments were recorded, but were placed in the possession of plaintiff in error, where they have since remained.

April 25, 1907, the St. Louis Mining & Reduction Company executed a deed of trust, conveying the above described lode claim, mill site, mill, and tramway to the public trustee of Boulder county to secure the payment of its promissory note for \$11,000, of same date with the deed of trust, payable to the order of plaintiff in error. On the same date it likewise executed and delivered to plaintiff in error a lease of all of said property, with the right or option to purchase the same within a designated time, which has not expired. Plaintiff in error was and is a stockholder in each of the hereinbefore designated corporations.

In January and February, 1907, Lewis S. Young caused to be published a "notice of tax purchase," based upon the certificate assigned to and held by him as aforesaid. It was specified in the notice that the time of redemption from the sale would expire May

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7, 1907; and that, unless sooner redeemed from the sale, the said Young would apply, on May 8, 1907, to the treasurer for a tax deed.

May 6, 1907, plaintiff in error instituted a suit to restrain the execution and delivery of a deed based upon the certificate of sale held by Young. A temporary injunction was issued, which, upon final hearing, was dissolved, and the cause brought here for review.

Plaintiff in error contends: That the county, having bid in the St. Louis lode claim in 1901 for the taxes of 1900, and not having assigned the certificate of sale until November 9, 1904, the sale in 1902, and certificate based thereon, under which Young claims, for the nonpayment of the taxes of 1901, were and are nullities; that the statutory provision, empowering the board of county commissioners to assign a certificate of purchase of property, "bid in for the county at a tax sale for such sum as the board of county commissioners at any regular meeting may decide," is unconstitutional; that the notice of intention of Young to apply for tax deed was not published within the required statutory period, and erroneously stated the date of expiration of time for redemption, and was defective and insufficient in many other particulars; that an assessment, as an entirety, of two or more properties owned in severalty, is void.

[1] The law may be as plaintiff in error contends, but as to that we need not and do not now determine. Should we so assume, the judgment here under review must be affirmed. One seeking relief in a court of equity must bring his cause of action within some recognized rule of equity jurisprudence. It is not the province of a court of equity to review or correct the proceedings of officers intrusted with the assessment of property and collection of the public revenue. If such officers commit substantial errors that invalidate their proceedings, no title can pass by a sale based thereon of real estate for taxes.

[2] However, if the owner of the premises does not wish to accept the risk of an adverse title being made to his land by tax deed, the legality of which remains undetermined, and files his complaint in equity to enjoin the execution of such deed, he must do equity by paying, or offering to pay, the taxes justly due. This plaintiff in error has failed to do. No claim is made of payment or tender of the taxes lawfully due upon any of the property in question. The omission in this respect is sought to be excused by an allegation in the replication that the treasurer waived the requirement of tender. There was not sufficient evidence of such waiver, and the court expressly found that there was no tender. Moreover, the record discloses that defendants in error offered "to permit the plaintiff to redeem the properties mentioned in the complaint, or any of them, or any part of them, on payment of the

amount for which the properties were sold, interest and costs, and with the understanding that the rate of interest shall be figured at only 8 per cent. after November 7, 1905," and further "to permit him to redeem the St. Louis lode on the basis of its assessment of \$500, which in each year was the actual assessment made by the assessor. We further offer to permit him to redeem separately the improvements upon the lode, or the tramway, or the mill, upon payment of such proportion of the taxes as the assessment of the part desired to be redeemed bears to the whole assessment, separating the assessment for the years 1902, 1903, 1904, and 1905 in the same proportion that they were separated by the assessor in the year 1901." Plaintiff in error has failed to do equity, an essential prerequisite to entitle him to a standing in a court of equity.

[3] If the provision of the statute, authorizing the board of county commissioners to assign a certificate of purchase of property bid in for the county at a tax sale for such sum as the board of county commissioners at any regular meeting may decide, is unconstitutional, or if the notice published, of intention to apply for a deed, is fatally defective, it in no wise removes the duty of the property owner to pay his just proportion of the burdens of taxation. If the assignment of the certificate of purchase by the county is void, the county treasurer, one of the parties here sought to be enjoined, is nevertheless the person to whom the payment of taxes accruing subsequent to the first sale should be made. If after that officer receives payment of the subsequent taxes he undertakes to improperly pay the amount thereof over to the holder of the tax certificate under the void assignment, no doubt the rights of plaintiff in error, and other taxpayers of the county, may be protected in a proper proceeding.

We do not think plaintiff in error can complain of the manner of assessment for the year 1903. At least it will avail him nothing in this suit. The then owner of each of the properties caused them to be assessed together. Moreover, the total assessment for such year was exactly the same as the aggregate of the separate assessments of the lode, mill, and tramway for the year 1901. When the plaintiff in error acquired his lease and option to purchase these properties, and became the beneficiary of a deed of trust thereon, it was upon the property as an entirety from a single owner, and long subsequent to the particular assessment of which complaint is made. It is true this form of assessment might affect the redemption of a part of the properties should such redemption be desired, but the owner caused the assessment to be so made, and the plaintiff in error necessarily had knowledge thereof when he accepted the lease, option to purchase, and deed of trust. The fact that he became and is the holder of the certificate of

sale to the county of the lode claim for the taxes of 1900 ought not to change the situation under the circumstances of this case. It was the duty of the plaintiff in error, when he purchased the certificate from the county, to pay all subsequent taxes assessed on the property therein described, or have the board of county commissioners, if they possessed that power, to relieve him therefrom, which he failed to do, though the amount assessed for such years was readily ascertainable. As to the taxes for the year 1903, the offer made by defendants in error to permit plaintiff in error to redeem the lode claim on the basis of its assessment of \$500, or either of the other properties as disclosed by this record, eliminates every just complaint that could be urged against such assessments. As to the validity of the tax deed if issued, and the proceedings culminating in the sale, we express no opinion herein, but hold only that upon this record the plaintiff in error is not entitled to injunctive relief.

The judgment is therefore affirmed.

Judgment affirmed.

MUSSER and BAILEY, JJ., concur.

PAINTER v. WILCOX.

(Supreme Court of Colorado, May 6, 1912.

Rehearing Denied July 1, 1912.)

1. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—ACCOUNTING—FINDING.

In an action for an accounting and dissolution of a farming partnership, an erroneous finding that the partnership had been already dissolved was harmless where the account, as found by the referee, was right and would have been no different without the erroneous finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4284-4289; Dec. Dig. § 1071.*]

2. APPEAL AND ERROR (§ 1032*)—PREJUDICIAL ERROR—BURDEN OF SHOWING PREJUDICE.

Where the testimony taken by the referee in an action for an accounting and dissolution of a partnership was reduced to writing and preserved in the record, and the appellant contended that he was prejudiced by an erroneous finding of the referee but failed to point out wherein such finding was prejudicial, the judgment based on the referee's report could not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

3. PARTNERSHIP (§ 97*)—ACCOUNTING—ITEMS CHARGEABLE.

Where a partner transacts business in his own name for his own benefit, and uses the copartnership property therefor, he is not entitled on an accounting to have such transactions considered as firm business, though of the same nature, and is chargeable on an accounting with the reasonable rental value of the copartnership property so used.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 146-151; Dec. Dig. § 97.*]

4. PARTNERSHIP (§ 97*)—ACCOUNTING—RENT.

In determining the correctness of the amount for which the referee on an accounting

charged a partner as rent for the use of the partnership ranch property in his private business, the fact that the total production of the ranch for the period during which he so used it did not equal the rent charged was not material.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 146-151; Dec. Dig. § 97.*]

5. PARTNERSHIP (§ 97*)—ACCOUNTING—RENT.

Where, on an accounting of a farm partnership, it was difficult, if not impossible, to determine the value of the products from the farm during the time that the defendant partner used it for his own benefit, he was properly charged with the fair and customary rental value.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 146-151; Dec. Dig. § 97.*]

6. PARTNERSHIP (§ 233*)—DISSOLUTION—FIRM PROPERTY—OWNERSHIP.

Where a partner withdraws from a partnership under such circumstances as to work a dissolution, the property then belonging to the partnership does not revert to the other partner but continues to belong to the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 482½, 483; Dec. Dig. § 233.*]

Appeal from District Court, Weld County; James E. Garrigues, Judge.

Action by Lucius M. Wilcox against Joseph E. Painter. From a judgment on report of referee, defendant appeals. Affirmed.

Edward C. Stimson and John B. Hutchinson, both of Denver (P. M. Brereton, Julius C. Gunter, John W. Sleeper, and Malcolm Lindsey, all of Denver, of counsel), for appellant. Henry J. O'Bryan, of Denver, for appellee.

GABBERT, J. Appellee, as plaintiff, brought suit against appellant, as defendant, the purpose of which was to dissolve the partnership theretofore existing between them, and for an accounting. So far as material to notice, the answer of the defendant admitted the existence of the partnership, asked for an accounting and a dissolution of the firm. After the issues were made up, such proceedings were had that a referee was appointed to take an account of the dealings and transactions between the parties from the commencement of the partnership, and for that purpose to hear and report the testimony, together with his findings of fact, upon which his determination of the account between the parties was based. The referee heard the testimony and made a report exhibiting the account between the parties, which was, in all respects, approved and adopted by the court, and judgment rendered thereon. From this judgment, the defendant has appealed.

On behalf of appellant it is urged that the referee erred in finding and reporting that the partnership had been dissolved by mutual consent prior to the date when the action for dissolution and accounting was commenced. In support of this alleged error, two propositions are advanced: (1) That the evidence is insufficient to support this finding; and (2) that such finding is contrary to

the respective pleadings of the parties, because it was thereby admitted by both parties that the partnership was in existence, and had never been dissolved.

[1] We may concede, for the sake of the argument, that the finding of the referee under consideration was erroneous for the reasons given, but such an error does not necessarily justify a reversal. The real question involved is whether or not the account, as exhibited between the parties as determined by the referee, is right or wrong. Counsel for defendant urge that the referee, following the theory that the partnership had been dissolved prior to the commencement of the suit, erroneously charged the defendant with certain items, and erroneously refused to credit him with certain items. Conceding this to be true, and also adopting the theory of counsel for defendant that the accounting should have been taken between the parties and determined by the referee upon the assumption of fact, as made by the pleadings, that the partnership was in existence, it is not made to appear, from anything in the record to which our attention has been directed, that the account between the parties, as found by the referee, would and should have been any different from what it is.

[2] As previously stated, the real question is whether the judgment based upon the report of the referee is right or wrong. Until it is made to appear on behalf of the defendant that it is wrong, to his prejudice, he is not in a position to complain. A party bringing a case here for review must make it affirmatively appear that the judgment of which he complains is erroneous to his prejudice. It has frequently been held that error will be presumed prejudicial unless it is made to affirmatively appear that it is not. This rule, however, is not universal. The referee was directed to take an account of the dealings and transactions of the parties relating to the partnership from its inception. He did so. The testimony was reduced to writing and is preserved in the record. It is therefore within the power of the defendant to point out wherein the judgment is erroneous to his disadvantage on an account exhibited upon the theory which he contends the referee should have adopted and followed. Where it is within the power of a party complaining of an alleged erroneous ruling to show from the record that the judgment finally entered is erroneous to his prejudice, as the result of such ruling, he must do so, otherwise it will not be disturbed.

It is not necessary, however, to base an affirmance of the judgment alone upon the reasons already given, as an examination of the carefully prepared report of the referee discloses that it is substantially correct in every particular; and, although the evidence upon which his findings are based is in some respects conflicting, it is ample to support

them. Such being the case, they will not be disturbed, nor is it necessary to review the evidence except in a general way.

Going to the merits, the real question to consider is whether or not, independent of the finding that the partnership was dissolved, the other findings of fact sustain the account exhibited by the report of the referee and the judgment rendered thereon. The partnership was evidenced by two contracts entered into between the parties, bearing date March 14, 1905. The first is what may be designated the contract of partnership proper. From this it appears, the purpose of the partnership was to conduct a general farming business, and was to continue for 10 years unless dissolved by mutual consent. Each party was to contribute \$5,000. The firm was authorized to engage in the purchase and sale of real estate and water rights, and buy, sell, or take upon shares live stock. The capital was to be applied to the purchase of what was known as the Stone Ranch and the water rights connected with that property. In case any additional money was required to carry on the business, and either partner should advance it, the partner making the advance was to receive a partnership note. The title to all property acquired by the partnership was to be taken and remain in the name of Wilcox until such time as Painter should discharge all indebtedness he might owe the firm. All checks, notes, and evidences of credit or indebtedness were to be signed by Wilcox only, for and on behalf of the firm. Painter was to manage the business, but was not authorized to make any contract for the purchase, sale, or lease of the property of the firm without first having the consent of Wilcox, except that he was authorized to hire and discharge necessary help. For his services, Painter was to receive \$3 per day for his time actually devoted to the management and care of the business. The contract also provided that at least once a year, or as often as mutually agreed upon, an accounting should be had of the affairs and business of the copartnership, a balance struck, and the net profits divided.

The supplemental or second agreement provided that, whereas Wilcox had advanced \$1,000 to purchase the Stone Ranch, and had executed notes for the balance of the purchase price for that property in the sum of \$6,500, secured by mortgage thereon, Painter was to execute his notes for one-half of the money so advanced and the indebtedness incurred by Wilcox in the purchase of the ranch, which should be a first lien upon the property and income of the firm until Painter discharged his obligation connected with the purchase, when he was to receive a deed from Wilcox for a one-half interest in the ranch and other property of the firm.

Turning to the report of the referee, we find it there stated that the business of the

firm was entered upon shortly after these contracts were executed. Painter took charge of the ranch. Farming implements, stock, and other articles necessary to carry on the business were purchased and placed upon the farm. Improvements were made. Neither party advanced the \$5,000 that each was to put into the firm, but advances were made from time to time by the respective parties in addition to that named in the supplemental agreement, for the purpose of carrying on the business, or, for this purpose, the obligations of the firm were executed with the consent of both.

Among the items purchased in December, 1905, was 187 head of steers, for which the firm paid, or agreed to pay, \$3,831.86. These steers were known, and are referred to in the report of the referee, as the P. W. herd, and their purchase was sanctioned by Wilcox.

In January, 1906, Wilcox, having advanced considerable money, became dissatisfied with the management of the partnership business, refused to further proceed with the partnership affairs, or to make any further advances. Subsequent to this time, Painter bought stock at diverse times, without the knowledge or consent of Wilcox, for which he paid, or incurred obligations, in an amount exceeding \$10,000. Considerable of this stock was registered, and the price paid was very much more than that paid for ordinary cattle. Referring to these transactions and others subsequent to January, 1906, the referee, after calling attention to the fact that the partnership articles inhibited Painter from making such purchases, or incurring obligations therefor without the consent of Wilcox, states: "The plaintiff denies the authority of the defendant to make these purchases aside from the P. W. herd, and I think the plaintiff's contention in respect to this must be admitted. * * * These purchases, subsequent to the 1st day of December, A. D. 1905, were, moreover, made in the individual name of the defendant, and not in the name of the firm. The defendant, in his testimony, asserted that all the cattle subsequent to the first purchase were, in fact, purchased for the partnership account and benefit, although purchased in his own name. All his conduct in regard to them seems to dispel this contention. He mortgaged them in his own name, branded them with his own brand (4-N), and exhibited them, advertised them, and sold them in his own name. In his book of account (Exhibit C, page 59) appears a memorandum of the properties of the firm then on hand (January 15, 1907) in these words: 'Bal. on hand, estimated, cattle, 36 hd. on ranch and out on range.' Now, while this number does not agree at all with the number of the P. W. cattle, which, according to his statement of sales of that herd (Exhibit D, 27), ought to have been on hand, if the purchase subsequent to December 1, 1905, were included, he would have had on

hand more than twice the number stated in this memorandum. For these reasons the defendant is not allowed credit for moneys expended by him on account of purchase of cattle subsequent to the 1st day of December, 1905. The purchases of cattle subsequent to the 1st day of December, 1905, when the P. W. herd was acquired, were made in the sole name of the defendant; in his own name he executed the promissory notes, evidencing the purchase price; in his own name he executed mortgages of the different animals purchased; in his own name he advertised his herd of registered cattle; and in his own name he exhibited and sold them. And in the negotiations of these purchases, if the testimony of Mr. and Mrs. Hathaway is to be believed (and they are not contradicted by the defendant), he announced that, if there was money in cattle, he intended to have it for himself. Now these cattle, to the number of over 300, and of the value of over \$10,000, were kept upon the partnership property, cared for by its employees, fed and attended at the partnership expense. The time of the defendant was largely given to their management, exhibition, and sale. They were mingled with the partnership herd purchased in December, 1905, and sold with them, and the defendant himself declares it is impossible to determine, except approximately, what particular moneys were received for them, either the one or the other. * * *

At this point the referee calls attention to the fact that, during the period defendant was conducting the business in his own name, he operated, in connection with the partnership ranch, other premises on the opposite side of the river, the title to which was vested in himself, his wife, and his sister-in-law; that partnership animals, implements, and utilities were used in fencing, improving, and cultivating these premises; and that it was impossible to determine, with any degree of certainty, how much of the defendant's time was so occupied; that the defendant sought to justify this diversion of partnership properties to the cultivation and improvement of the private property across the river by suggesting that the product of those premises was used by the partnership. Continuing the report, the referee says: "Considering the entire impossibility of ascertaining what ought to be charged against the defendant on account of his own time in the caring for and sale of the 4-N herd, and the unregistered cattle, the impossibility of determining with certainty what ought to be charged against him for the time of the employees upon the partnership ranch, in caring for these cattle, and in improving and cultivating private lands of himself, his wife and sister-in-law, a just result can only be arrived at by regarding the partnership as in fact dissolved in January, 1906, treating the whole enterprise thereafter as the private affair of the defendant, and charging

against him a reasonable rental for the occupation and use of the copartnership property. * * * The defendant from that time seems to have managed the partnership property and carried on business in his own name and for his own account. He expressly testifies that since January, 1906, he carried on the ranch in his own name, and that the moneys arising from the cultivation of the ranch were his moneys. He bought the cattle and hogs in his own name, executed promissory notes and mortgages to evidence the purchase money, in his own name advertised them, and sold them in his own name; bought supplies for the ranch in his own name; he contracted in his own name with another as to the crop to be planted and the amount to be paid therefor, and, except in the single instance of one lease of the partnership lands, he made no transaction whatever in the name of the firm, nor did any act in any way evidencing that the firm was interested in or liable for his doings except the entries made in his private book accounts. I find, therefore, that the firm was dissolved on the 2d day of January, 1906. That no salary is to be allowed defendant after that date, and that the firm is not to be charged with his disbursements, except as they are related to indebtedness previously contracted."

As we understand the argument of counsel for appellant, it is contended that the referee erred in finding as a fact that the partnership was dissolved in January, 1906, and for that reason refusing to give Painter any credit for disbursements, obligations incurred, or for salary after that date. It may be conceded that the partnership was not dissolved, either in law or in fact, but, however that may be, it appears from the findings of the referee that the transactions after January, 1906, which counsel for Painter contend should have been treated as partnership transactions, were not, in fact, transactions of that character, but were those of Painter alone, acting for himself and not for the partnership, although he was making use of the ranch property which belonged to the firm for his sole personal benefit. Consequently, independent of the fact of whether the partnership was or was not dissolved in January, 1906, the referee very properly held that the firm should not be charged with disbursements after that date, except as they related to indebtedness previously contracted on behalf of the firm; that the business which Painter thereafter transacted in his own name should be treated as his private affair; and that he should be charged on this account a reasonable rental for the occupation and use of the copartnership property. So that, although the referee may have given a wrong reason for the conclusion that after January, 1906, the business was that of Painter, and not that of the firm, it will not work a reversal when it appears that the accounting is nevertheless right.

[3] We think it is clear on principle that, if a member of a copartnership avowedly transacts business in his own name and for his own benefit, although it might be of a character which the partnership was formed to engage in, and, for the purpose of carrying on the business on his own behalf, makes use of copartnership property, on an accounting he is not entitled to have such transactions considered as firm business, and should account to the firm for the reasonable rental value of the copartnership property which he has utilized exclusively for his benefit. It was upon this theory that the referee proceeded in taking an account with respect to the transactions after January, 1906, giving Painter, however, credit for money expended in discharging firm indebtedness incurred prior to that date, and charging him with money received for partnership property, and also charging him with reasonable rental value of the partnership property which he used in carrying on his own private business. With respect to all prior transactions, it appears the parties were properly debited and credited for moneys received and disbursed in connection with the partnership affairs.

[4] It is urged that the referee erred in debiting the defendant with the amount charged to his account for the rent of the ranch, tools, and other property belonging to the partnership. This contention is based upon the assumption that the total production of the ranch for the period for which Painter was charged rent did not equal the amount of the rent charged. We do not deem this as material.

[5] Besides it appears that it was impossible to ascertain from the testimony the total value of the production of the ranch during this period. On this subject the referee reports, in substance, that some of the cattle which the defendant was handling were kept in the partnership stables, fed from the products of the ranch, and pastured on the premises; that defendant's household, five in number, were fed and maintained in part from the farm products, lived upon the ranch, and that, in view of all this, it was difficult, if not impossible, to ascertain the value of the products, and therefore proper and reasonable to charge the defendant with the fair rental value of the premises, as shown by the testimony was the annual and customary rental of lands and water rights in that vicinity. We think this was correct. As the defendant was practically using the ranch for his sole benefit, the value of such use should be determined by ascertaining the fair rental value, and not the value of the production.

[6] Counsel for appellant contend the testimony discloses that plaintiff withdrew from the partnership without just cause, and for that reason it should have been held in the accounting that he was only entitled to a fair compensation for work done and money

advanced to the date of his withdrawal, and deprived of all interest in the partnership property. In support of this claim, *Beaver v. Lewis*, 14 Ark. 188, is cited. The facts in that case are such that the holding of the court is in no respect applicable to this. In that case the partners entered upon a joint enterprise, which, in order to be utilized, had to be completed. Before its completion, one of the partners, after spending some money and several months' work, abandoned the partnership without just cause. This was held to work a dissolution, and, as the enterprise was completed by the others, the party withdrawing had no specific interest in the property as completed, but was entitled to a fair compensation for his work and money advanced. In the case at bar, if it should be conceded that the plaintiff withdrew in such circumstances as to work a dissolution (a matter, however, which the defendant did not claim in his pleadings), the property then belonging to the partnership, consisting, as it did, of a ranch, stock, tools, and other items, still belonged to the firm, and upon an accounting had to be and was treated accordingly.

An examination of the record convinces us that the accounting is just and fully sustained by the testimony in the case. The judgment entered thereon should therefore be affirmed, which is accordingly done.

Judgment affirmed.

BAILEY, J., concurs.

MUSSER, J., without expressing any opinion on matters of fact or law other than is embraced in his special concurrence, concurs in the affirmance of the judgment for the reason only that the findings of the referee disclose that the business conducted by Painter, after the time at which the referee found the partnership was dissolved, was conducted by him in his own name and professedly for his own benefit to the exclusion of Wilcox, and the accounting was thus made upon a basis on which Painter had placed himself, and from this viewpoint the findings of the referee appear to be right.

BRINKER et al. v. MALLOY et al.

(Supreme Court of Colorado. June 3, 1912.)

1. ESCROWS (§ 10*)—DELIVERY—EFFECT.

Where a bank to which certain deeds were delivered in escrow had instructions from the grantor to deliver the deeds to the grantee, provided the bank would become responsible for the purchase price, and the bank pursuant to such instructions delivered the deeds and accepted the grantee's note for the price, the delivery was absolute, and passed title to the grantee.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 15; Dec. Dig. § 10.*]

2. VENDOR AND PURCHASER (§ 228*)—BONA FIDE PURCHASER—UNRECORDED DEED.

Where defendants had actual notice of the existence of certain prior conveyances of the

property in controversy before they opened negotiations with one of the grantors for the purchase of his interest in the property, the fact that the prior deeds were not of record did not give defendants any superior rights under subsequent deeds to them under Rev. St. 1908, § 694, providing for the record of conveyances of real estate, and that, after record, such conveyances shall take effect as to subsequent bona fide purchasers or others not having notice thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495-501; Dec. Dig. § 228.*]

Appeal from District Court, Morgan County; H. P. Burke, Judge.

Suit by Patrick J. Malloy and another against Charles F. Brinker and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Doud & Fowler, of Denver, for appellants. L. C. Stephenson, of Ft. Morgan, and Allen & Webster, of Denver, for appellee Patrick J. Malloy.

GABBERT, J. Appellees, plaintiffs below, brought suit against appellants to quiet title to an interest in lands in Morgan county. The judgment was in favor of the plaintiffs, from which the defendants have appealed.

Thomas D. Malloy, who lived at Yuma, Ariz., for himself and as attorney in fact for his sister, Mrs. Harris, executed a deed for the interest in the real estate in controversy, conveying it to Patrick J. Malloy, and deposited it in escrow with the State Bank at Hillrose, with instructions to deliver on or before a specified date, on payment of a sum named, with the reservation that the grantors retained the right to withdraw the deed at any time before the deal contemplated was consummated. The deed, because of irregularities, was not satisfactory, and another was executed and deposited with the bank under practically the same instructions, except that the cashier was directed that he might deliver to the grantee, without the payment of the purchase price, but at the risk of the bank, in which event the grantors would wait a reasonable time for the purchase money; that is, if the bank delivered the deeds without the money being paid within the time fixed by the instructions, it was to be responsible to the grantors for the purchase price, which should be paid to them within a reasonable time. Pursuant to these instructions, the cashier handed the deeds to Patrick J. Malloy, taking his note for \$4,000, which was the amount of the purchase price. It appears that the bank neglected to notify Malloy at Yuma of this transaction. Shortly afterward the defendant, Brinker, acting for himself and his codefendant, Joslin, offered Malloy at Yuma \$1,500 for his interest, which the latter accepted by wire. He then wrote the bank that the Patrick J. Malloy escrow was withdrawn, and that the deeds were not to be delivered, and that new deeds were to

be sent for Brinker, which were to be delivered to Joslin upon the payment of the sum agreed upon. The cashier of the bank then wired Patrick J. Malloy that his escrow was canceled, and ordered him to return the deeds, which he refused to do. It appears that a deed, conveying the property to Brinker or Joslin, or both of them, was deposited with the bank. Brinker tendered the agreed purchase price to the bank, and demanded the deed, which was refused. At the time of these transactions, the deeds to Patrick J. Malloy had not been recorded. Some time after the demand of Brinker, he and Joslin commenced a suit for a specific performance against Thomas D. Malloy and the cashier of the bank, and filed a *lis pendens* for record in the county where the land is situate. There are some other transactions and facts connected with the matter, which we do not deem it necessary to consider, as they do not affect the rights of the parties.

The first point urged on behalf of appellants is that the court erred in holding that the handing of the deeds by the bank to Patrick J. Malloy was a delivery; and, second, that the court erred in holding that the delivery of these deeds could not be attacked by the appellants under the pleadings, for the reason that, when the grantor of a deed does not attack the validity of its delivery, it cannot be so attacked by other persons for him. In connection with these two alleged errors, it is also urged that the court erred in excluding testimony which would have tended to prove that the deeds were not, in fact, delivered by the bank to the grantee, Malloy. These three propositions can be considered together.

[1] We think the testimony indisputably establishes an intention on the part of the bank to make an absolute delivery of the deeds to the grantee, Malloy, for the purpose of conveying title, and accepted by the grantee for that purpose. The bank had instructions from the grantor to deliver the deeds, provided it became responsible to him for the purchase price. It saw fit to act on these instructions, and assumed responsibility by taking the grantee's note. Had there not been a delivery with intent to pass title, there would not have been any occasion for the bank to require an obligation for the purchase price, nor would the grantee, unless he thus acquired title, have assumed the obligation he did. The very essence of the delivery of a deed is the intention of the parties, which is to be gathered from their conduct and all the surrounding circumstances. The testimony which it is said was excluded was not competent or material on the subject of delivery, for the reason, as stated, that it appears the deeds were, in fact, delivered unconditionally, and in pursuance of instructions from the grantor. If the court was wrong in holding that the

delivery of the deeds could not be attacked by the defendants under the pleadings, for the reason assigned, it cannot affect the case on review when it appears, as it does, that there was an actual unconditional delivery of these conveyances.

[2] These deeds were not recorded until after the suit for specific performance was commenced and the *lis pendens* filed. For this reason it is asserted on behalf of appellants that they are not bound by these conveyances. We think it appears, without question that Brinker, who was acting for himself and Joslin, had actual notice of the existence of these conveyances prior to the time when he opened negotiations with Malloy at Yuma for the purchase of his interest in the property. Such being the case, the fact that they were not of record cuts no figure. Section 694, Rev. Stats. 1908.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER and BAILEY, JJ., concur.

(53 Colo. 589)

BRITISH AMERICA ASSUR. CO. v.
COLORADO & S. RY. CO.

(Supreme Court of Colorado. May 6, 1912.
Rehearing Denied July 1, 1912.)

1. DAMAGES (§ 64*)—REDUCTION BY INSURANCE.

Where property covered by a fire policy was destroyed by fire set by a railroad company, and insurer paid the amount of the policy and the railroad company paid the balance of the loss, the liability of the railroad company to the owner was settled.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 113; Dec. Dig. § 64.*]

2. RAILROADS (§ 453*)—OPERATION—FIRE—LIABILITY.

See *Sess. Laws* 1903, p. 404, making every railroad company liable for damages by fire set by operating its lines, whether negligently or otherwise, substantially embodying the provisions of *Gen. Laws* 1877, § 2237, and *Sess. Laws* 1887, p. 368, imposes on a railroad company an absolute liability for damages by fire set out in the operation of its road.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1657-1660, 1667; Dec. Dig. § 453.*]

3. INSURANCE (§ 606*)—FIRE INSURANCE—PAYMENT OF LOSS—SUBROGATION.

Where an insurance company pays a loss caused by a fire set by a railroad company in the operation of its road, and under the statutes the railroad company is absolutely liable for loss of property by fire set in the operation of its road, the insurance company is entitled under the doctrine of subrogation to the rights of the owner, and it may recover from the railroad company the amount paid by it on the policy; the statutory liability of a railroad company being based on the theory of indemnity or security.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.*]

4. CONSTITUTIONAL LAW (§ 154*)—“IMPAIRING OBLIGATION OF CONTRACT”—INSURANCE—STATUTES.

Laws 1903, p. 404, making every railroad company liable for damages by fire set in the operation of its road, but providing that the liability shall inure solely in favor of the owner or mortgagee of the property destroyed, and shall not pass by assignment or subrogation to any insurance company issuing a policy thereon, is invalid as impairing the obligation of contracts, in violation of U. S. Const. art. 1, § 10, and Const. Colo. art. 2, § 11, when applied to a fire policy issued before its passage, and stipulating that insurer shall be subrogated to the extent of payment made to all right of recovery by insured for loss resulting from fire caused by the act of another.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 426-428, 442-444, 447-455; Dec. Dig. § 154.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3412-3417.]

5. INSURANCE (§ 606*)—SUBROGATION ON PAYMENT OF LOSS—STATUTES—APPLICABILITY.

Sess. Laws 1903, p. 404, providing that the liability imposed on every railroad company for damages by fire set by the operation of its road shall not pass by assignment or subrogation to any insurance company issuing a policy on property destroyed by fire, is not applicable to a policy issued prior to the passage of the act, and stipulating for subrogation; otherwise, the statute will take away a right accruing under a prior contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.*]

6. INSURANCE (§ 606*)—SUBROGATION ON PAYMENT OF LOSS—CONTRACTS—STATUTES—APPLICABILITY—“ACCRUED.”

Where a fire policy, stipulating that insurer should be subrogated to the extent of any payment to all right of recovery by insured for loss resulting from fire caused by the act of another, was issued prior to Sess. Laws 1903, p. 404, providing that the liability imposed on railroad companies for damages by fire caused by the operation of their roads shall not pass by assignment or subrogation to any insurance company issuing a policy on the property, but not affecting any right which has “accrued,” the mere fact that a fire occurred after the passage of the act did not prevent the insurance company paying a loss from insisting on its right to be subrogated to the rights of the owner against the railroad company, causing the fire; the right accruing by virtue of the contract, and the word “accrued” meaning any right that has arisen.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. § 606.*]

For other definitions, see Words and Phrases, vol. 1, pp. 101-103.]

7. STATUTES (§ 263*)—CONSTRUCTION—PROSPECTIVE OPERATION.

A statute will be construed prospectively so as not to affect the legal character of a past transaction, unless the intention so to do is unequivocally expressed in the act, though there is no constitutional restriction, nor words in the statute expressly excluding its application to accrued rights.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. § 263.*]

White, J., dissenting.

En Banc. Error to District Court, City and County of Denver; Booth M. Malone, Judge.

Action by the British America Assurance

Company against the Colorado & Southern Railway Company. There was a judgment of dismissal, and plaintiff brings error. Reversed and remanded.

S. G. Williams, of Denver, for plaintiff in error. E. E. Whitted, of Denver, for defendant in error.

GARRIGUES, J. Action by the British America Assurance Company against the Colorado & Southern Railway Company to recover the amount of a fire loss paid by the former to Alvin Maul. The first cause of action states that Maul was the owner of certain buildings and personal property of the value of \$4,810.40, located adjacent to the track and right of way of the railway company; that September 7, 1902, the insurance company insured the property against loss from fire for three years in the sum of \$1,800; that March 2, 1904, a locomotive of the railway company caused and set out a fire which totally destroyed the property; that the policy of insurance contained the following clause: “If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of said payment to all right of recovery by the insured for the loss resulting therefrom, and said right shall be assigned to this company on receiving said payment”—that the insurance company on demand paid Maul \$1,800 on account of the loss; that Maul assigned to it all his right against the railway company to the extent and amount of the insurance so paid; that, after the insurance company had paid the loss, the railway company, with full knowledge of that fact, settled with Maul on account of the fire for the amount of his loss in excess of the insurance so paid, but refuses to pay either Maul or the insurance company any portion of the \$1,800. The second cause of action is identical with the first, except it is alleged the railway company negligently caused and set out the fire. Defendant demurred to the complaint upon three grounds: First, that the assignment and subrogation sought to be enforced is prohibited by the act of 1903; second, defect in parties plaintiff, and splitting up the cause of action; third, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment entered dismissing the action.

In 1874 the Legislature passed the following act: “That every railroad corporation operating its line of road or any part thereof within this state, shall be liable for all damages by fire that is set out or caused by operating any such line of road or any part thereof, and such damages may be recovered by the party damaged by the proper action in any court of competent jurisdiction; pro-

vided, the said action be brought by the party injured within three years next after the said damage shall have been inflicted or caused." General Laws 1877, p. 740, § 2237. In 1887 the act was amended to read: "Every railroad corporation operating its line of road, or any part thereof, shall be liable for all damages by fire, that is set out or caused by operating any such line of road or any part thereof, and such damages may be recovered by the party damaged by the proper action, in any court of competent jurisdiction; * * * Provided the said action be brought by the party injured within three years next after it accrues." Session Laws 1887, p. 368.

In 1903 an act was passed entitled:

"An act to provide a liability against railroad companies for damages caused by fire, and to repeal all acts and parts of acts in conflict therewith.

"Section 1. Every railroad company operating its line of road, or any part thereof, within this state shall be liable for all damages by fires that are set out or caused by operating any such line of road, or any part, thereof, in this state, whether negligently or otherwise; and such damages may be recovered by the party damaged, by the proper action, in any court of competent jurisdiction: Provided, the said action be brought by the party injured within two years next ensuing after it accrues; and provided further, that the liability herein imposed shall inure solely in favor of the owner or mortgagee of the property so damaged or destroyed by fire; and the same shall not pass by assignment or subrogation to any insurance company that has written a policy thereon: Provided, that nothing in this act shall be held to apply to or in any manner affect any right which has accrued prior to the passage hereof or any cause or suit now pending.

"Sec. 2. All acts and parts of acts in conflict with this act are hereby repealed."

Session Laws 1903, p. 404.

[1] 2. Maul's loss was paid in full; a portion by the plaintiff, the balance by the defendant. He has no further right or interest in the claim against the railway company. When it settled with him, it narrowed the transaction down to the right of the insurance company to recover against it. The statute provides that suits shall be brought in the name of the real party in interest, and the parties here are the only ones now having any interest in the transaction. The railway company protected itself against more than one suit when it paid all Maul's loss except the insurance. This is not a splitting up of Maul's right against the railway company, because there is but one item remaining to be determined, and that is the right of the insurance company to recover from the railway company, and it is there-

fore impossible to split the cause of action. All liability of the railway company to Maul on account of the fire has been settled. *Liverpool Steam Co. v. Insurance Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; *St. Louis Ry. Co. v. Insurance Co.*, 139 U. S. 235, 11 Sup. Ct. 554, 85 L. Ed. 154; *Marine Insurance Co. v. St. Louis Co. (C. C.)* 41 Fed. 643; *Norwich Insurance Society v. Standard Oil Co.*, 59 Fed. 984, 8 C. C. A. 483; *Fairgrieve v. Marine Co.*, 94 Fed. 686, 37 C. C. A. 190; *Swarthout v. Ry. Co.*, 49 Wis. 623, 6 N. W. 314; *Insurance Co. v. Railway Co.*, 73 N. Y. 399, 29 Am. Rep. 171; *C. B. & Q. Ry. Co. v. German Ins. Co.*, 2 Kan. App. 395, 42 Pac. 594; *Hustisford Ins. Co. v. C. M. & St. P. Ry. Co.*, 66 Wis. 58, 28 N. W. 64; *Hartford Ins. Co. v. Wabash Ry. Co.*, 74 Mo. App. 106; *A. T. & S. F. Co. v. Home Ins. Co.*, 59 Kan. 432, 53 Pac. 459.

[2] 3. The statute of 1903 provides that every railroad company shall be liable for all damage by fire set out or caused by the operation of its road, whether negligent or otherwise. The ancient common law held one liable for all damages by fire set out or caused by him, and the statute imposing absolute liability for such damages is said to be declaratory of this ancient common law of England. But according to modern common law as interpreted by our American courts, in the absence of a statute imposing absolute liability, negligence is the gist of the action. *U. P. Ry. Co. v. De Busk*, 12 Colo. 299, 20 Pac. 752, 3 L. R. A. 850, 13 Am. St. Rep. 221. The Session Laws of 1874 and 1887 provide that every railway company shall be liable for all damages by fire set out or caused by the operation of its road. The corresponding portion of the act of 1903 is identical, except that it contains the additional clause, "whether negligent or otherwise." Our statute for more than 30 years has continuously, without change, imposed upon railroad companies absolute liability for all damages from fire set out in the operation of their roads, whether negligence entered into the cause or not, and the only question to be determined in cases of this character was, Did the railway company set out or cause the fire in the operation of its road? If so, the answer has always been the same, namely, that it was liable. The liability clause in the act of 1903 only reenacts the pre-existing liability. The railway company since the first statute has always been liable, whether the fire was caused by negligence or not, and the additional phrase, "whether negligent or otherwise," does not change the status of the railway company in relation to the owner in the least. The statutes eliminate all adjectives and differences, as to the origin of the fire, and exact but one condition; that is, that the fire was set out or caused by the operation of the road. In this respect the act of 1903 is no different from the former acts.

If the fire originated in the operation of the road, it makes no difference how it otherwise occurred, the company is liable.

[3] 4. The statute is intended to provide an indemnity to owners against loss from fire caused by the operation of railroads. It was enacted to settle upon whom the loss should fall, and, because of the peculiar manner in which railway companies use this dangerous element, it casts the responsibility of employing it on them. The law when this insurance contract was written made the indemnity of the railway company primary, and that of the insurance company secondary. In other words, the owner held two sureties, each indemnifying him against loss, one, based on a statute, the other on a contract, in which the statutory security was primary and the indemnity of the insurance company secondary. The owner could resort to either or both. If the insurance company was compelled to pay the loss, it was entitled under the doctrine of subrogation to the primary security held by the owner, and could recover from the railway company any insurance paid on the loss. It is admitted this was the law as to fires negligently set out; but it is contended the doctrine does not apply to liability based on the statute. We fail to find where such a distinction is recognized. As we have said, the statutory liability of the railway company is based on the theory of indemnity or security. If the insurance company pays the loss, it is entitled to whatever primary security was held by the owner, and this includes all the liability of the railway company to the owner. *Lumber Co. v. D. & R. G. Ry. Co.*, 17 Colo. App. 277, 68 Pac. 870; 2 Biddle on Insurance, § 1281; *Harris on Subrogation*, §§ 13, 606; *Sheldon on Subrogation*, §§ 11, 230; *Hart v. Railway Co.*, 13 Metc. (Mass.) 100, 46 Am. Dec. 719.

[4] 5. In consideration for the insurance, Maul promised to assign to the insurance company his right against the railway company to the extent of any loss paid by it, so that the insurance company should, to that amount, be subrogated to his right against the railway company. He assigned to the insurance company in accordance with the agreement, his claim to the extent of \$1,800, and this suit depends on that assignment, the legality of which turns on the contractual right for assignment and subrogation. The act of 1903, passed after the contract was made, and before the fire, contains a clause which provides that the liability of the railway company shall inure solely in favor of the owner of the property, and shall not pass by assignment or subrogation to any insurance company having written a policy thereon. This statute further provides that nothing therein shall be held to apply to, or in any manner affect, any right which shall accrue prior to the passage of the act. The question under consideration is, treating the anti-subrogating act of 1903 as constitu-

tional, but not so deciding, Is this contract of insurance eliminated from the operation of the statute? After careful study and investigation, we have reached the conclusion that it is, and for four reasons: First, it impairs the obligation of the contract by taking away and destroying security held by the insurance company under the contract for assignment and subrogation; second, it is retrospective in its operation; third, the right arose or accrued at the time the contract of insurance was made, and it is expressly exempt from the operation of the statute; fourth, without the exempting clause, and with no constitutional inhibition, the statute, nevertheless, will be construed prospectively and not retrospectively, unless the contrary intent clearly appears. Article 1, § 10, par. 1, of the federal Constitution provides: "No state shall . . . pass any . . . law impairing the obligation of contracts." Article 2, § 11, of the state Constitution provides: "No law impairing the obligation of contracts, or retrospective in its operation, . . . shall be passed by the General Assembly." When the insurance company contracted to insure his property, Maul agreed, as a part of the consideration entering into the contract, in the event it paid a loss from fire caused by the operation of a railroad, that he would to the extent of the loss paid assign his right against the railway company to the insurance company. This promise, like the premium, was a valuable consideration entering into the contract. The agreement is an express contract based in part upon Maul's promise to make the assignment. That was one of the conditions upon which the policy was issued. There is a direct conflict between the contract, which provides that Maul's right against the railway company shall pass by assignment to the insurance company, and the statute, which provides that it shall not. The purpose of the act is not to change the liability of the railway company to Maul; but to destroy the right of the owner to assign to the insurance company any liability of the railway company. The liability of the railway company to Maul depends on the law at the time of the fire, but the right to recover on an assignment of that liability depends on the law as it existed when the contract for the assignment of the right was made. The assignment was contracted for, and the contractual right for the assignment arose between the parties, or accrued, at the time the agreement was entered into. When the insurance was paid, and the assignment taken, it was the exercise of a right reaching back to the date of the contract; that is, the right existed from the time of the execution of the contract, but the assignment was not made until the loss was paid. There was a vested right, from the date of the contract, to have something upon the happening of a contin-

agency, and any statute destroying that right impairs the obligation of the contract. The contractual liability of the insurance company was to indemnify Maul against loss from fire, and Maul's contract for assignment was security for the indemnity. To destroy the security upon which reliance was placed, and which entered into the consideration for the policy of insurance, would impair the obligation of the contract. *Robinson v. Magee*, 9 Cal. 81, 70 Am. Dec. 638; *Atlantic Trust Co. v. The Vigilancia*, 73 Fed. 452, 19 C. C. A. 528.

[5] 7. In *Denver, South Park Railway Co. v. Woodward*, 4 Colo. 167, and later in *Perry v. Denver*, 27 Colo. 95, 59 Pac. 747, this court, in speaking of retrospective legislation, said: "Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new liability, in respect to transactions or considerations already past, must be deemed retrospective. If we apply the anti-subrogating act to this policy of insurance, we take away a right which accrued under a contract against which there was no law at the time when the contract was made. It would also create a different obligation than that upon which the insurance was written, and attach a new and different liability to the transaction. If the statute is permitted to defeat the right of assignment, it destroys the right to enforce the agreement made by the parties, and to that extent changes the obligation of the contract; therefore, the act is not applicable, and the contract of insurance is excluded from its operation on account of the constitutional inhibition."

[6] 8. The Legislature expressly excluded from the operation of the statute past transactions of this character by declaring that nothing in the act should be held to apply to, or in any manner affect, any right which had accrued prior to the passage of the act. It is claimed, however, that no right accrued under the contract for assignment before the passage of the act, because there had been no fire, no loss paid, no assignment, and consequently no vested right accrued prior to the passage of the act. With this we do not agree. The insurance company possessed the right to demand an assignment whenever a certain contingency, which might happen, did actually occur. It was the making of the contract which conferred that right to demand the assignment when the contingency arose. The right accrued by virtue of a contract promising to make an assignment at some future time upon the happening of the contingency. The word "accrued" is employed in different ways. It was evidently the intent of the Legislature to use it here in its ordinary sense, which would mean any right that had arisen; that is, was in existence before the passage of the act. In

Barnes v. Allen, 1 Brown's Chancery Reports, 168, it is said: "Contingent or executory interests may be as completely vested as if they were in possession." The statute itself bars the operation of the act upon any accrued right existing under the contract of insurance at the time the act was passed. The contractual right for assignment was co-extensive with the contract of insurance, and the right accrued when the policy was written. A lawful contract based on a valuable consideration for the delivery of a thing in the future, upon the happening of an event which may occur, is an accrued right within the ordinary and common meaning of the word.

[7] 9. Without any constitutional restriction, and in the absence of any statute expressly excluding its application to accrued rights, the act should be construed prospectively, so as not to affect the legal character of past transactions, unless the intention so to do is unequivocally expressed by the Legislature. *Endlich on Interpretation of Statutes*, §§ 271, 272, 273; *McMaster v. State of New York*, 103 N. Y. 554, 9 N. E. 313; *Bridgewater Bank v. Copeland*, 7 Allen (Mass.) 140; *Davidson v. Gaston*, 16 Minn. 238 (Gil. 202); *Aurora Turnpike Co. v. Holthouse*, 7 Ind. 59; *Plumb v. Sawyer*, 21 Conn. 351.

Counsel have given much time to arguing the question of the constitutionality of the anti-subrogating clause; but a decision of that matter is unnecessary to the determination of this case, and we express no opinion upon it.

Reversed and remanded.

CAMPBELL, C. J., not participating.
WHITE, J., dissents. See 125 Pac. 1135.

(68 Colo. 187)

KAVANAGH et al. v. HAMILTON.

(Supreme Court of Colorado. June 3, 1912.)

1. JUDGMENT (§§ 489, 485*)—COLLATERAL ATTACK—"VOID" AND "VOIDABLE."

The words "void" and "voidable," as applied to judgments, do not denote different degrees of faultiness, but are a classification based upon the source from which the evidence comes to show the fault, and generally dependent on the method of attack; the judgment being void and subject to collateral attack if the record proper discloses that the court was without jurisdiction, but merely voidable and subject only to direct attack where the record shows jurisdictional facts which are untrue, but does not show want of jurisdiction.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 924, 925, 919; Dec. Dig. §§ 489, 485.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7332-7342; vol. 8, p. 7830.]

2. JUDGMENT (§ 518*)—DIRECT ATTACK—WHAT CONSTITUTES.

Direct attack on the judgment of a court of record as distinguished from collateral attack may be by motion, by answer and cross-complaint, by an equitable action to cancel or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

enjoin its enforcement, by writ of error, or possibly by a bill of review.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. § 518.*]

2. JUDGMENT (§ 518*)—COLLATERAL ATTACK—WHAT CONSTITUTES.

An attack in a district court proceeding to partition land, upon a judgment of the county court in a probate matter affecting the same land, was a collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 961, 962; Dec. Dig. § 518.*]

4. JUDGMENT (§ 489*)—COLLATERAL ATTACK.

In a collateral attack on a domestic judgment of a court of record, an inspection of the judgment roll must affirmatively show want of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.*]

5. JUDGMENT (§ 475*)—COLLATERAL ATTACK—COUNTY COURTS—PROBATE MATTERS.

The county court in the settlement of estates is a court of record and of general jurisdiction, and its judgments are not open to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 910; Dec. Dig. § 475.*]

6. JUDGMENT (§§ 496, 499*)—COLLATERAL ATTACK—PRESUMPTIONS OF JURISDICTION.

On collateral attack, the jurisdiction of a court of record must be determined by its own record, and jurisdiction will be presumed, unless it therein affirmatively appears that the court was without jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. §§ 496, 499.*]

7. JUDGMENT (§ 490*)—COLLATERAL ATTACK—JURISDICTION.

In a collateral attack upon a judgment, the mere absence from the record of the summons and return, coupled with the absence of any recital of service in the judgment, does not make it affirmatively appear that the court was without jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 926-928; Dec. Dig. § 490.*]

8. JUDGMENT (§ 497*)—COLLATERAL ATTACK—JURISDICTION—IMPEACHMENT BY RECORD.

Where a judgment recites generally due service of process without giving the mode, and the return of the officer shows the mode of service which is bad, the record stultifies itself, and the return will impeach the general recitals in the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

9. JUDGMENT (§ 497*)—SUFFICIENCY OF RECORD TO SHOW JURISDICTION.

Where the judgment recites due and legal service, the record proper, without other evidence, affirmatively shows jurisdiction, and the judgment is not open to collateral attack, though the summons and return cannot be found.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

10. JUDGMENT (§ 497*)—COLLATERAL ATTACK—SUFFICIENCY OF EVIDENCE.

A certified copy of a summons and return was insufficient to impeach recitals of service in a judgment upon which a collateral attack was made, where the evidence did not show beyond a reasonable doubt that the certified copy was correct.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

11. JUDGMENT (§ 497*)—COLLATERAL ATTACK—IMPEACHMENT BY RECORD.

The omission of the letter "i," making a name read "George," instead of "Georgie," in the officer's return of a summons, did not stultify the recital of due and legal service in the judgment upon which a collateral attack was made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

12. PROCESS (§ 149*)—ATTACK—SUFFICIENCY OF EVIDENCE.

Oral evidence is admissible to impeach the record in a direct attack on a judgment for want of service, if no one is affected except the parties in the case in which the return is made, but public policy requires that the record shall not be overthrown except upon clear and convincing evidence impeaching the officer's return.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 202-205; Dec. Dig. § 149.*]

13. JUDGMENT (§ 499*)—ATTACK—SUFFICIENCY OF EVIDENCE.

Where a judgment upon which the plaintiff in partition proceedings made a collateral attack was rendered fifteen years before and when she was only six years of age, her testimony that she was not personally served with summons was insufficient to impeach the record showing proper service; testimony being judged and weighed rather by its effect than by what the witness actually says, and it being apparent that such testimony went merely to the question of her remembrance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 940; Dec. Dig. § 499.*]

14. JUDGMENT (§ 501*)—COLLATERAL ATTACK—ERRORS.

Where the county court acquires jurisdiction over the person and subject-matter in a probate matter affecting land, the district court has no authority in a subsequent collateral proceeding for partition of the same land to review such judgment for mere errors and irregularities, though some of them were serious enough to have reversed the case on review.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 941; Dec. Dig. § 501.*]

Appeal from District Court, City and County of Denver; George W. Allen, Judge.

Action by Georgia B. Hamilton against Ella T. Kavanagh and others. From judgment for plaintiff, defendants appeal. Reversed.

Branch H. Giles, Edward C. Stimson, Lawrence Lewis, and William B. Tebbetts, all of Denver, and Charles B. Ward, of Boulder, for appellants. E. P. Costigan, Ward & Ward, and Hugh McLean, all of Denver, for appellee.

GARRIGUES, J. 1. October 6, 1891, Robert J. Hamilton died intestate, owning Denver property on Glenarm street. He left as his sole heirs his widow, Hannah Hamilton, two sons, George A. and Franklin R. Hamilton, and two daughters, Jessie F. and Georgie B. Hamilton. The latter was plaintiff below and is appellee here. Her name was "Georgie," but in this suit, begun March 17, 1906, it is spelled "Georgia." She was born March 28, 1885, and when her father died was 5½ years old. Mr. Hamilton's estate was insolvent. The family lived in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Glenarm street property, on which was an incumbrance of \$10,000, bearing interest at the rate of 7 per cent. per annum, and due October 22, 1893. The widow was appointed administratrix, and January 4, 1892, filed a petition in the county court, naming plaintiff as one of the defendants, and asking to sell or incumber the premises to pay debts. The petition alleged that decedent left no personal estate of any kind or value, that there was a large indebtedness on which the interest was past due, and that the taxes were unpaid. Petitioner asked to be authorized to either negotiate a loan, or to sell the real estate. On this petition a summons was issued, and January 6, 1892, returned served. March 8, 1892, W. T. Rogers was appointed guardian ad litem for the minor heirs, and March 14, 1892, answered the petition. May 23, 1892, after hearing the petition, the court entered a decretal order, finding due and legal service of process had been made upon all the defendants in the manner prescribed by law, and authorizing the administratrix to borrow \$15,000 at 7 per cent. interest, and to secure the payment of the same by executing a trust deed on the property. June 28, 1892, this order was amended or modified by making the rate of interest $7\frac{1}{2}$ per cent. She borrowed the \$15,000 from J. S. Brown & Bro., and secured its payment by a deed of trust on the property. July 11, 1892, the loan was approved by the court. October 27, 1894, taxes and interest being in default, the premises were advertised, and November 28, 1894, sold under the trust deed to J. Sidney and Junius F. Brown, who received a trustee's deed. The subsequent deeds of conveyance are as follows: J. Sidney and Junius F. Brown to Thomas Harrison; Thomas Harrison to Charles A. Brinley; Charles A. Brinley to Viola F. Halliwell; Viola F. Halliwell to Ella T. Kavanagh; and Ella T. Kavanagh to the Roanoke Investment Company, and since the foreclosure they have been in possession of the property, paid the taxes, and collected all the income. For over 14 years the original summons issued on the petition to sell or incumber remained in the files of the county court. In February, 1906, it was examined by defendant's counsel, and notes taken of the return. In March, before the institution of the partition suit, it was examined by plaintiff's counsel, who ordered certified copies of both the petition to sell and the summons, which were furnished by the clerk of the court. When the complaint was filed on the 17th, alleging no personal service on the plaintiff, defendant's counsel again examined the files, but the summons could not be found. Thereafter counsel for both parties met while at the courthouse inquiring about the lost summons, and while there they compared the certified copy of the petition with the original on file, and found that plaintiff's name was spelled "George". In the original petition, but that

in the certified copy it was spelled "George," exactly as in the certified copy of the return. The person who made the copies, when her attention was called to the matter, said that, if she had made such a mistake in the petition, she was not sure that the copy of the return was correct.

At the trial in the district court, the original summons could not be produced or accounted for, and, to prove that an inspection of the judgment roll would show the judgment void, the court admitted in evidence the certified copy of the summons and return. In this certified copy of the sheriff's return plaintiff's name is spelled "George B. Hamilton." There is no "i" between the second "g" and the letter "e." The certified copies of the summons and petition were made by the same person, and the clerk signed the certificate without any personal knowledge as to whether or not they were correct. Each counsel testified as to how the name in the original appeared to him when he examined it. Counsel for defendant said, in his opinion, the name was spelled "George B. Hamilton," and he so entered it on notes made at the time; that there was a blot between the second "g" and final "e." Counsel for plaintiff testified that in his opinion the name was spelled "George B. Hamilton" on the original return; that it appeared as if the person in writing the second "g" had stopped, as if with indecision, before making another letter, giving an indentation between the "g" and "e"; but which was not dotted.

2. Plaintiff says this suit is to recover her interest in the land, and to partition the premises. She alleges she is the owner of an undivided one-eighth of the property, to which interest defendants have no title; that the county court proceeding as to her is void, because the court had no jurisdiction over her person, for the reason that she was not personally served with summons, and that the recital in the decree as to service is untrue; also, that the judgment is void because the court had no jurisdiction over the subject-matter. She claims that the judgment is void because the record proper stultified itself by showing that she was not served with summons; or, if the judgment is not void on this account, that it is voidable because she was not served, which fact, she alleges, is established by the evidence. Plaintiff further says that the name "George B. Hamilton," as found in the certified copy of the sheriff's return, is not hers, hence the record shows she was not served, notwithstanding the court found and recites in its judgment that she was. She invokes the rule of law that where a judgment recites generally due service of summons, without giving the specific mode of service, and the officer's return shows the mode of service, which is bad, that the record stultifies itself, and the specific recitals in the return will control the general

recitals in the judgment. She prays for a partition or allotment of the premises, or that they be sold, the proceeds divided, and an accounting had of the rents and profits.

3. The district court found that plaintiff was not served with summons in the county court proceeding, and that the county court decree, as to her, was void for want of service; but did not say whether the finding was based on an inspection of the judgment roll or on oral evidence impeaching it. It found plaintiff owned an undivided one-eighth of the property; that the Roanoke Investment Company owned the balance, and ordered the premises to be partitioned, if practicable, by commissioners to be appointed by the court. The case is here on appeal.

[1] 4. The words "void" and "voidable" do not denote different degrees of faultiness in judgments, but are a classification based on the evidence. If an inspection of the record proper furnishes the facts showing that the court acted without jurisdiction, the judgment is void, and may be collaterally attacked. If, on the other hand, the record does not show this jurisdictional infirmity, or does not furnish the evidence of nullity, or if it shows or recites jurisdictional facts which are untrue, the judgment is voidable. The attack upon it, however, in such a case, must be direct, for the purpose of establishing by other evidence the untruthfulness of the record. When this is done, it is as void as any judgment which the record shows was rendered without jurisdiction. The classification generally depends on the method of attack, which is determined by the source from which the evidence comes. If the judgment is void, the source of the evidence to prove it is the judgment roll, and the attack may be collateral; whereas, if it is voidable, the evidence to prove it void must come from some source other than the judgment roll, and the attack must be direct, and cannot be collateral. A void judgment must show from an inspection of its own record that it is void, while a voidable judgment shows from its record that it is good, and it will remain good until proven void, in a suit brought for that purpose. Plaintiff contends that the county court judgment is void and was subject to collateral attack; or, if she is mistaken in this, then that it was voidable, and is subject to direct attack by evidence showing that the recitals in the judgment of due service are untrue.

5. Before plaintiff was entitled to a judgment of partition, she had to establish her title, and before it could render such a judgment, the district court was obliged to find, and it did find, that the county court judgment was void.

[2, 3] It is necessary, therefore, at the outset, to determine whether the attack on the county court judgment was direct or collateral. Direct attack on the judgment of a

court of record may be by motion, as in *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750, or by answer and cross-complaint, as in *Wilson v. Hawthorne*, 14 Colo. 530, 24 Pac. 548, 20 Am. St. Rep. 290, or by an equitable action to cancel or enjoin its enforcement, as in *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824, or by writ of error, or possibly by a bill of review. This was neither. The main purpose of this suit was to partition the premises in which plaintiff was compelled to establish her title as in ejectment. Her attack on the county court judgment authorizing this loan is an attempt in a partition suit, to establish title by impeaching the judgment of the county court. This is a collateral attack. *Hughes v. Cummings*, 7 Colo. 138, 203, 2 Pac. 289, 928; *Thompson v. Crocker*, 18 Colo. 328, 32 Pac. 831; *Bateman v. Reittler*, 19 Colo. 547, 36 Pac. 548; *Manson v. Duncanson*, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. Ed. 1105; *Cohen v. Portland Lodge*, 152 Fed. 357, 81 C. C. A. 483; *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214. The case last above cited is directly in point, and many authorities are given. In *Israel v. Arthur*, 7 Colo. 5, 1 Pac. 438, it is held where a divorce had been granted, and the wife afterwards brought suit to establish a right in her husband's estate on the ground that the divorce was void, the attack was collateral.

6. When a domestic judgment of a court of general jurisdiction is offered in evidence in another suit, it cannot be attacked collaterally unless the record proper, the judgment roll, shows affirmatively that it is void for want of jurisdiction. *Martin v. Force*, 3 Colo. 199; *Gomer v. Chaffe*, 5 Colo. 383; *Brown v. Tucker*, 7 Colo. 30, 1 Pac. 221; *Hughes v. Cummings*, 7 Colo. 138, 203, 2 Pac. 289, 928; *Thompson v. Crocker*, 18 Colo. 328, 32 Pac. 831; *Bateman v. Reittler*, 19 Colo. 547, 36 Pac. 548; *Farmers' U. D. Co. v. Rio Grande Co.*, 37 Colo. 512, 86 Pac. 1042; *Cochrane v. Parker*, 12 Colo. App. 169, 54 Pac. 1027; *Harter v. Shull*, 17 Colo. App. 162, 67 Pac. 911.

[4] In a collateral attack on a domestic judgment of a court of record, an inspection of the judgment roll must affirmatively show the infirmity which deprives the court of jurisdiction, and renders its judgment void. *Burke v. Interstate Sav. Ass'n*, 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416.

[5] 7. The county court in the settlement of estates is a court of record and of general jurisdiction. *Clemes v. Fox*, 25 Colo. 39, 53 Pac. 225; *Hughes v. Cummings*, 7 Colo. 138, 203, 2 Pac. 289, 928; *Thompson v. Crocker*, 18 Colo. 328, 32 Pac. 831; *Bateman v. Reittler*, 19 Colo. 547, 36 Pac. 548; *Rawles v. People*, 2 Colo. App. 501, 31 Pac. 941.

8. Having shown that the county court is a court of record, and of general jurisdiction in probate matters, that this is a collateral attack made against its judgment in partition

suit in the district court, and that the infirmity, if any, which renders the judgment void on such attack, must affirmatively appear from the record, we will now inspect the record.

[6] Courts of record are presumed, on collateral attack, to have jurisdiction over the parties and the subject-matter. *Farmers' U. D. Co. v. Rio Grande Co.*, 37 Colo. 512, 86 Pac. 1042; *Hughes v. Cummings*, 7 Colo. 138, 203, 2 Pac. 289, 928; *Pennington v. McNally*, 11 Colo. 557, 19 Pac. 503; *Behymer v. Nordloh*, 12 Colo. 352, 21 Pac. 37; *Fletcher v. Stowell*, 17 Colo. 94, 28 Pac. 326; *Martin v. Force*, 3 Colo. 199; *Gomer v. Chaffe*, 5 Colo. 383. The above cases are ample authority for the statement that if the county court judgment had contained no recital of jurisdiction, and no summons was found in the record, jurisdiction over the person and subject-matter would be presumed. In other words, on collateral attack, the jurisdiction of a court of record must be determined by its own record, and, unless it therein affirmatively appears that the court was without jurisdiction, jurisdiction will be presumed.

[7] The mere absence of a summons and return, coupled with the absence of any recital of service in the judgment, does not make it affirmatively appear that the court was without jurisdiction. Jurisdiction on collateral attack will be presumed until that presumption is affirmatively overturned by an inspection of the judgment roll. *Gulickson v. Bodkin*, 78 Minn. 33, 80 N. W. 783, 79 Am. St. Rep. 352; *Burke v. Interstate Sav. Ass'n*, 25 Mont. 315, 64 Pac. 879, 87 Am. St. Rep. 416.

[8] This court is committed to the doctrine that if the judgment recites generally due service of process, without giving the mode, and the return of the officer shows the mode of service, which is bad, that the record sustains itself, and the return will impeach the general recitals in the decree.

[9] In the case at bar one part of the record proper, to wit, the judgment, recites due and legal service, while another part, to wit, the summons and return, cannot be found; therefore the record proper, without other evidence, affirmatively shows jurisdiction.

[10] A certified copy of the missing summons and return were admitted in evidence for the purpose of showing that the record sustained itself, because her name was spelled in the return "George B. Hamilton." No authority has been cited holding that one part of the record proper on collateral attack may be impeached by a certified copy of another part of the record. In *Gage v. People*, 207 Ill. 377, 69 N. E. 840, it is held that a copy of an original notice which had been lost could not be used to impeach the recitals in the record; but the opinion does not state whether the copy was certified. If a certified copy of a summons and return may be used to impeach the recitals of service

in the judgment, the danger of doing so, unless the evidence shows beyond a reasonable doubt that the certified copy is correct, is forcibly and strikingly illustrated in this case. Plaintiff's bible name, child name, home name, and name given by her mother in the settlement of the estate is spelled "Georgie." In the original petition it is spelled "Georgie." In the certified copy of the petition it is spelled "George," just as it is in the certified copy of the return. The clerk, with no personal knowledge of their accuracy, attached a certificate to both. We know that clerical errors and mistakes do occur in certified copies. The person who made these was careless, and admitted that the same mistake might have occurred in the copy of the return as in the petition. Suppose the petition was lost, and the copy, which we now know is wrong, was admitted to impeach the recital in the judgment. It would be a manifest wrong, and goes to show the danger of admitting a copy for the purpose of impeaching a court record. The evidence of the attorneys who inspected the original return tends to show that the name was intended for "Georgie." The fact that there was an indentation between the "g" and "e" which was not dotted is not sufficient to show that the named was intended for "George," and not for "Georgie." Under all the circumstances, we have no hesitancy in saying that the certified copy of the return in this case is not sufficient to impeach the recitals in the judgment.

9. The claim that the judgment is voidable because, in fact, she was not served, and the recital in the decree is untrue, will be considered later.

[11] We are now dealing with the case, not from the standpoint of the untruthfulness of the record; but that an inspection of the record shows that the judgment is void. From this viewpoint it will be implied, and we have a right to assume that she was served with a summons. From this view her complaint is not that she was not in fact served; but that an inspection of the record shows that she was not served, the name being spelled "George B. Hamilton," which sustains the recital in the judgment, that she was served, because her name is not "George." In other words, the complaint is based upon the misspelling of her name in the return. If the plaintiff was in fact served with summons, and her name was spelled in the return "George B.," it was an immaterial variance that in no way prejudiced or misled her under the circumstances of this case. The mere omission of the letter "i" in spelling her name in the return will not overcome the recital in the decree that she was in fact served. On collateral attack this mistake in the return is not sufficient to render the service upon her invalid. The statute required personal service upon her; but she was a mere child six years of age, without the slightest comprehension of the

legal document. She was living with her mother, her natural guardian, who was administratrix of the estate, had filed the petition, and was attending to the court proceedings. A guardian ad litem was appointed for plaintiff, who appeared in court and filed on her behalf an answer to the petition. Under such circumstances the law will not permit, 15 years afterwards, the ownership of valuable property which has passed into the hands of others, upon the faith of court records, to be overturned by a mistake in the spelling of a child's first name in the return of a summons. Suppose her name was "Jessie" and it was spelled in the return "Jesse," or that she spelled her name "Frances," and it was spelled in the return "Francis," it would make no difference if she was in fact served. Such a misspelling of the name would not stultify the recital in the judgment of due and legal service. *Archibald v. Thompson*, 2 Colo. 388; *Marr v. Wetzel*, 3 Colo. 2; *Schlacks v. Johnson*, 13 Colo. App. 130, 56 Pac. 673; *Smith v. Smith*, 13 Colo. App. 295, 57 Pac. 747; *Rich v. Collins*, 12 Colo. App. 511, 56 Pac. 207; *Lane v. Innes*, 43 Minn. 143, 45 N. W. 4; *Schooler v. Asher*, 1 Litt. (Ky.) 216, 13 Am. Dec. 232; *State v. Patterson*, 24 N. C. 346, 38 Am. Dec. 699; *Belton v. Fisher*, 44 Ill. 32; *Mallory v. Riggs*, 76 Iowa, 748, 39 N. W. 886; *Pond v. Ennis*, 69 Ill. 341; *McGhee v. Romatka*, 19 Tex. Civ. App. 397, 47 S. W. 291; *Insurance Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Townsend v. Ratcliff*, 50 Tex. 148; *McAuliff v. Hughes*, 128 App. Div. 355, 112 N. Y. Supp. 486; *Waterbury v. Mather*, 16 Wend. (N. Y.) 611; *First Nat. Bank v. Jagers*, 31 Md. 38, 160 Am. Dec. 58; *Parry v. Woodson*, 33 Mo. 347, 84 Am. Dec. 51; *Fosbler v. Narver*, 24 Or. 441, 34 Pac. 21, 41 Am. St. Rep. 874.

10. We will now consider the case from the viewpoint that the recital of service in the judgment is untrue, that the judgment is voidable, and the attack direct for the purpose of having it declared void.

[12] In direct attack on a judgment upon the ground that there was no service, if third parties have not acquired rights upon the faith of the return, and no one is affected except the parties in the case in which the return is made, oral evidence is admissible for the purpose of impeaching the record. But in such a case public policy requires that the record should not be overthrown except upon clear and convincing evidence. *Manson v. Duncanson*, 166 U. S. 583, 17 Sup. Ct. 647, 41 L. Ed. 1105; *Ferguson v. Crawford*, 86 N. Y. 609; *Owens v. Ranstead*, 22 Ill. 161; *Davis v. Dresback*, 81 Ill. 395. In the latter case the officer's return showed personal service on the man and his wife. They each testified they were not served with process. The officer testified that he personally served each of them with summons in the manner specified in his return. The lower court set aside the service. On appeal, the Supreme Court of Illi-

nols held that the evidence was not satisfactory, and set aside the finding of the lower court on the ground that the evidence was insufficient to impeach the return of the officer.

[13] In the case at bar, the record shows due and legal service of summons upon the plaintiff. A sworn officer of the court testified that he made personal service of summons on her. To impeach this record and overthrow the whole court proceeding as to her, we have her evidence that she was not served with summons. In considering the weight of her testimony to determine whether she has established her claim beyond a reasonable doubt, we must consider all the facts and circumstances in the case. When she testified, she was some 22 or 23 years of age. When the service was made upon her, she was 6 years of age. Nothing had transpired between these dates to cause her to think or remember whether she had been served or not. In fact, she says the first time that she remembered it, or thought about it, was when she was asked in her attorney's office during the preparation of the case, and shortly before the trial, whether she had been personally served with summons. She knew that her father at one time had owned this Glenarm street property, and, if her mind was so keen at six years of age, it would certainly have come to her knowledge through family history that they had lost the property through some court proceeding. It is strange that it had never occurred to her until the attorney asked her whether she was served with summons. A child six years of age has no understanding or conception whatever of legal transactions, and it is unreasonable to believe that fifteen years after the occurrence she could suddenly remember, in the preparation of this suit, that no service had been made upon her. The whole story is told by two questions asked her by her counsel: "Q. Do you remember in the year 1892 ever having any legal or court papers served on you by the same being handed to you or read to you? A. I do not. Q. Do you remember any sheriff or deputy sheriff, in 1892, reading or handing any such papers to you? A. No, sir." True, she said she was very positive that she was not served with summons in any way or at any time; but evidence is not always what a witness says. It is the effect of what he says. The effect of her whole testimony was that she did not remember whether she was served or not. We know from the circumstances of the case, her age at the time, and the manner of service that it was impossible for her to remember. The evidence was insufficient to justify the district court in finding that she was not served with summons.

[14] 11. The finding of the district court that the county court had no jurisdiction over the subject-matter on account of errors and irregularities, is erroneous. As we have

already said, the county court is a court of record, and of general jurisdiction in probate matters, and in the settlement of estates. If it had jurisdiction over the person and subject-matter, the district court was without authority to review its judgment for errors and irregularities. The district court made a finding of the matters which deprived the county court of jurisdiction over the subject-matter, which may be summarized as follows: First, insufficiency of the petition; second, failure of the order appointing the guardian ad litem to mention specifically the names of the minor heirs; third, that the rate of interest was changed by amending the order to read 7½ per cent. instead of 7 per cent.; fourth, that the trust deed failed to recite the order of the county court; fifth, that the trust deed did not purport to bind the appellee; sixth, that the court authorized a deed of trust instead of a mortgage.

The county court petition to sell or encumber is in substantial compliance with the statute, and was sufficient to call into operation the jurisdiction of the county court over the subject-matter. The district court was in error in holding that the petition was insufficient to confer jurisdiction upon the county court over the subject-matter. In *Bradley v. Droan*, 187 Ill. 175, 53 N. E. 304, 79 Am. St. Rep. 214, the court says: "It is said the petition filed by the administrator, asking for an order to sell real estate to pay debts, fails to allege necessary facts with reference to amount of claims allowed, the estate on hand and the manner of disposing of the same, and the amount of claims paid. While we are satisfied the petition is a substantial compliance with the requirements of the statute, the objections pointed out, if well founded, are at most but mere irregularities, and are not open to review in this collateral proceeding. There may be errors in the proceedings to sell land which might, on direct appeal, lead to a reversal of the order; but where, as here, the proceeding to sell it attacked collaterally, as is held in the case last above cited, it cannot be defeated or impeached for mere errors." All the matters found by the district court to be jurisdictional were at most mere errors or irregularities. It does not matter even if some of them were serious enough to have reversed the case on review, the petition was in substantial compliance with the statute that gave the county court jurisdiction over the subject-matter, and in this collateral attack the district court was powerless to review the action of the county court for any errors committed in that proceeding. *Nichols v. Lee*, 16 Colo. 147, 26 Pac. 157; *Bateman v. Reitler*, 19 Colo. 547, 36 Pac. 548; 18 Cyc. pp. 715, 724, 802, 807, and 809; *Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250; *Magee v. Big Bend Land Co.*, 51

Wash. 406, 99 Pac. 16; *Bradley v. Droan*, 187 Ill. 175, 53 N. E. 304, 79 Am. St. Rep. 214; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Est. of Devincenzi*, 119 Cal. 498, 51 Pac. 845.

Reversed.

MUSSER and HILL, JJ., concur.

REITZE et al. v. HUMPHREYS.

(Supreme Court of Colorado, June 3, 1912.)

1. MORTGAGES (§ 33*)—ABSOLUTE DEED AS MORTGAGE—POSSESSION.

Plaintiffs owned certain real property, subject to three mortgages, and, the time to redeem from a foreclosure sale under the third being about to expire, they applied to defendant for a loan for an amount sufficient to take up the certificate of sale, the second mortgage, pay the taxes, and \$1,000 on the first mortgage, in order to obtain an extension thereof. Defendant agreed to loan the money to do this for 90 days; the transaction being accomplished by assigning to defendant the certificate of sale, the execution to him of a sheriff's deed thereon, the further assignment to him of the second mortgage, which was later canceled and released; and the execution by plaintiffs of a quitclaim deed of the property to defendant, and his execution to them of a lease for three months at a rental of \$100, which was the amount they agreed to pay for the loan, and an option to repurchase the property, within the term of the lease, for the amount of the loan any rent thereafter paid to apply on the purchase price. Held, that the transaction constituted a mortgage, and not a sale of the real estate, so that, on plaintiffs' default, defendant could not recover possession without foreclosure.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 67-82; Dec. Dig. § 33.*]

2. MORTGAGES (§ 27*)—NATURE OF TRANSACTION—SECURITY.

Where a transaction resolves itself into a security, whatever may be its form and whatever name the parties may choose to give it, it is in fact a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 43, 45-53, 55; Dec. Dig. § 27.*]

3. MORTGAGES (§ 37*)—PAROL EVIDENCE—NATURE OF TRANSACTION.

Where land is conveyed to secure a debt, and the papers are silent as to the existence of the debt, and on their face purport an absolute conveyance, parol evidence is admissible to show the intent of the parties and the true nature of the transaction.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 97-107; Dec. Dig. § 37.*]

4. MORTGAGES (§ 608½*)—SUIT TO REDEEM—TENDER.

Where, in a suit to have the legal relation of the parties determined under a transaction in which plaintiffs claimed that an absolute deed was in fact a mortgage, and to protect their possession, the complaint alleged, and the answer admitted, that defendant was claiming ownership and right to possession, and was prosecuting an action in another court to oust plaintiffs, in which plaintiffs were barred from having heard and determined the question whether the conveyance was in fact a mortgage, plaintiffs were not bound to allege and prove a tender of payment of the amount they admitted was due, since, if they were correct in their contention, they were entitled to possession, without payment or offer to pay, until

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a deed had been issued to defendant pursuant to foreclosure sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

5. MORTGAGES (§ 608½*)—ABSOLUTE DEED AS MORTGAGE—EQUITY JURISDICTION—POSSESSION.

Where complainants, who were in possession, sued in equity to have an absolute deed declared a mortgage, and to protect their possession, they could not complain that the court had no jurisdiction to determine the issue of possession, under the rule that, where a court of equity has jurisdiction for any purpose, it will retain it until complete justice is done.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

Appeal from District Court, City and County of Denver; Carlton M. Bliss, Judge.

Action by Bertha S. Reitze and another against Harry W. Humphreys. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

See, also, 125 Pac. 522.

F. T. Johnson and S. W. Johnson, both of Denver, for appellants. Edward L. Shannon, of Denver, for appellee.

MUSSER, J. The only evidence given at the trial in the court below was that on behalf of the plaintiffs, who are appellants here. From this it appears that Mrs. Reitze was the owner of certain real property in Denver, which she, with her husband, the other appellant, had occupied as a home from the time she acquired it to the time of the rendition of the judgment in the district court. There were three mortgages upon the premises. The third one had been foreclosed, the six months allowed by statute for redemption by the owner had expired, and it was upon the last day, or the day before the last, for the redemption by creditors, when the transaction, out of which this action arose, had its inception. On that day, Mr. Reitze who had full authority from his wife, called upon Mr. Humphreys and informed him that they would lose their home, unless they obtained assistance, and requested a loan of \$2,500 which Mr. Reitze thought would be sufficient to satisfy the holder of the certificate of the foreclosure sale, who was willing to surrender it, if paid, and to pay the second mortgage and all interest, taxes, and other liens, except a first mortgage of \$4,000, which the holder had said he would extend, for a period of about 18 months. Mr. Humphreys agreed to loan the money for 90 days, and Mr. Reitze agreed to pay \$100 for the use of it for that period, and that this interest should be deducted from the \$2,500, leaving \$2,400 for Mr. Reitze. The loan was to be secured by the home. Mr. Humphreys drew his check for \$2,400 and informed Mr. Reitze that they would go over to the office of Mr. Humphreys' attorney, who would attend to the matter. There Mr. Reitze informed the attorney of the agreement which had been made for the loan

of \$2,500, and that out of this every lien and incumbrance was to be paid, except the first mortgage. Mr. Humphreys assented to this, handed the check for \$2,400 to his attorney, and told the latter to attend to the matter for him. On the same day, or the next day, Mr. Reitze called upon the holder of the first mortgage, and the latter refused to extend it, unless \$1,000 was paid on the principal. Mr. Reitze informed Mr. Humphreys of this, and the latter agreed to loan \$1,000 more on the same conditions, for the use of which Mr. Reitze agreed to pay \$25 in addition to the \$100 that had been agreed upon before. Mr. Humphreys declared he did not want to buy the property. Again they went to the attorney, who was informed of the increase in the loan, and was told to attend to it for Mr. Humphreys, and the latter insisted that the attorney should be paid by Mr. Reitze.

Here was a plain and simple contract made for the loan of \$3,400 for 90 days, for the use of which the borrower agreed to pay \$125 and to secure the same by the premises, subject to a mortgage of \$3,000, and the attorney was to attend to the matter for the lender. With this money the certificate of sale was obtained, the second mortgage paid off, the interest due on the first mortgage and \$1,000 of the principal thereof and taxes on the premises were paid, together with small expenses incurred in recording papers, and \$25 to the attorney, all of which amounted to \$3,400. In paying out this money, except a small amount for taxes, Mr. Reitze and the attorney called upon the parties together, and the attorney would pay the necessary amounts. There can be no dispute about all this; for the evidence is one way and uncontradicted, and no other construction can be given it. The money thus loaned became the money of the borrowers, who were to repay it within 90 days, together with \$125 interest. After Mr. Humphreys had taken Mr. Reitze to the attorney, Mr. Reitze informed the attorney of the condition of the property. He also informed him that there was a judgment against himself and Mrs. Reitze, which would be a lien on any property in Mrs. Reitze's name, but which they expected soon to pay off. Under the advice and insistence of Mr. Humphreys' attorney, for the protection of his client, the papers were disposed of and executed in this wise: The certificate of sale was assigned to Mr. Humphreys, and a sheriff's deed taken thereon to him. The note, secured by the second mortgage, was assigned to Mr. Humphreys and later canceled, and the mortgage released. Mrs. Reitze executed a quitclaim deed to Mr. Humphreys, and a lease and option was executed by the Reitzes and Humphreys for the term of three months for a rental of \$125, and they were given the option to purchase the property, within the term of the lease, for \$3,525, and any of the rent paid was to apply on the purchase price.

[1] It must be borne in mind that at the time Humphreys and Reitze arranged for the loan they did not agree upon the security more than in a general way—that it was to be upon the home, subject to the first mortgage—and the details were to be worked out by Mr. Humphreys' attorney. The attorney explained and insisted to Reitze that the manner adopted was the best way, under all the circumstances, to arrange the matter, so that Mr. Humphreys would be protected, and the Reitzes desired to protect him. No reflections are to be cast upon Mr. Humphreys or his attorney in this matter, or any ulterior motive ascribed to them. The attorney, no doubt, intended to adopt a method to secure his client which to him honestly appeared to be the best for all concerned, under the circumstances. There seems to have been an honest misconception of the nature of the transaction as detailed above. The defendant was content to rest his case upon the undisputed evidence offered on behalf of plaintiff, and the only question is: What is the legal effect of what was done, taking in view the whole transaction from beginning to end?

The lower court held that when the transaction was completed Mr. Humphreys was the owner of the property, and that the only interest that the plaintiffs had in it was a lease for three months and the option to purchase it during that time for \$3,525. The court adjudged that Mr. Humphreys was the owner and entitled to the possession of the premises, and ordered the Reitzes to surrender possession. The plaintiffs are now here insisting that the lower court was wrong in its conclusion, and that the only interest that Mr. Humphreys had in the property was as security for the loan made by him. Some time after the expiration of the three months, the Reitzes, not having paid the loan, Mr. Humphreys began an action of unlawful detainer in a justice court to oust the plaintiffs from possession of the premises, claiming to be the owner of the property and entitled to its possession. On the trial of that case, the justice refused to hear and determine the matter of the loan and security hereinbefore stated, and which was alleged in the answer in the justice court, and the justice rendered judgment against the Reitzes for rent and possession of the premises, from which judgment the Reitzes appealed to the county court, and that appeal was pending at the time of the commencement of the action in the district court.

[2] Voluminous briefs have been submitted by both parties to this action, in which a mass of authorities are cited and quoted. The case, however, is a very simple one, the evidence clear and undisputed, and the application of the first general principles of equity relating to such matters is all that is needed. All that was done from the time that Mr. Reitze approached Mr. Humphreys for the loan, to be secured by the home, down to the execution and delivery of the

papers, constituted but one transaction. That a loan was agreed upon at the very first, together with the time it was to run, the interest to be paid, and by what it was to be secured, is undisputed and beyond the shadow of a doubt on this record. This initial step stamped the transaction with the character of a debt and security, and this character remained with it until the final completion of the transaction, no matter what the form in which it may have been made to appear at the close. Equity has to do with the substance and reality of a transaction—not the form and appearance which it may be made to assume. The case of *Blackstock v. Robertson*, 42 Colo. 472, 94 Pac. 336, conclusively shows that it is the real intention of the parties and the true nature of the transaction that concern equity; and if the true nature is that of security the transaction will be given that effect, no matter how many papers may have been executed that cover up the real purpose and give to the transaction an appearance other than the true one. As our Court of Appeals has said, quoting from Story, "If a transaction resolve itself into a security, whatever may be its form and whatever name the parties may choose to give it, it is in effect a mortgage." *Borchardt v. Pavor*, 16 Colo. App. 406, 66 Pac. 251.

In *Wilson v. McWilliams*, 16 S. D. 96, 91 N. W. 453, the lender, at about the expiration of the time for redemption from a foreclosure sale, paid the amount necessary to redeem the property and some back taxes. He took the sheriff's certificate of sale and later a deed to himself. He agreed orally to sell the property to the plaintiff at any time within one year for the amount advanced on the property and interest. A written lease was also executed to the plaintiff. There the initial fact necessary to make the transaction one of security—that is, whether the money necessary to redeem was advanced as a loan—was disputed. The plaintiff claimed that it was so advanced, while the defendant claimed that he took a deed to the property for the purpose of acquiring title thereto. After a review of the conflicting evidence, the court found that the money was advanced as a loan; that thereby the relation of debtor and creditor was created between the parties; and that therefore the true nature of the transaction was one of security, and the defendant was held to be a mortgagee, and not the owner of the premises.

[3] The authorities generally hold that in such transactions, when the papers are silent as to the existence of a debt to be secured, and on their face purport otherwise, parol evidence may be resorted to to show the intent of the parties and the true nature of the transaction; and if it appears that there was a loan and a debt resulting therefrom a transaction, like the one in this case, is declared to be a mortgage to secure

that debt. *Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240; *Heron v. Weston*, 44 Colo. 379, 100 Pac. 1130.

The defendant says that the Reitzes had no interest in the property; that their time for redemption had expired, and they had nothing to mortgage. He took from them a quitclaim deed, and he must have thought that they had some interest which they could convey by it. It is undisputed on this record that at the time the negotiations began with Mr. Humphreys they had an arrangement with the holder of the certificate of sale, whereby the holder would assign it to them for the amount it would take to redeem. In any event, it was the money of the Reitzes, borrowed from Humphreys, that obtained whatever right he had in the property. With this money the second and third mortgages were disposed of; the principal of the first mortgage reduced, and the taxes paid, all of which were valid liens on the property; and it was the interest in the property covered by these liens which was to secure Mr. Humphreys for the money. What was done, as between the Reitzes and Mr. Humphreys, was in legal effect the same as though the certificate had been assigned to Mrs. Reitze, and she had taken the sheriff's deed and then conveyed the property to Mr. Humphreys for the purpose of security. When a grantee obtains title to property with money loaned to parties related to the property, as the Reitzes were in this case, there can be no doubt that the transaction is a mortgage. *Rogers v. Davis*, 91 Iowa, 730, 59 N. W. 265; *Hall v. O'Connell*, 52 Or. 164, 95 Pac. 718, 96 Pac. 1070; *Jones*, Mort. (4th Ed.) §§ 331, 332; 27 Cyc. 579.

When the prime fact that a loan was made and a debt thereby created is in dispute, and the evidence relating thereto is conflicting, then many attendant facts and circumstances are noticed and given weight as evidence for and against the prime fact. Such are to be found in the authorities cited by the defendant. Here, however, the prime fact is clear and undisputed, and no recourse need be had to the attendant facts, as in cases of dispute.

[4] The defendant contends that the plaintiffs should have alleged an offer or tender of the amount admitted to be due and secured by the alleged mortgage. There is some conflict in the authorities as to whether this must be done in a suit to redeem. Here, however, the complaint alleged and the answer admitted that the defendant was claiming the ownership and right to possession of the property, and was prosecuting an action in another court to oust plaintiffs from possession, in which action these plaintiffs were debarred from having heard and determined matters which, if proven, entitled them to possession. The action in the district court was commenced to have the true relation of the plaintiffs established and their possession of the property, to which they were entitled

under the allegations of their complaint, protected. Under the allegations of the complaint and the case made by them, they were entitled to the possession of the premises, without paying or offering to pay the indebtedness, and could not be ousted from the possession until the mortgage had been foreclosed and a deed issued on the foreclosure sale. Certainly it was not necessary for them to offer to pay an indebtedness to protect a possession to which they were thus entitled without payment or offer to pay. It has been held that the rule applicable under some authorities in actions to redeem, that requires the plaintiff to tender the amount due, or allege his ability and readiness to pay it, does not apply to a case which has for its object only the construction of a contract and the relation of the parties. *Brown v. Follette*, 155 Ind. 316, 58 N. E. 197; *Tucker v. Witherbee*, 130 Ky. 269, 113 S. W. 123. This must be especially true in a case like the present, where the right of the plaintiffs to possession does not depend upon the payment of the debt or offer to pay.

[5] Plaintiffs raise a question about the right of the court to award possession to the defendant. As has been seen, the action was not begun for the purpose of redeeming from the alleged mortgage, but to have the true relation of the parties determined, in order to protect the possession of the plaintiffs, which, it was alleged, was menaced by the defendant. The plaintiffs prayed that Mrs. Reitze be adjudged the owner of and entitled to the possession of the premises, and the defendant be adjudged a mortgagee, and that he be enjoined from demanding or taking possession or prosecuting an action therefor. Under the allegations of the complaint, it was in equity, if at all, that the relation of the parties was that of mortgagor and mortgagee. The plaintiffs therefore were obliged to, and did, invoke the aid of equity to protect their possession. Having done so, they would not be heard to complain, because the court awarded the possession to defendant when the issues tendered by them, one of which was their right to possession, were decided against them, provided, of course, that they were properly so decided, and that the proper allegations were made and proofs submitted that would entitle the defendant to possession. The rights of the defendant arose out of the transaction detailed in the complaint. Before the court could protect or refuse to protect the possession of the plaintiffs, it was necessary to determine the right to possession. The court certainly had the right to retain jurisdiction for the purpose of affording complete relief and thus end the litigation, under the maxim that, "Where a court of equity has jurisdiction of a cause for any purpose, it will retain it generally until complete justice is done." *Packard v. King*, 3 Colo. 211; *Schilling v. Rominger*, 4 Colo. 100; *Danielson v. Gude*, 11 Colo. 87.

17 Pat. 268; Coal Co. v. Coal Co., 24 Colo. 116, 48 Pac. 1045.

However, the court erred in its finding of what the true relation of the parties was, and that the defendant was entitled to possession. For that reason the judgment was wrong; and it is therefore reversed, and the cause remanded for new trial.

Reversed and remanded.

BAILEY and GARRIGUES, JJ., concur.

REITZE et al. v. HUMPHREYS

(Supreme Court of Colorado, June 3, 1912.)

1. FORCIBLE ENTRY AND DETAINER (§ 12*)—ANSWER—DEFENSES.

Rev. St. 1908, § 2612, provides that, in an action for unlawful detainer, defendant shall set forth in his answer all the substantial facts on which he relies, entitling him to the possession of the property described in plaintiff's complaint. *Held*, that defendant in such action was entitled to plead and prove that a deed under which plaintiff claimed title was in fact a mortgage, and, not having been foreclosed, defendant mortgagor was entitled to possession.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 57-63; Dec. Dig. § 12.*]

2. LANDLORD AND TENANT (§ 62*)—LANDLORD'S TITLE—DENIAL.

The rule that a tenant may not deny his landlord's title does not apply until the relation of landlord and tenant has been first established, so that defendant, when sued in unlawful detainer, may allege and prove that he never was a tenant, but was a purchaser or mortgagor in possession, and for that reason was entitled to remain.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152-154, 156-158, 168, 170; Dec. Dig. § 62.*]

3. FORCIBLE ENTRY AND DETAINER (§ 13*)—OTHER ACTION PENDING.

Plaintiffs sued, in equity, to have a deed under which defendant claimed title declared a mortgage, and to protect their possession before foreclosure. In his answer defendant affirmatively pleaded his title through the quitclaim and sheriff's deeds, and also pleaded execution of a lease to plaintiffs, alleging that such instruments were what they purported to be, and that plaintiffs went into possession as his tenants; that the lease had expired; that a demand had been made for possession; and that he was entitled to immediate possession, for which he prayed, and for general relief. *Held*, that the court thereby acquired jurisdiction of the entire controversy, and should have dismissed or abated a subsequent action for unlawful detainer brought by defendant therein to recover the same property, based on the same title, during the pendency of the equity suit.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Dec. Dig. § 13.*]

Error to District Court, City and County of Denver; Harry C. Riddle, Judge.

Unlawful detainer by Harry W. Humphreys against Albert Reitze and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

F. T. Johnson and S. W. Johnson, both of Denver, for plaintiffs in error. Edward L. Shannon, of Denver, for defendant in error.

MUSSEY, J. This writ of error was sued out to review a judgment of the district court in an action of unlawful detainer, which was begun before a justice of the peace. It involves the same property and, in fact, the same transaction and parties as case No. 6,588 (125 Pac. 518), which has just been determined. For convenience, we will refer to the case last mentioned as the equity suit and the other as unlawful detainer. The two were consolidated for hearing and determination in this court. As shown by the opinion in the equity suit, there was an unlawful detainer action between the same parties for possession of the same property pending in the county court on appeal from a justice of the peace. It is made to appear in this case that that first unlawful detainer action ran afoul of some question of jurisdiction in the county court and was dismissed. The present unlawful detainer action was commenced in a justice court, while the equity action was pending in the district court. On the incoming of the defendant's answer, the justice certified the action to the district court. We need not stop to inquire whether the justice should have so certified the case, for the district court had jurisdiction in unlawful detainer, and the parties appeared and made motions, filed pleadings, and tried the case without objecting to its being there.

Mr. Humphreys, the plaintiff, alleged in his complaint that he had leased the premises to the defendants, the Reitzes, for a certain term; that the term had ended; that under the contract of lease the defendants had agreed to surrender the premises at the end of the term; that demand in writing had been made upon them; that they refused to surrender; and prayed for possession in plaintiff. To this complaint the defendants filed an answer, first denying the allegations of the complaint, and then further answered that the defendant Bertha S. Reitze had borrowed money from the plaintiff; that the property had been deeded to the defendant to secure the loan; that the lease had been executed upon the false and fraudulent representations of the plaintiff that all parties would be better secured by allowing the plaintiff to pretend to be the owner of the premises, and to go through the form of executing a lease thereon; and that the plaintiff had no right in the premises, except as mortgagee. For a further answer and cross-complaint, the matters of the loan, quitclaim, and sheriff's deeds, lease, and option, detailed in the opinion in the equity suit, were pleaded by the defendants, and they alleged, in substance, that the lease mentioned by the plaintiff in his complaint

was a part of the transaction whereby the loan was secured; that the plaintiff had no other rights in the premises than as mortgagee; that the mortgage had not been foreclosed; and asked that the complaint be dismissed and that the defendant Bertha Reitze be adjudged to be the owner of the premises, subject to the mortgage held by the plaintiff. To this answer the plaintiff replied, in substance, that in the transaction detailed in the defendants' cross-complaint the plaintiff became the owner of the premises, and the relation of landlord and tenant was created between him and the defendants. Before the trial of the unlawful detainer action in the district court, the equity suit was tried, in which a judgment was rendered in favor of Humphreys and against the Reitzes, finding and adjudging that Humphreys was the owner of the premises and entitled to the possession thereof, and the Reitzes were ordered to deliver possession within 10 days, and if they failed to do so that a writ should issue to oust them. From this judgment, an appeal was taken.

After the rendition of the judgment in the equity suit, while the appeal was pending, the plaintiff, by leave of court, filed what he called his supplemental answer to defendants' further answer and cross-complaint, wherein he alleged the commencement of the equity suit, set forth the pleadings and the judgment rendered therein, alleged that the cause of action, the matters adjudicated, and the parties in the equity suit were the same as involved in the further answer and cross-complaint, and that the defendants were thereby estopped from making their attempted defense. To this so-called supplemental answer of the plaintiff, the defendants replied and alleged, among other things, that the equity suit was brought before the unlawful detainer action, admitted the rendition of the judgment, the identity of cause of action, matters adjudicated and parties in the equity suit, alleged that an appeal had been prayed, allowed, and perfected from the judgment of the district court, where the suit was pending, and prayed that the unlawful detainer action be abated until the final determination of the equity suit.

[1] The plaintiff contends that the defendants could not plead and prove in such an action the transaction of the loan, quitclaim, and sheriff's deeds, lease, and option, which, if proven, would make the relation of the parties mortgagor and mortgagee, as seen in the opinion of this court in the equity suit. If the relation was mortgagor and mortgagee, the defendants were entitled to the possession. Section 2612, Rev. Stat. 1908, provides that a defendant, in an action for unlawful detainer, in his answer, "shall set forth all the substantial facts upon which he relies, entitling him to the possession of the property described in plaintiff's complaint." His possession as a mortgagor is a substantial fact on which he may rely for

possession. Of course, if he shall plead such a fact, he may prove it and profit thereby. *Adcock v. Lieber*, 117 Pac. 993.

[2] The court refused to permit the defendants to introduce evidence tending to prove the transaction of the loan, which made the relation of the parties mortgagor and mortgagee, instead of landlord and tenant, as alleged in plaintiff's complaint. This evidence was objected to on two grounds: First, because, as claimed, the relation was landlord and tenant; and, second, because these matters had been litigated and determined in the equity suit. It was incumbent upon the plaintiff to establish the existence of the relation of landlord and tenant, else his action would fail. It needs no authorities to show that a defendant may disprove such relation by proving some other one that would entitle him to possession. It is not a defendant, as such, who is barred from denying a plaintiff's title; but it is a tenant who is not allowed to deny the landlord's title. The latter relation must exist to apply the rule. The plaintiff may allege that the defendant is a tenant and introduce evidence to prove it; but that is not conclusive upon the defendant. The latter may go forward and prove that he never was a tenant, but a purchaser or mortgagor in possession, for instance, and, for that reason, entitled to remain. This is so plain that the court must have ruled out the offer of defendants, on the ground that the matters they wanted to prove had been adjudicated in the equity suit.

We need not determine whether these matters were res adjudicata in face of the fact that an appeal had been taken from the judgment. The plaintiff attempts to say that his rights under the lease and his right to possession were not adjudicated in the equity suit. The decree specifically names the lease, and finds that it was what it purported to be; that it had expired, and the Reitzes had no more rights thereunder; and adjudged that Humphreys was entitled to the immediate possession of the premises, and ordered the Reitzes to vacate, and that if they did not do so in 10 days an appropriate writ should issue.

[3] It was thus made to appear by the plaintiff's own plea that his rights under the lease had been adjudicated, as well as the rights of the defendants. He filed his answer in the equity suit before he brought his action for unlawful detainer. In this answer, not content with mere negation, he affirmatively pleaded his title through the quitclaim and sheriff's deeds, as well as the execution of the lease; alleged that these instruments were what they purported to be; that the Reitzes went into possession under this lease as Humphreys' tenants; that the lease had expired; that written demand had been made for the possession; that he was entitled to immediate possession; that the tenants held over wrongfully and contrary

to the terms of the lease; and prayed for the possession and general relief. He thus invoked the jurisdiction of the court to completely determine the litigation in the equity suit. After doing this, he sought the aid of another court in this action between the same parties to obtain the relief that he had affirmatively submitted to the court in the equity suit. He persisted in the prosecution of both actions in the district court; and, after obtaining a judgment in one, he used that judgment to obtain the same relief in the other, notwithstanding the judgment had been appealed from. The district court gave him, in this case, a judgment that he had already obtained in that court. Both cases came to this court for review, and have been heard together. This court has reversed the judgment in the equity suit and remanded that action. If this court were now to affirm the judgment in the unlawful detainer suit on account of the former adjudication of the equity suit, it would place itself in the anomalous and unjustifiable position of rendering two judgments between the same parties on the same state of facts, one of which would nullify the other; and it would do this by virtue of a judgment which has been adjudged erroneous. The district court should have dismissed the unlawful detainer action, or abated it until the final determination of the appeal, as asked by defendants, instead of rendering a judgment that was the same as the judgment appealed from.

While the distinctions between actions at law and suits in equity do not exist in this state, yet right principles are always applicable; and under all the circumstances of this case this is a time for the application of the principle announced in the syllabus of *Quidnick Co. v. Chaffee*, 13 R. I. 367, as follows: "When proceedings at law and in equity are pending between the same parties and for the same cause of action, the court, on motion, will compel an election of remedies; and when the equity proceedings have been carried to hearing and decree the court, on motion, will enjoin the prosecution of the suits at law, and will order the discharge of any attachment made in them."

From the two records before us, it appears that every issue tendered in both can be determined, every right of each party adjusted, and every relief to which either party may be entitled can be given, in the equity suit. If any amendment should be thought necessary to fully accomplish this, it may be allowed. So that the further prosecution of the unlawful detainer action would be vexatious and serve no good or useful purpose.

The judgment of the district court is therefore reversed, and the cause remanded, with directions that the action be dismissed.

Reversed and remanded.

BAILEY and GARRIGUES, JJ., concur.

NESBIT, Sheriff (WORK, Intervener), v. SIGEL-CAMPION LIVE STOCK CO.

(Supreme Court of Colorado. July 1, 1912.)

1. COURTS (§ 213*)—JURISDICTION—AMOUNT IN CONTROVERSY.

The Court of Appeals act (Laws 1911, p. 266), providing for review of any decision of the Court of Appeals involving the construction of a provision of the federal or state Constitution, or relating to a franchise or freehold, or "a judgment for more than \$5,000 exclusive of costs," does not authorize a review by the Supreme Court of a decision of the Court of Appeals, on the ground that the amount in controversy exceeds \$5,000, where the judgment complained of is for less than \$5,000, while the pleadings show the value of the property involved is \$14,000; the quoted words meaning an actual money judgment for more than the sum mentioned.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 517-527; Dec. Dig. § 213.*]

2. STATUTES (§ 188*)—CONSTRUCTION.

The court, in construing a statute, must give effect to it according to the ordinary and usual meaning of its language.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. § 188.*]

En Banc. Error to Court of Appeals.

Action by the Sigel-Campion Live Stock Company against Alexander Nesbit, Sheriff, in which Robert M. Work, trustee in bankruptcy of Abe Becker, alias Tom Johnson, intervened by petition. There was a judgment of the Court of Appeals (123 Pac. 110), affirming a judgment for plaintiff, and defendant and intervener bring error. Dismissed.

Stuart & Murray, of Denver, for plaintiff in error Nesbit. Robert M. Work, of Ft. Morgan, pro se. Goudy & Twitchell and J. H. Burkhardt, all of Denver, for defendant in error.

BAILEY, J. The matter for consideration is a motion to dismiss a writ of error sued out of this court to review a decision of the Court of Appeals, affirming a judgment of the district court of the city and county of Denver, in a cause wherein the Sigel-Campion Live Stock Company was plaintiff, and Alexander Nesbit, as sheriff, was defendant, in which action Robert M. Work, trustee in bankruptcy, intervened. The district court dismissed the intervention petition of Work. At the trial there was a jury verdict, upon which judgment was ordered, allowing plaintiff to retain possession of the property in dispute, and awarding one dollar, as damages for the unlawful taking and detention thereof, with costs. The suit is in replevin, and it is admitted by the pleadings that the property in controversy is of the value of \$14,000.

The act creating the Court of Appeals (Laws 1911, p. 266) has been upheld by this court as constitutional. *People ex rel. v. Scott, et al.*, 120 Pac. 126. All of the provisions are to be therefore treated as in full

force, and given effect according to their plain and undoubted meaning. By sections 4 and 5 thereof provision is made for the transfer of causes pending in the Supreme Court, on appeal or error, to the Court of Appeals, making the decision of the Court of Appeals in all such cases, except as specified in section 6 of the act, final and conclusive. That portion of section 6 which directly relates to the matter under consideration is as follows:

"Section 6. Provided, however, that in causes thus transferred from the Supreme Court to the Court of Appeals, whether pending on appeal or error, wherein the decision necessarily involves the construction of a provision of the federal or state Constitution, or relates to a franchise or freehold, or a judgment for more than \$5,000, exclusive of costs, such decision thereof by the Court of Appeals shall not be final. Such cases may be reheard in the Supreme Court by writ of error from the latter court, under rules to be adopted by it."

The contention, in support of the motion to dismiss, is that the matter sought to be reviewed falls within none of the exceptions found in section 6, since the decision neither involves a construction of a provision of the federal or state Constitution, nor relates to a franchise or freehold, nor to a judgment for more than \$5,000, exclusive of costs. On the other hand it is urged that, as the pleadings show the value of the property involved to be \$14,000, the judgment is reviewable by this court.

[1, 2] The provision relating to reviews by the Supreme Court of certain Court of Appeals decisions is so clear, simple and direct that it needs no construction. It has, and can have, but one meaning, nor can that meaning be in the least in doubt. In plain and unmistakable language it provides for a review of any decision of the Court of Appeals which necessarily involves a construction of either a provision of the federal or state Constitution, or relates to a franchise or freehold, or to a judgment for more than \$5,000, exclusive of costs, and of no other. The judgment last referred to in the provision under consideration is one which, in terms, is measured by an award in dollars, not by the amount involved in the suit or the value of the property in controversy. The provision reads precisely so. That such is its meaning is not debatable. The statute says where the judgment is "for more than \$5,000, exclusive of costs." That means an actual money judgment for more than the sum mentioned; no other meaning can be fairly given it. With the wisdom, policy or justness of the law this court has nothing to do; those were matters for the Legislature to consider and settle. Nor had the court power or authority to read into the statute

something which plainly is not there. If the law as it now stands proves inexpedient, relief must be sought by legislation. Courts are powerless to give it. Their province and function is to interpret and enforce the law as found, not to change and modify old laws, and thus, by strained and unwarranted construction, virtually make new ones.

By section 1 of the legislative act of 1891 (Laws 1891, p. 118) creating the original Court of Appeals, it was provided:

"Section 1. No writ of error from, or appeal to, the Supreme Court shall lie to review the final judgment of any inferior court, unless the judgment, or in replevin, the value found exceeds two thousand five hundred dollars, exclusive of costs. Provided, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor where the construction of a provision of the Constitution of the state or of the United States is necessary to the determination of a case."

It is to be observed that by this provision for reviews of the decisions of the former Court of Appeals, it is expressly provided that where in replevin the value found exceeded \$2,500, exclusive of costs, a review might be had. The fact that no such provision is found in the present statute is significant. The only reasonable conclusion is that the provision was omitted advisedly. Otherwise, had the purpose been to allow a review in such cases, the Legislature would have provided, after the manner of the old statute, that where in replevin the value of the property exceeded a certain sum the writ of error should lie. Or if a review had been intended, where the amount involved was more than \$5,000, it would have been so declared. But nothing of the sort was done; the statute provides for a review only where there is a judgment for more than \$5,000. So that, from every standpoint, the conclusion must be that no review of a decision of the Court of Appeals was intended, and none has been provided for, where a consideration of a provision of the federal or state Constitution is not necessarily involved, or where it does not relate to a franchise or a freehold, except of a money judgment in excess of \$5,000, exclusive of costs.

Since the question involves the construction of a particular statute, failure to cite authorities in point occasions no surprise. Indeed, precedents are not needed to support the conclusion reached. The duty of the court is to give effect to the statute, according to the ordinary and usual meaning of its language, in which view it is obvious that the motion must be sustained, and the writ dismissed. Judgment is ordered accordingly.

CAMPBELL, C. J., not participating.

(53 Colo. 209)

YOST v. IRWIN.

(Supreme Court of Colorado. July 1, 1912.)

1. LIMITATION OF ACTIONS (§ 182*)—PLEADING—MANNER.

The objection that an action is barred by the statute of limitations cannot be raised by general demurrer or general denial, but must be specially pleaded, either by answer or by special demurrer.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-682, 695, 705; Dec. Dig. § 182.*]

2. LIMITATION OF ACTIONS (§ 182*)—PLEADING—WAIVER.

The defense of limitations is waived unless pleaded.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-682, 695, 705; Dec. Dig. § 182.*]

3. LIMITATION OF ACTIONS (§ 180*)—PLEADING.

Though not authorized by the section of the Code stating the grounds of demurrer (Rev. Code, § 54), the statute of limitations may be interposed by special demurrer where the bar appears on the face of the complaint, or may be interposed by answer if the defendant so elect.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

4. LIMITATION OF ACTIONS (§ 182*)—WAIVER—DEMURRER.

The defendant did not waive his right to plead the statute of limitations by filing a general demurrer, or by securing permission to file a special demurrer.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-682, 695, 705; Dec. Dig. § 182.*]

5. LIMITATION OF ACTIONS (§ 180*)—DEMURRER—DISCRETION.

The matter of permitting a defendant before action on his general demurrer to file a special demurrer setting up that it appeared on the face of the complaint that the action was barred by limitations was within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675; Dec. Dig. § 180.*]

Error to District Court, Weld County; Harry F. Gamble, Judge.

Action by I. M. Yost against Hughey Irwin. From judgment for defendant, plaintiff brings error. Affirmed.

A. J. Bryant, of Denver, for plaintiff in error.

MUSSEY, J. In the court below Yost brought an action on a promissory note. The defendant, Irwin, filed a general demurrer to the complaint. Afterward, and before the disposition of the general demurrer, the defendant, on application supported by affidavit, was permitted, over the objections of the plaintiff, to withdraw the general demurrer and to file a special one, setting up that it appeared on the face of the complaint that the action was barred by the statute of limitations. On hearing the special demurrer was sustained. Thereupon, on motion of the defendant, the action was

dismissed and judgment rendered for costs in favor of the defendant. The plaintiff did not ask for leave to amend the complaint. The contention of the plaintiff is that by filing the general demurrer the defendant waived his right to plead the statute of limitations under the oft-expressed rule that such plea must be made in apt time, and he contends that, because the plea was thus waived, the court erred in permitting the defendant to file the special demurrer.

[1] The objection that an action is barred by the statute of limitations cannot be raised by general demurrer, nor is it available under a general denial. It must be specially pleaded in the answer, or when it appears on the face of the complaint that the action is barred it may be pleaded by special demurrer.

[2] If it is not pleaded one way or the other, it is deemed waived. *Hunt v. Hayt*, 10 Colo. 278, 15 Pac. 410; *Jennings v. Rickard*, 10 Colo. 395, 15 Pac. 677; *Brown v. Bell*, 46 Colo. 163, 103 Pac. 380, 23 L. R. A. (N. S.) 1096, 133 Am. St. Rep. 54.

[3] Section 56, Revised Code, provides for seven grounds of demurrer. When any one of them appears upon the face of the complaint, it may be taken advantage of. Section 60 provides that "when any of the matters, enumerated, as demurrable, do not appear upon the face of the complaint, the objection may be taken by answer." The sixth ground of demurrer—that the complaint does not state facts sufficient to constitute a cause of action—is the only one by which it was ever claimed that the plea of the statute of limitations may be made available. In the cases cited above this court has said that the plea of the statute of limitations cannot be taken advantage of by demurrer on the sixth ground. If it cannot be taken advantage of by demurrer on any of the grounds enumerated in the Code, it must follow that the apparent bar appearing upon the face of the complaint is not matter enumerated in the Code as demurrable. The reason why the appearance of the bar of the statute in the complaint is not demurrable matter is because the defendant must specifically and affirmatively indicate his intention to invoke the statute before it is at all apparent that the action may be barred. It is not the appearance in the complaint, but it is the affirmative claim of the defendant, sustained by sufficient proof, that bars the action. Under such circumstances, if the Code alone is to be followed, the only way that the plea of the statute of limitations can be made is by answer. This court, very soon after the adoption of the Code, in common with some other Code states, announced the rule that the statute of limitations may be pleaded by special demurrer when the bar appears on the face of the complaint. The rule thus announced

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

has been consistently followed, and is a settled rule of practice. This court has not said that the plea of the statute must be interposed by special demurrer under such circumstances. It has said that it may be so interposed. To say that it must be so interposed and at the same time say that the apparent bar is not matter enumerated in the Code as demurrable would be to repeal in part that portion of the Code that provides that, when any of the matters enumerated as demurrable do not appear upon the face of the complaint, the objection may be taken by answer. Notwithstanding the fact that this court has said that the plea may be made by special demurrer, it may be made by answer if the defendant elects to make it so, for the Code gives him that right. So that, when it appears upon the face of the complaint that the action is barred, the defendant may plead the statute in one of two ways—by special demurrer or answer. He may demur to the complaint on any of the grounds enumerated in the Code, and, when that demurrer is disposed of, he may set up his plea of the statute of limitations in the answer, if he elects to so plead. For instance, if the plaintiff relies upon a new promise to avoid the bar of the statute, and does not plead the new promise in his complaint, if a special demurrer is interposed and sustained, the plaintiff may amend his complaint by alleging a new promise. If, however, the plea of the statute is made by way of answer, the plaintiff may avail himself of the new promise by way of replication. Formerly the action was brought upon the original cause of action. Defendant answered the statute, and plaintiff replied the new promise. Notwithstanding the rule that the plea of the statute may be taken advantage of by special demurrer when the face of the complaint will permit, the old way of pleading has not been done away with if the defendant wants to so plead, for the Code gives him the right to answer the statute. These views are sustained by the reasoning of this court in *Buckingham v. Orr*, 6 Colo. 587, which was an action on promissory notes. While it appeared from the complaint that the old contract on the notes was barred, the plaintiff alleged payments made within six years from which a new promise was implied. And this court said, beginning on page 590: "If, therefore, plaintiff states in his complaint ultimate facts from which the law implies a new promise, such facts are not surplusage. They are the very essence of the action, and are necessary to prevent a successful attack by demurrer. And the only reason why a failure to state them would not render the complaint obnoxious to a general demurrer is that defendant must specifically and affirmatively

indicate his intention to invoke the statute, whether he pleads by demurrer or by answer. If the answer contains proper denials of the facts averred in the complaint as the foundation of the new promise, the issue is made. The additional plea of the bar is only important as showing defendant's intention to claim the benefit of the statute. It cannot be that in such case plaintiff must, in his replication, deny the plea and reply the new promise. He does not care to deny the bar of his action upon the old contract, for he relies upon the new one; and the new promise in his replication would be but a repetition of what he has already pleaded in his complaint. If plaintiff fails to state in the first instance facts from which the new promise may be inferred, and the bar of the statute is pleaded by answer, instead of demurrer, he must of course reply the new promise. If he does not, a motion is in order for judgment upon the pleadings." It must follow from this that, inasmuch as the plaintiff may plead the statute, either by special demurrer or by answer, the plea is in apt time if made in the answer.

[4] So that the defendant did not waive his right to plead the statute by filing a general demurrer and it was not waived when the court permitted him to file a special demurrer.

[5] It was within the discretion of the trial judge to grant him leave to file the special demurrer and under the circumstances the judge did not abuse his discretion.

If the defendant had filed an answer without pleading the statute and afterwards the judge had permitted an amendment for the purpose of letting in the plea, authorities cited by the plaintiff would have then been for consideration, but not under the circumstances. The case of *Spaur v. McBee*, 19 Or. 76, 23 Pac. 818, has no bearing. One of the grounds of demurrer in Oregon was that the action was not commenced within the time limited by the Code. The Code also provided that, if no objection be taken of the matters enumerated as demurrable, they should be deemed waived, except the general demurrer and objection for want of jurisdiction. Under such a Code, of course, the plea of the statute of limitations must be taken by demurrer if appearing upon the face of the complaint. Our Code has no such ground of demurrer. The Washington case cited indicates that its Code has a provision similar to that of the Oregon Code. From what has been said, no error is apparent in the record before us, and the judgment is therefore affirmed.

Judgment affirmed.

WHITE and BAILEY, JJ., concur.

BOARD OF COM'RS OF BENT COUNTY et al v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Colorado. May 6, 1912.
Rehearing Denied July 1, 1912.)

1. COUNTIES (§ 196*)—TAXES—RESTRAINING COLLECTION.

In view of public interest, judicial announcement, and Rev. St. 1908, § 5750, providing that in all cases when a person shall pay any tax that shall be found to be erroneous or illegal the board of county commissioners shall refund the same without abatement or discount, it is improper to enjoin the collection of a special county tax levied to pay for repairs on a bridge, where it does not appear that the payment of the tax will work any irreparable injury on the petitioner.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

2. COUNTIES (§ 124*)—CONTRACTS—VALIDITY.

A contract entered into by the county commissioners for the necessary repair of a county bridge is not invalid, where at that time the commissioners had funds sufficient to pay for the bridge, though they knew that the fund was insufficient to pay the contract price for the necessary repairs, and also pay for the necessary maintenance of other roads and bridges.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. § 124.*]

3. HIGHWAYS (§ 99*)—CONSTRUCTION AND MAINTENANCE—DUTY OF STATE.

The primary duty to construct and maintain a public highway rests upon the state, which is delegated to the counties and intrusted to the various boards of county commissioners.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-330; Dec. Dig. § 99.*]

4. COUNTIES (§ 190*)—TAXES—REPEAL OF STATUTE.

Laws 1891, p. 112, § 4, provides that the board of county commissioners of each county may levy taxes not exceeding three mills on the dollar to pay outstanding warrants and for floating indebtedness; and Laws 1890, p. 329, authorizes the levy by such board of a tax not exceeding 16 mills on each dollar for ordinary county revenue, including the support of the poor and to raise a fund to meet unforeseen contingencies, and an unlimited rate for the erection, maintaining, repairing, leasing, or renting of county buildings, or for roads and bridges, bonds, and interest thereon, or judgment bonds, and for school purposes, while Rev. St. 1908, § 1183, makes provision for the levy of taxes for the payment of judgments rendered against counties. *Held* that, as these acts are in pari materia, the latter cannot be construed as repealing the provisions of the act of 1891, allowing a levy for the payment of outstanding claims, for, if it were repealed, such claims would have to be reduced to judgment before they might be paid, and so a levy made, to pay such outstanding claim is not invalid.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.*]

5. COUNTIES (§ 192*)—TAXES—LEVY.

A levy by the board of county commissioners of taxes to pay for repairs to a public bridge is not invalid because merely designated as a special fund, where, in accordance with Rev. St. 1908, § 1215, the resolution of the commissioners stated that the sum raised by the special fund is for liquidation, payment,

and redemption of unliquidated and unpaid amounts.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.*]

Error to District Court, Bent County; Henry Hunter, Judge.

Suit by the Atchison, Topeka & Santa Fé Railway Company against the Board of County Commissioners of Bent County and O. P. Smith, as Treasurer. There was a judgment for plaintiff, and defendants bring error. Reversed, with directions.

Allen M. Lambright, of Las Animas, and Northcutt & McHendrie, of Trinidad, for plaintiffs in error. Henry T. Rogers and George A. H. Fraser, both of Denver, for defendant in error.

WHITE, J. In August, 1904, unusual and unprecedented floods washed away or destroyed the bridges across the natural streams in Bent county, and otherwise materially damaged the public roads. Thereafter, and on August 30, 1904, the board of county commissioners entered into a contract in the sum of \$5,700 for the rebuilding of a span of a bridge so destroyed across the Arkansas river, known as the "Caddoa Bridge." When the contract was entered into, there was in the county treasury, belonging to the proper fund, a sum in excess of the contract price of the repairs, but it was known to the board of county commissioners that nearly all of such fund, together with the contingent fund, would be consumed by the ordinary expenses of maintaining the roads and bridges aside from the repairs in question, and if the Caddoa bridge was repaired, and the ordinary expenditures for roads and bridges made, the road and bridge fund for the fiscal year would not equal such total expenditures by about \$3,900. Subsequent to the making of the contract, but prior to the completion of the repairs, the commissioners caused other work to be done upon the roads and bridges of the county, and drew warrants for the cost thereof, which were paid, so that upon the completion of the Caddoa bridge there had been paid on the contract price thereof only the sum of \$1,800, leaving a balance of \$3,900 after the road and bridge fund and the contingent fund for the fiscal year were exhausted. Such was the condition of the county's affairs on November 30, 1904, at the time of making the general tax levy for the fiscal year of 1905. The levy then made included inter alia 8 mills on each \$1 valuation "for ordinary county revenue fund"; 1.5 mills "for county poor"; 1 mill "for county contingent fund"; and 2.5 mills "for special fund." The sum of \$3,900 which would arise from the 2.5-mill levy was appropriated "for liquidation, payment, and redemption of unliquidated and unpaid amounts." The levy, under the designation "special fund," and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the appropriation thereof, was made, set aside, and intended for the payment of the balance of the debt incurred by the repairs on the Caddoa bridge. Neither the separate nor aggregate levies for the different purposes for which levies were made for the fiscal years of 1904 and 1905 equaled the rate or amount that might have been levied under the limitation imposed by law in counties of the eighth class, to which Bent county belongs. Thereafter, at the beginning of the fiscal year of 1905, warrants were drawn upon the "special fund" in favor of the contractors who made the repairs on the Caddoa bridge, and were paid by the county. Subsequently the defendant in error, which operates a railroad through Bent county, paid all taxes assessed against it for the fiscal year of 1905, except solely the 2.5 mills levied as a "special fund," and prosecuted a suit in the district court to enjoin procedure by the proper officers to collect the same. The injunction was granted, and the defendants in that suit bring the cause here for review on error.

[1] Public interest, judicial announcement, and, in this state, statutory enactment, are opposed to injunctive interference in the collection of the public revenues. *State Railroad Tax Cases*, 92 U. S. 575, 618; 614, 23 L. Ed. 663; *Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *City of Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004; *Woodward v. Ellsworth*, 4 Colo. 580; *Price v. Kramer*, 4 Colo. 546; *Ins. Co. of No. Amer. v. Bonner*, 7 Colo. App. 97, 42 Pac. 681; section 5750, R. S. The policy of noninterference by the courts with the process of collecting the taxes on which the state depends for its continued existence "is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice." *State Railroad Tax Cases*, supra. In *Dows v. City of Chicago*, supra, cited and quoted from in the *State Railroad Tax Cases*, supra, after commenting upon the necessary reliance of the state governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, it is said: "No court of equity will, therefore, allow its injunction to issue to restrain their collection, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real

estate, throw a cloud upon the title of complainant, before the aid of a court of equity can be invoked."

While, perhaps, no absolute limitation has been placed upon the powers of courts of equity in restraining the collection of illegal taxes, it is settled beyond question that, "in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax." *State Railroad Tax Cases*, supra. So recognizing the law, and appreciating the necessity of prompt payment of the public revenue as an essential prerequisite to efficient government, the General Assembly enacted a law that: " * * * in all cases where any person shall pay any tax, interest or cost, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer." Section 5750, R. S. We do not hold that this statute affords an adequate remedy to the taxpayer in all cases founded upon an erroneous or illegal tax. We readily conceive that a case might arise in which the complainant would not have an adequate remedy by an action at law based upon the statute. Facts like those in *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903, would bring a case within the exception. The case at bar, however, is not within the exceptions recognized by the authorities, and the trial court erred in taking jurisdiction of the case. Nevertheless, as the parties stipulated in the trial of the cause that the sole question involved was the legality of the tax in question, and, if the tax was found to be illegal, the injunction should be made permanent, regardless of the lack or existence of other features of equitable cognizance, we shall determine the matter upon its merits, but shall not consider ourselves bound to so proceed in other causes of similar import that may hereafter be brought before us.

[2, 3] The trial court held, and the defendant in error maintains, that the contract for the repairs on the Caddoa bridge was void, for the reason that, when it was entered into, there was not sufficient money in the county treasury belonging to the proper fund out of which payment for such repairs could be made. The holding of the court and the assumption of counsel in that respect has no support in the record. On the contrary, the stipulation of the parties is to the effect

that the contract for the repairs was made on the 30th day of August, 1904; that on said date "there was in the proper fund sufficient money to pay for the construction of said bridge"; that the fund so on hand was afterwards consumed in the necessary repairs of other bridges and roads before warrants could be issued for the contract in question.

As far as the legality of the contract is concerned, we think it wholly immaterial as to what caused the necessity for the work, or what knowledge the commissioners had as to the necessity of doing other work, or the necessary expenditures therefor. The primary duty rests upon the state to open, construct, and maintain public highways, and such duty, in part, at least, has been imposed by such sovereign power upon the counties, and intrusted to the various boards of county commissioners therein. The county commissioners, within the legitimate limits of their power, brought into existence for the fiscal year of 1904 a specific fund for "roads and bridges" in Bent county. Such commissioners had exclusive power over that fund, and it could be expended, under their direction in such manner as seemed to them most advantageous to the interest of the county for the opening, construction, maintenance, or repair of any public roads, or bridges therein. If, in the judgment of the commissioners, it was necessary to do the repair work in question, the cost thereof could properly be charged against the road and bridge fund. And, if there was a sufficient credit to such fund at the time of entering into the contract, it was a legal contract, notwithstanding the particular work was not contemplated at the time the levy was made, and it was known that the amount credited to such fund by the levy would be thereafter otherwise consumed, if the ordinary work, necessary to keep the roads and bridges in repair, was performed. Every element and thing essential to the making of a valid contract existed and was present when the Caddoa bridge contract was made. The necessary money was in the fund. No orders or obligations had depleted it below the sum covered by the contract in question. Moreover, the contract covered one of the very purposes for which the fund was raised and could be expended; that is, for roads and bridges. It therefore constituted a valid and binding obligation of the county. If any contracts for road and bridge work, or claims allowed against such fund were illegal, they were contracts made and claims allowed subsequent to the making of the contract in question. *Hockaday v. Bd. of Co. Com.*, 3 Colo. App. 302, 29 Pac. 287.

[4] It is claimed, by defendant in error, that the board of county commissioners in making the levy assumed to do so under the authority of the legislative act, (Session Laws 1893, c. 54, pp. 100-102), but failed to

comply with the essential requirements of that act; and, further, that the act only contemplated the creation of a fund for the payment of debts other than those existing prior to its enactment; and, moreover, that such act had been repealed by that of 1899 (Session Laws, c. 183, pp. 329-331; sections 1185, 1186, 1187, R. S.), and that so much of the act of 1891 (Session Laws, p. 111) being section 4 thereof, that would seem to justify the levy, was likewise repealed. It may be, though we shall not now determine, that the purpose and intent of the act of 1893 was as defendant in error contends, though it is certain the act contains expressions that might include indebtedness subsequently incurred. However that may be, we think the levy can be sustained, without reference to the existence, nonexistence, or purpose of that act. We think that an essential part of section 4 of the act of 1891 sufficient to support this levy was in no wise affected by the act of 1899. The latter act, as it applies to the county in question, authorizes the levy of not to exceed 16 mills on each dollar of valuation "for ordinary county revenue, including the support of the poor and for the purpose of raising a fund to meet any unforeseen contingencies," and an unlimited rate "for the erection, maintaining, repairing, leasing or renting of county buildings, for roads and bridges, bonds and interest thereon, or judgment bonds and interest thereon, and for school purposes." When we consider the several purposes enumerated in the statute for which taxes shall be levied, it is apparent that no provision is made therein for the raising of a fund "for the purpose of paying outstanding warrants and for floating indebtedness." However desirable it may be that the affairs of the several counties be conducted on a cash basis from the revenues derived each year from taxation, it is a matter of common knowledge that to do so is practically impossible, and the General Assembly has frequently recognized the fact and made provision therefor. By section 1183, R. S., it recognized the probability of judgments being rendered against counties, and made provision for their payment; and in 1891 did likewise relative to "outstanding warrants and other floating indebtedness." And this court has held that where a valid county indebtedness was incurred, presently payable, during one fiscal year, but for any reason was not paid therein, it becomes the duty of the county authorities to make provision for the payment of such indebtedness at the earliest possible moment when it can legally do so, which would be at the time of making the levy and appropriation for the succeeding fiscal year. *Bd. Co. Com. of La Plata County v. Hampson*, 24 Colo. 127, 48 Pac. 1101. Possessing such knowledge, we do not think it reasonable or probable that the General Assembly intended to make it im-

possible for a county to pay a valid indebtedness previously incurred from funds arising from taxes levied in a subsequent year, unless the indebtedness be first reduced to judgment. To do so would be useless and absurd. Such, however, would be the effect of the legislation if all of section 4 of the act of 1891 was repealed by the act of 1899. This is true, for the latter act does not authorize the raising of a fund for the payment of a debt previously contracted. The expression "for ordinary county revenue," as used in the statute, must necessarily mean the sum or amount set aside for the ordinary expenses, such as the payment of officers, expenses of courts, etc., and in no sense a debt previously existing, the latter not coming within the ordinary or usual. Neither would it fall within an unforeseen contingency. A fund, to meet an unforeseen contingency, must necessarily refer to something which at the time of the levy was unknown, and which may subsequently happen. So viewing the matter, we feel justified in holding that the authority vested in the board of county commissioners by section 4 of the act of 1891 to levy "for the purpose of paying outstanding warrants and other floating indebtedness, not more than three mills on the dollar," was not repealed by the act of 1899, and remains in full force and effect. The several statutes pertain to the same general subject and are in pari materia, and must be taken and considered together. We uphold this clause of the section, because there is nothing in the subsequent act inconsistent therewith. *Dunton v. People*, 36 Colo. 128, 87 Pac. 540.

[5] It, therefore, follows, that the levy is valid, unless designating it "special fund" makes it void. While such designation is indefinite, nevertheless, we think it sufficient when aided, as it is, by the annual appropriation resolution. The statute requires the commissioners to pass a resolution to be termed the annual appropriation resolution for the next fiscal year at the same time that the county levy of taxes is made. It also requires the specification therein of the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. Section 1215, R. S. The resolution sets aside the sum raised by the special fund "for liquidation, payment and redemption of unliquidated and unpaid amounts." This we think sufficient, as that which was uncertain is thereby made certain. The act of levying and the act of appropriation must necessarily be construed together. The judgment of the trial court was wrong, and is therefore reversed, with directions to dissolve the injunction, and dismiss the complaint.

Judgment reversed.

MUSSER and BAILEY, JJ., concur.

PEOPLE v. GIBSON et al.

(Supreme Court of Colorado. June 3, 1912.
Rehearing Denied July 1, 1912.)

1. STATUTES (§ 225*)—ENACTMENT—CONSTRUCTION—*PARI MATERIA*.

Where a series of statutes constitute a system of laws providing for the prosecution of crimes, misdemeanors, and offenses naming the parties who shall prosecute, and prescribing the means and methods to be pursued therein, they must be construed in *pari materia*, if possible, so as to be consistent and harmonious; it being immaterial that they were enacted at different dates under distinct and various aspects of the common subject.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

2. ATTORNEY GENERAL (§ 7*)—POWERS—CRIMES—PROSECUTION BY INFORMATION—AUTHORITY—"DISTRICT ATTORNEY"—"PUBLIC PROSECUTOR."

Const. art. 4, § 1, created the office of Attorney General requiring him to perform such duties as should be prescribed by the Constitution and by law, and by Rev. St. 1908, § 6168, he was required to appear for the state, prosecute and defend all actions and proceedings, civil and criminal, in which the state should be a party or interested, when required to do so by the Governor or General Assembly. By Laws 1891, pp. 240-242, the courts were invested with the same power and jurisdiction to try prosecutions on information as they had been authorized to do by indictment, section 2 providing that all informations should be filed in term time in the court having jurisdiction of the offense by the district attorney of the proper county as informant, and his name should be subscribed thereto either by himself or by his deputy. Section 4 prescribed a form of information in which the district attorney appeared as the charging officer, and section 5 declares that all provisions of law applicable to prosecutions on indictments, to writs and process therein, and the issuing of service thereof, to motions, pleadings, trials, and punishments, or to the passing or execution of any sentence, and to all proceedings in cases of indictment, whether in court of original or appellate jurisdiction, shall apply to informations and to all prosecutions and proceedings thereon. *Held*, that the words "district attorney" as used in such act, should be construed as synonymous with "public prosecutor," and hence the Attorney General has authority to charge by information in the name of the people the commission of a felony and to prosecute the proceedings in the district court.

[Ed. Note.—For other cases, see *Attorney General*, Cent. Dig. §§ 8-10; Dec. Dig. § 7.*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2138; vol. 6, p. 5815.]

En Banc, Error to District Court, Fremont County; Charles A. Wilkin, Judge.

Information by the People, at the instance of the Attorney General, against D. E. Gibson and others. A motion to quash was sustained by the trial court, and petitioner brings error. Reversed and remanded.

Benjamin Griffith, Atty. Gen., and Archibald A. Lee, Deputy Atty. Gen., for plaintiff in error. Hayt, Dawson & Wright, of Denver, and McLain & Pease, Waldo & Stump, and H. R. Waldo, all of Cañon City, for defendants in error.

*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r. Index.

WHITE, J. The Attorney General of the state, in the name of the people thereof, filed in the court below, by its leave first had and obtained, two informations purporting to charge D. E. Gibson, W. M. Gibson, Herman Loehr, John Cleghorn, and A. R. Frisbie with the commission of certain felonious offenses. In one information they are charged with having unlawfully conspired to obtain from the state of Colorado the sum of \$25,000 by falsely and fraudulently representing to the Board of Commissioners of the Colorado State Penitentiary that goods, wares, and merchandise of such value were sold and delivered to the state of Colorado for use in the state penitentiary. In the other, they are charged with having obtained such sum of money from the state of Colorado by false pretenses. The informations are substantially in the form prescribed by the statute, except the name of the Attorney General appears therein instead of that of the district attorney, and the recitals that the Governor of the state requested the Attorney General to prosecute the actions. Caplases were issued, defendants arrested, and subsequently admitted to bail. Thereafter motions were filed questioning the validity of the informations and proceedings thereunder; upon the ground that the Attorney General had no power to commence and prosecute the actions by informations. The court sustained the motions, discharged the defendants, and dismissed the proceedings. The people bring the cases here for review.

The sole question for determination is whether the Attorney General had authority to charge by information, in the name of the people, the commission of a felony, and to otherwise prosecute the actions in the district court.

Defendants contend that there is no analogy between the office of Attorney General of this state and the officer known as the Attorney General under the common law of England, and that therefore no inherent common-law right exists in the Attorney General of this state to prosecute criminal actions of any kind, and that such officer has not, by constitutional or statutory enactment, been invested with the power to prosecute felonies by information.

While neither conceding nor denying the correctness of the contention as to the non-existence of common-law powers in the Attorney General, the plaintiff maintains that the written law vests the power in, and makes it the duty of, such official to prosecute by information those guilty of the commission of felonies and other crimes, when requested so to do by the Governor or General Assembly.

In arriving at a correct conclusion as to the powers of the Attorney General, we deem it helpful to refer briefly to some of the territorial and state legislation pertaining to the prosecution of crimes.

In 1861 the Council and House of Repre-

sentatives of the territory established the grand jury system (Laws 1861, p. 334), and authorized the institution of prosecutions by indictment. It also established the office of county attorney in each county (Laws 1861, p. 213), and provided for the election of an incumbent thereof for a designated term. He was required to appear in the district court in his county and prosecute and defend, on behalf of the territory or county, all suits, indictments, applications, or motions, civil or criminal, to which the territory or county was a party, and, *inter alia*, to draw and sign all indictments or other pleadings connected with his office, and, whenever required by the grand jury, to appear before that body and examine witnesses, etc.

By chapter 24, R. S. 1868, the office of county attorney was abolished, and the office of district attorney for each judicial district established. The district attorney was, *inter alia*, required to appear in behalf of the territory and the several counties of his district in all indictments, suits, and proceedings pending in the district court in any county within his district wherein the territory or the people thereof, or any county of his district was a party. He was also required to appear in the Supreme Court on writs of habeas corpus sued out by persons charged with, or convicted of, public offenses before the judge of his district. Furthermore, he was commanded to discharge all duties theretofore imposed by law upon the county attorney and not enumerated in the act of 1868. A clause in section 4 of the act, defining his duties, reads: "Nothing contained in this section shall be so construed as to prevent the county commissioners of any county from employing one or more attorneys to appear and prosecute or defend in behalf of the people of the territory or such county, in any such indictment, action or proceeding." The act became effective in one judicial district immediately upon its approval, while in other districts it did not become effective until a subsequent date; the county attorneys in the meantime necessarily performing the duties of prosecuting officials therein as before.

By an act of the territorial Legislature of 1876 (Laws 1876, p. 65) it was provided that: "If the district attorney be interested or shall have been employed as counsel in any case which it shall be his duty to prosecute or defend, the court having criminal jurisdiction may appoint some other person to prosecute or defend the cause," or "if he be sick or absent, such court shall appoint some person to discharge the duties of the office until the proper officer resume the discharge of his duties," and "the person thus appointed shall possess the same power * * * as the proper officer would if he were present." Sections 897, 898, 899, G. L. 1877; sections 2109, 2110, 2111, R. S. 1908.

Thereafter the Constitution was adopted, and the office of district attorney became an

office thereunder, the duties of which were to be as provided by law. Article 6, § 21, Const. And by section 1 of the Schedule to the Constitution, R. S. 1908, p. 60, the duties pertaining to the territorial office of district attorney became the duties pertaining to such office under the Constitution; the word "state" having been inserted in the territorial act in place of "territory," in accordance with an act approved March 22, 1877, under which the General Laws were compiled and published.

The Constitution also created the office of Attorney General, made the incumbent thereof an executive officer of the state, and required him to perform such duties as may be prescribed by the Constitution or by law. Article 6, § 1. No specific duties pertaining to the matters here under consideration are prescribed by the Constitution to be performed by the Attorney General. However, article 3 of an act of the General Assembly, approved February 27, 1877 (section 1103 et seq., G. L.; section 6168 et seq., R. S. 1908) prescribes some of the duties to be performed by that official. Among others therein prescribed, he is required to "appear for the state, prosecute and defend all actions and proceedings, civil and criminal, in which the state shall be a party or interested, when required to do so by the Governor or General Assembly."

The above and foregoing constitutional and statutory enactments constituted the only written law pertaining to the matter here under consideration, until the enactment of 1891 (Laws 1891, p. 240) authorizing prosecutions by information. That act is entitled "An act providing for the prosecution and punishment of crimes, misdemeanors and offenses by information." The first section thereof invests the courts of the state with the same power and jurisdiction to hear, try, and determine prosecutions upon information and to do all acts in connection therewith as in cases of prosecution under indictment. The second section, as far as it has any bearing upon the matter before us, provides that "all informations shall be filed in term time, in the court having jurisdiction of the offense specified therein, by the district attorney of the proper county as informant, and his name shall be subscribed thereto either by himself, or by his deputy." The third section insures to the defendant the same rights as to all proceedings therein, as he would have if prosecuted for the same offense under indictment. The fourth section, *inter alia*, provides "that the informations may be in the following form," setting forth a form in which the district attorney appears as the charging officer. The fifth section is as follows: "All provisions of law applying to prosecutions upon indictment, to writs and process therein, and the issuing of service thereof, to motions, pleadings, trials and punishments, or to passing or execution of any sentence, and to all other proceedings

in cases of indictment, whether in court of original or appellate jurisdiction, shall to the same extent and in the same manner as near as may be, apply to informations and to all prosecutions and proceedings thereon." Section 9 empowers the judge of the court having jurisdiction to require the district attorney, in extreme cases upon affidavit filed with him of the commission of a crime, to prosecute any person for such crime.

While the act of 1891 permitted the filing of informations when verified by the oath of the district attorney or his deputy, or by the oath of some person competent to testify as a witness in the case, under an amendatory act of 1893 (S. L. p. 116, § 1), it was provided that "in all cases in which the defendant has not had or waived a preliminary examination there shall be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of affiant that the offense was committed." The latter act also provided that the information shall be sufficient if it can be understood therefrom, *inter alia*, "that it is presented by the person authorized by law to prosecute the offense."

The same General Assembly that passed the act of 1891 authorizing prosecutions by information amended the law which theretofore required the calling of a grand jury at each term of the court, so that thereafter grand juries should not be required to attend the sitting of any court in any county unless specially ordered by the court having jurisdiction to make such order. S. L. 1891, p. 258; R. S. 1908, § 3695.

[1] It is certain that these several legislative acts are all parts of the same system of laws providing for the prosecution of crimes, misdemeanors, and offenses, naming the parties who shall prosecute, prescribing the means and methods to be pursued therein, and must necessarily be construed *in pari materia*. They are parts of one system, governed by one spirit and policy, and must be construed, if possible, so as to be consistent and harmonious one with the other and in their several parts. In re Thomas, 16 Colo. 441, 445, 27 Pac. 707, 18 L. R. A. 538. The fact that they were considered and enacted by the legislative authority at different dates, under distinct and varied aspects of the common subject, is of no concern. Whenever the earlier and the later provisions of the law can stand together, they will be permitted to do so. *Kollenberger v. People*, 9 Colo. 233, 235, 11 Pac. 101; *Stermer v. La Plata Co.*, 5 Colo. App. 379, 383, 38 Pac. 839.

"Where enactments separately made are read *in pari materia*, they are treated as having formed, in the minds of the enacting body, parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative

bodies, and is essential to give unity to the laws and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and, so far as still in force brought into harmony, if possible, by interpretation." 2 Lewis' Sutherland Stat. Const. p. 853; *Sales v. Barber* A. P. Co., 166 Mo. 671, 678, 66 S. W. 979, 980.

Moreover, in harmonizing different legislative acts so as to connect them in a symmetrical system, and arrive at the legislative intent embodied in the whole law, the nature of the several acts, including their respective titles, the history of such enactments, and the state of the law when the several acts were passed, are properly considered. "This may result sometimes in the words used in a statute being transposed, or in some of them being omitted or ignored, or in an interpolation of others where necessary to effect the manifest legislative purpose." *Commonwealth v. Barney*, 115 Ky. 475, 74 S. W. 181, 184, 24 Ky. Law Rep. 2352.

As said in *County Commissioners v. Lunney*, 46 Colo. 403, 415, 104 Pac. 945, 949: "In the interpretation of a statute the legislative purposes and object are always to be borne in mind, and an indispensable requisite is to first inquire what object was sought to be accomplished by it. The intent of the statute is the law, and general words may be restrained to it, and those of a narrower import may be expanded to embrace it to effectuate that intent. * * * The intention of an act will prevail over the literal sense of its terms."

[2] When the act prescribing the duties of the Attorney General became effective, the method for prosecuting felonies was by means of an indictment returned by a grand jury. The law, however, required the indictment to be signed by the district attorney and the latter to appear in the courts of his district and prosecute in behalf of the people. Such being the state of the law, it is clear that, when the Legislature empowered the Attorney General to prosecute under certain conditions, that official, when the required conditions existed, could do each and every thing the district attorney might have done in the premises. Though the letter of the law required one official alone to do certain things, its spirit permitted another to do and perform the same or similar acts under certain conditions.

This principle is recognized and applied in many cases. In 1855 the Legislature of the territory of Kansas created the office of district attorney for each judicial district, and prescribed his duties. Laws 1855, c. 10. He

was required to appear in each county at the district court and prosecute and defend, on behalf of the territory or county, all suits, indictments, applications, or motions, civil or criminal, in which the territory or county should be a party, and, among other things, to draw and sign all indictments or other pleadings connected with his office. A Code of Criminal Procedure, adopted by the same Legislature, made it the duty of the attorney prosecuting in the county to attend any grand jury whenever required, and aid in various ways in the conduct of its proceedings; but no reference was made in such act to the matter of signatures to indictments. In 1858 (Laws 1857-58, c. 13) such territorial Legislature created the office of county attorney for each county organized for judicial purposes, requiring the incumbent of the office to appear in the several courts of the county and prosecute or defend actions, attend the sittings of the grand jury when required, and draw bills of indictment, and provided for the election of such county attorneys at the general election following the session of the Legislature. The same Legislature adopted a provision, amendatory of the Code of Criminal Procedure, requiring all indictments to be signed by the prosecuting attorney. This act took effect immediately after its passage, so necessarily the district attorneys remained in office until after the election of county attorneys under the new system. Upon admission into the Union, Kansas abolished the office of county attorney and returned to the former system of district attorneys. It also created the office of Attorney General, and by an act of the Legislature in 1861 (Laws 1861, c. 58), in defining the duties of that official, provided, inter alia, that he should, whenever required by the Governor or either branch of the Legislature, appear for the state and prosecute and defend in any court or before any officer in any case or matter, civil or criminal, in which the state might be a party or interested. In 1864 (Laws 1864, c. 31) it abolished the office of district attorney and restored the office of county attorney, but the statute relating to the signing of indictments remained unmodified. The Supreme Court, in *State v. Nulf*, 15 Kan. 404, had held that: "Under the laws of Kansas, the 'prosecuting attorney' is always the county attorney. G. S. pp. 223, 284, §§ 135, 136, 137. That is, every criminal action, prosecuted in the name of the state, must be prosecuted by the county attorney, who is the public prosecutor. Therefore, for the purpose of prosecuting criminal actions, the prosecuting attorney and the county attorney is one and the same person."

Under this state of the law, the Attorney General of Kansas, claiming to act upon request of the Governor, signed an indictment and otherwise undertook to prosecute in the case of *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176, decided in 1905. His authority to sign indictments was challenged.

and the court, after remarking upon the necessity of a state government equipped with sufficient power to protect public rights and redress public injuries throughout the entire state independent of local authorities who might be indifferent, incapable, or even antagonistic, held that the purpose or legislative intent "was to make the authority of the government felt, through its chief law officer, in every part of its territory, if the chief executive or either branch of the Legislature should determine it to be necessary," saying: "The language of the statute indicates that the intention was to grant plenary power to the Attorney General to this end, and he was invested with full authority to use all the means afforded by the law to meet the requirements of any situation and fully protect the interests of the state. When directed by the Governor or either branch of the Legislature to appear and prosecute criminal proceedings in any county, he becomes the prosecuting attorney of that county in those proceedings, and has all the rights that any prosecuting officer there may have, including those of appearing before the grand jury, signing indictments, and pursuing cases to final determination."

The law of North Dakota made it the duty of the Attorney General, *inter alia*, "to consult with and advise the several state's attorneys in matters relating to the duties of their office; and, when in his judgment the interests of the state require it, he shall attend the trial of any party accused of crime and assist in the prosecution." Another statute made it the duty of the state's attorney to appear before the grand jury to give information or advice and to interrogate witnesses, but provided that no other person shall be permitted to be present during the session of the grand jury except the members thereof and a witness actually under examination. Under this state of the law the Attorney General requested the district judge of a certain district to call a grand jury to consider a particular matter. This was done, and the Attorney General attempted to appear before the grand jury for the purpose of presenting to that body the matters to which he had called the attention of the court. The trial court denied his right to do so. The matter was carried to the Supreme Court, where, in *State v. District Court*, 10 N. D. 819, 834, 124 N. W. 417, 423, it was held that, notwithstanding the language of the statute, to the effect that no person other than the state's attorney might go before the grand jury, the Attorney General might do so under the authority given him by law to assist the state's attorney. The court therein said: "If he cannot go before the grand jury, then his authority to institute and prosecute cases and to prosecute any violation of the several laws hereinbefore mentioned is for naught."

The following cases are analogous in prin-

ciple: *State v. District Court*, 22 Mont. 28, 55 Pac. 918; *State v. Robinson*, 101 Minn. 277, 289, 112 N. W. 269, 272 (20 L. R. A. [N. S.] 1127). In the last case cited the statute considered provided that "every county attorney shall prosecute all cases under this chapter arising in his county." The court said: "The statute under consideration, imposing specific duties upon county attorneys in the matter of its enforcement, is in no proper view a limitation upon, nor does it exclude, the general authority of the Attorney General upon the same subject."

So under the law of this state, district attorneys are specifically authorized, *inter alia*, to appear in all indictments, criminal cases, and proceedings which may be pending in the district court of their respective counties. Nevertheless, general authority is imposed upon the Attorney General to appear and prosecute in all cases wherein the state is a party or interested when required so to do by the Governor or General Assembly. The two provisions are not inconsistent. They may stand together. The specific duty imposed upon the district attorneys in no wise limits or excludes the general authority of the Attorney General upon the same subject.

However, as under the Constitution no power existed in district attorneys or in the Attorney General to prosecute felonies by information, it is argued that such power was conferred by the act of 1891 exclusively upon the district attorneys or their representatives, and can be exercised by no one else. If the words "district attorney," as used in the act, cannot be construed to include "public prosecutor," the contention is doubtless correct. As a general rule, where, by statute, authority is given to a particular officer, its exercise by any other officer is forbidden by implication. However, when we apply the well-known rules of construction to the constitutional and statutory provisions constituting the system by which criminal offenses are to be prosecuted in this state, we have no doubt the words "district attorney," found in the information act, must be construed to mean "public prosecutor" authorized to prosecute in any particular case. Section 8 of article 2 of the Constitution recognizes but two methods whereby a person may be proceeded against criminally in the courts. The one method is by indictment, the other, by information; and until otherwise provided by law a prosecution for a felony could be by means of the former method only. Each of these methods was well known and understood at the time of the adoption of the Constitution, and there is no more uncertainty as to what was meant by the word "information" used therein than there is as to what was meant by the use of the word "indictment." An information is essentially a written accusation of crime preferred by the public prose-

cuting officer without the intervention of a grand jury. It is used in the Constitution in the common-law sense of the term; that is, an accusation preferred, as at common law, by the public prosecutor. As the purpose of the information act, together with that dispensing with the calling of a grand jury, unless specially ordered by the district court, was to change or regulate the system of instituting criminal prosecutions in courts of record by substituting informations as the ordinary mode of procedure in the place of indictments (In re Dolph, 17 Colo. 35, 39, 28 Pac. 470), and the district attorney was and is the ordinary prosecuting officer, the use of his name was quite natural in the former act relative to the authentication of the information, and in no sense excludes the exercise of the power there conferred by another who is as much the public prosecutor, under certain conditions, as the district attorney himself. As said in *Town of Trinidad v. Simpson*, 5 Colo. 65, 66: "The maxim, 'Expressio unius est exclusio alterius,' is not of universal application in the construction of statutes. The legislative intention is to be taken according to the necessity of the matter, and according to that which is consonant to reason and sound discretion."

Williams v. People, 26 Colo. 272, 57 Pac. 701, was a prosecution for perjury in which the district attorney had been of counsel in a civil case, during the trial of which the alleged perjury was committed. The information was signed and presented by a special prosecutor appointed under the provisions of the territorial act of 1876, *supra*. The right of the special prosecutor to sign and file the information was challenged. It was argued in the briefs there filed by the plaintiff in error that, as the information act provides for the filing of informations by the district attorney or his deputy, the power was exclusive, and the alleged information was, in fact, no information at all. The authority of the special prosecutor in that case, like the authority of the Attorney General in the case at bar, rested primarily upon a statute enacted long prior to the information act, at a time when prosecution of felonies by information was impossible. We, however, held in that case that the special prosecutor, having been appointed by the court, had the right to sign his own name to the information, and that such an instrument, so signed, was valid. When the court in any case, exercising its powers under the law, appoints a special prosecutor, the latter becomes, to all intents and purposes, the district attorney. He nevertheless exercises such powers in his own name. Such is the effect of the *Williams' Case*. So, when the Governor or the General Assembly requires the Attorney General to prosecute a criminal case in which the state is a party, he becomes to all intents and purposes the

district attorney, and may in his own name and official capacity exercise all the powers of such officer, for he is then, and in that case, the public prosecutor. Being authorized and empowered to appear and prosecute, he can do each and every thing essential to prosecute in accordance with the law of the land. When prosecution by information was authorized in accordance with the constitutional permission, the signing and filing of informations became essentially an act in the process of prosecution, without which the full measure of power conferred to prosecute could not be exercised. We have heretofore held that "to prosecute" is "to proceed against judicially." *Brooks v. Bates*, 7 Colo. 576, 580, 4 Pac. 1069, 1072. It is "the act of conducting or waging a proceeding in court; the means adopted to bring a supposed offender to justice and punishment by due course of law. It is also defined as the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by an indictment or information." *State v. Bowles*, *supra*.

Believing as we do that the Attorney General had full power and authority to sign and file the informations as disclosed by this record, it is unnecessary to consider the matter further. The cases, in accordance with the rule applied in *U. S. v. Keitel*, 211 U. S. 370, 399, 29 Sup. Ct. 123, 53 L. Ed. 230, are therefore remanded, with instructions to reinstate the same, overrule the motions to quash in each case, and proceed therewith in accordance with the law.

Reversed and remanded.

CAMPBELL, C. J., and BAILEY, J., not participating.

BOARD OF COM'RS OF GUNNISON COUNTY v. BOARD OF COM'RS OF OURAY COUNTY.

(Supreme Court of Colorado. July 1, 1912.)

1. PAUPERS (§ 52*)—SUPPORT—LIABILITY OF COUNTY.

A claim against a county for the support of paupers has none of the elements of a contract, and can be sustained only when a liability is created by statute.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. §§ 215-237; Dec. Dig. § 52.*]

2. PAUPERS (§ 39*)—SUPPORT—LIABILITY OF COUNTY—NOTICE.

A notice, referring to an inclosed statement of money advanced for supplies furnished a pauper of the county notified, and requesting payment, but not stating that the pauper had become a charge on the county giving the notice, or that he was then in that county, or would require assistance in the future, and not requesting that he be removed therefrom or stating any sufficient reasons why he could not be removed, was not a sufficient compliance with Rev. Code 1908, § 4795, so as to create a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

liability against the county notified for the pauper's support.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 162-179; Dec. Dig. § 39.*]

Error to District Court, Ouray County; Sprigg Shackelford, Judge.

Action by the Board of County Commissioners of Ouray County against the Board of County Commissioners of Gunnison County. From judgment for plaintiff, defendant brings error. Reversed.

Dexter T. Sapp, of Gunnison, for plaintiff in error.

HILL, J. Action by the board of county commissioners of Ouray county to recover from Gunnison county a certain amount expended for and on behalf of a pauper resident of the latter county. Judgment was in favor of Ouray county. The action is brought under the provisions of sections 4794, 4795, 4796, and 4797, Revised Statutes 1908.

[1] A liability against a county for the support of paupers originates solely in provisions of the statutes. To sustain such a claim the case must fall within the liability thus created and in the manner prescribed by the statute. There are none of the elements of a contract, express or implied, in a demand for the support or relief of the poor. 30 Cyc. 1127; 22 Am. & Eng. Ency. of Law (2d Ed.) 1003; Hamlin County v. Clark County, 1 S. D. 131, 45 N. W. 329; Lander County v. Humboldt County, 21 Nev. 415, 32 Pac. 849; Augusta v. Chelsea, 47 Me. 367; Washoe County v. Eureka County, 25 Nev. 356, 60 Pac. 376; Kellogg v. St. George, 28 Me. 255; Miller v. Somerset, 14 Mass. 390; Mitchell v. Cornville, 12 Mass. 333; Poweshiek County v. Cass County, 63 Iowa, 244, 18 N. W. 895.

[2] The pleadings sought to charge Gunnison county for groceries and coal furnished a resident of that county by the board of county commissioners of Ouray county under the provisions of the sections of our statutes above cited. The sufficiency of the notice alleged to have been given pursuant to the provisions of section 4795, supra, was challenged in the answer. The only notice offered in evidence to sustain the allegation in the complaint inclosed a bill for \$23.50. It was from the clerk of the Ouray board, addressed and properly mailed to and received by the clerk of the Gunnison board. Omitting the letter head portion, date, address, and signatures, it reads: "Herewith find inclosed statement of money advanced for groceries and coal to one John Lyons, a pauper of your county. We have just ascertained through letters written by you inclosing money to Mr. Lyons for his support here, that he was a charge on Gunnison county, which letters we now have in our possession, and also learn that your county contributed towards sending him here. Kindly present this matter to your board at

their next meeting and forward us check in payment of same."

Section 4795, supra, provides that the notice shall contain a statement that said person has become chargeable as a pauper upon the county sending the notice; that it shall also include a request to the authorities of the county receiving it to remove said pauper forthwith and to pay the expenses accrued in taking care of him, her, or them. The notice given does not state that the pauper had become chargeable upon Ouray county, or that he was in that county at the time of sending the notice, or that he would require assistance in the future; neither does it request that he be removed forthwith or at all therefrom. The notice inclosed a bill for \$23.50. The judgment was for \$221.45. There is no allegation in the complaint that the pauper, by reason of sickness, or disease, or by neglect of the commissioners of Gunnison county, or for any other sufficient reason, could not have been removed from Ouray county, had such a request been made. Under such circumstances, we are of opinion that the notice was insufficient to show a compliance with the statute. 30 Cyc. 1132; 1134; Town of Beacon Falls v. Town of Seymour, 46 Conn. 281; Town of Beacon Falls v. Town of Seymour, 44 Conn. 210; McKay v. Welch, 6 N. Y. Supp. 358; Middletown v. Berlin, 18 Conn. 189; Cooper v. Alexander, 33 Me. 453; Belfast v. Lee, 59 Me. 293; Washoe County v. Eureka County, 25 Nev. 356, 60 Pac. 376.

The judgment is reversed.

Reversed.

MUSSER and GABBERT, JJ., concur.

TOWERS et al. v. BALFE.

(Supreme Court of Colorado. July 1, 1912.)

DEEDS (§ 143*)—CONSTRUCTION—RESERVATION—TRESPASS.

Where grantor reserved the right to remove the buildings from the premises conveyed, a hydrant used to supply water for stock, as well as for house use, and in no way connected with or attached to the buildings, was not within the reservation of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 453-455, 465-468; Dec. Dig. § 143.*]

Error to County Court, City and County of Denver; Grant L. Hudson, Judge.

Action by Frank T. Towers and another against Patrick H. Balfe. From a judgment for defendant, plaintiffs bring error. Reversed and remanded, with directions.

Robert H. Kane, of Denver, for plaintiffs in error.

MUSSER, J. Patrick Kett conveyed certain premises to Keel & Ellison. In the

* Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 53 Hun, 631.

deed, as well as in a prior contract of sale, the grantor reserved the right to remove the buildings. Later Keel conveyed his interest in the premises to Towers, one of the plaintiffs in error. At the time of the conveyance by Mr. Kett, as well as at the time Mr. Towers became interested in the premises, there was a hydrant thereon, situated about 10 feet from the house. This hydrant had been put in by Mr. Balfe, the defendant in error, two or three years before, for his mother-in-law, Mrs. Kett, and it was used in connection with the house and also to water the live stock. When the house was moved from the premises, Mr. Balfe, on his own motion, took this hydrant away. Mr. Kett did not know anything about or authorize its removal. An action was brought in a justice court for damages on account of the removal of this hydrant. From a judgment against him there, Mr. Balfe appealed to the county court, where, upon trial to the court, judgment was rendered in his favor for costs.

It is plain that the hydrant was a part of the realty and was conveyed with it, unless reserved. Mr. Kett did not authorize Mr. Balfe to remove it. Even if Mr. Kett had done so, Mr. Balfe would have had no right to remove the hydrant, because it was not reserved from the conveyance. It was not a building, nor connected with or attached to the building, so as to make it a part thereof. While it was used to supply water for the house, it was also used for the purpose of watering stock kept by the Ketts. In removing it, Mr. Balfe committed a trespass, and he is liable to the plaintiffs in error for the damages occasioned thereby. The cost of replacing the hydrant was \$12, and it was agreed that it was reasonably worth that sum. This small matter has been litigated enough.

The judgment is reversed, and, the cause remanded, with directions that the present judgment be vacated, and another entered in favor of plaintiffs in error for \$12 and costs, as of the date of the former judgment.

Reversed and remanded.

WHITE and BAILEY, JJ., concur.

CLARKE, Sheriff, v. ASHER.

(Supreme Court of Colorado. July 1, 1912.)

1. JUDGMENT (§ 470*)—COLLATERAL ATTACK. Where the court has jurisdiction of the parties and of the subject-matter, its judgment, unless reversed or annulled in a proper proceeding, is not open to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

2. TAXATION (§ 595*)—COLLECTION—JUDGMENT—COLLATERAL ATTACK.

A judgment of the county court for taxes on personal property is not void, and subject to collateral attack, merely because the complaint on which it is based alleges that for stat-

ed years defendant taxpayer was, on May 1st, the owner of the property, while personal property can only be assessed as on April 1st of each year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1218; Dec. Dig. § 595.*]

Error to District Court, La Plata County; Charles A. Pike, Judge.

Action by W. B. Asher against John Clarke. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Defendant in error commenced suit against the plaintiff in error in his official capacity, the sole purpose of which was to enjoin him from levying an execution on property of the defendant issued on a judgment rendered by the county court of Hinsdale county in an action wherein the treasurer of that county was plaintiff and the plaintiff in the present action the defendant. The complaint averred, so far as material to notice in considering the one question we shall determine, that the action instituted by the treasurer of Hinsdale county was to obtain judgment against the present plaintiff for taxes levied against him for the years 1902 and 1903 on personal property alleged to belong to the plaintiff; that he had no personal property in that county for either of these years; that the amount of such taxes for the year 1902 was a little over \$100, and for 1903 something like \$20; and that in the complaint in that action it was alleged that the taxes levied were upon personal property of the defendant situated in Hinsdale county on the 1st day of May for each of the years named. The complaint further charges that summons in this action was issued and served upon defendant, and judgment rendered against him by default. The execution sought to be restrained was issued on this judgment. To this complaint the defendant filed a general and special demurrer, which was overruled, and, as he elected to stand thereon, judgment was rendered in favor of the plaintiff, perpetually enjoining him from making any levy under the execution in his hands. To review this judgment the defendant brings the case here for review on error.

Russell & Reese, of Durango, for plaintiff in error. O. S. Galbreath, of Durango, for defendant in error.

GABBERT, J. [1] The attack made upon the judgment of the county court of Hinsdale county is collateral. Where the court has jurisdiction of the parties and the subject-matter in a case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment in any collateral action or proceeding whatever. *Trowbridge v. Allen*, 48 Colo. 419, 421, 110 Pac. 193. From the averments of the complaint it appears without question that the county court of Hinsdale county had jurisdiction of the subject-matter of the action in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r. Index

stituted by the treasurer of Hinsdale county against the plaintiff in the case at bar, and also jurisdiction of his person.

[2] Counsel for plaintiff asserts that, inasmuch as the complaint in the suit instituted in Hinsdale county alleged that for the respective years of 1902 and 1903 the plaintiff, on the 1st day of May of each of these years, was the owner of certain personal property situated within the county of Hinsdale subject to assessment, the judgment rendered on this complaint is void, for the reason that under the law in force at that time the owner of personal property could only be assessed for property of that character which he had on hand on the 1st day of April of each year. This proposition raises the question of the sufficiency of the complaint only. A judgment is not void because of the failure of the complaint upon which it is based to state a cause of action. *Campbell v. Jackson*, 34 Colo., 447, 452, 83 Pac. 1017; *Venner v. Denver Union Water Co.*, 40 Colo. 212, 233, 90 Pac. 623, 122 Am. St. Rep. 1036; *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291.

It may be that the complaint in the action brought by the treasurer did not state a cause of action; but that question, under the facts of this case, could only be raised by the defendant therein, the plaintiff in the case here under consideration, by a direct attack. The attack made is collateral.

The judgment of the district court is reversed, and the cause remanded for further proceedings in harmony with the views expressed herein.

Reversed and remanded.

MUSSER and HILL, JJ., concur.

POYDAK v. O'CONNOR.

(Supreme Court of Colorado: July 1, 1912.)

FINES (§ 19*)—PAYMENT—RECOVERY.

Plaintiff, whose son was charged before a justice with forgery, on an agreement with defendant, the county attorney, that the charge should be changed to one of larceny, and a fine of \$100 and costs be assessed, to be paid by plaintiff, paid such amount to defendant, who turned it into the county treasury. *Held*, that the payment having been voluntary, with an understanding of the facts, and the object sought by plaintiff accomplished, no part thereof could be recovered, even though the subsequent proceedings in the justice court, done at direction of defendant over the telephone, commencing with entry, through misunderstanding, of a fine of only \$5, and afterwards changed, at direction of defendant, to the agreed amount, were void.

[Ed. Note.—For other cases, see *Fines*, Cent. Dig. §§ 20-22; Dec. Dig. § 19.*]

Error to Boulder County Court; E. J. Ingram, Judge.

Action by George Poydak against Charles O'Connor. Judgment for defendant, and plaintiff brings error. Affirmed.

Miller, Barnd & Affolter, of La Fayette, and E. L. Williams, of Denver, for plaintiff in error. Charles B. Ward and Harold P. Martin, both of Boulder, for defendant in error.

HILL, J. The plaintiff in error instituted this action in a justice's court to recover from the defendant in error a certain sum claimed to have been obtained from him under a mistake of facts and alleged misrepresentations made by the defendant. Judgment was for the defendant. Upon appeal to the county court the trial was to the court, where a judgment was again entered in his favor. The plaintiff brings the case here for review upon error.

While there is some conflict in the testimony, it discloses that on or about June 29, 1909, a complaint was filed before a justice of the peace in Boulder county charging one George Poydak, Jr., a son of the plaintiff, with the crime of forgery; that he was arrested, brought before the justice, entered a plea of not guilty, and the cause was continued until July 10th following; that about the 5th of July the plaintiff came to the office of the defendant, who was the deputy district attorney for Boulder county, and solicited him as such officer to dismiss or make a settlement of the case, advising him that the complaining witness' bank had been paid the amount of its loss and did not desire to prosecute; that the defendant declined to allow the son to go free without any punishment; but, after some further conversation and explanation, agreed to dismiss the charge of forgery and to accept a plea of guilty of petty larceny in lieu thereof, provided the accused, or the plaintiff for him, would pay a fine of \$100 and costs; that during the negotiations the defendant telephoned the justice and sheriff asking what their costs were; that the amounts were ascertained to be \$11.25; that the plaintiff agreed to the proposition and paid the defendant the amount of the costs as furnished by the justice and sheriff and went out to secure the money with which to pay the fine, returning shortly thereafter with the \$100, which he paid to the defendant in harmony with their agreement; that thereafter the defendant telephoned the justice the result of this settlement, and testified that he instructed the justice by reason of this agreement to change the charge against the young man to petty larceny and to enter a plea of guilty for him and to assess a fine of \$95 with costs. The justice testified to the conversation over the telephone the same as the defendant, except that he understood the attorney to say that the amount of the fine was to be \$5 and entered it accordingly. The defendant mailed to the justice a check for \$16.25, and thereafter, on July 31st, following, rendered his report in writing for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that month to the board of county commissioners which showed the collections as above stated, including disbursements \$16.25 as costs paid to the justice in this case, which included \$5 as the district attorney's fee, and the \$95 was remitted by the deputy to the county commissioners with other sums included in his report. Thereafter, upon ascertaining the condition of the justice's docket, the defendant had him change or correct it, making it read a fine of \$95 instead of \$5. It will be observed that the fine was ultimately made \$5 less than the agreement provided for. This appears to have been brought about when in figuring the cost by omitting the district attorney's fee of \$5 and by thereafter including it in the amount of costs and paying it out of the total, making the fine the amount of the balance, viz., \$95 instead of the \$100, as the deputy had stated to the plaintiff it would be.

It is claimed that it was prejudicial error to allow the justice to testify as to the reasons why, and circumstances under which, he rendered his judgment for petty larceny, and thereafter in changing his docket making the fine read \$95 instead of \$5.

Neither this plaintiff, the defendant (who was the deputy district attorney), nor the accused was present in the justice's court when the original fine was pronounced, nor when the change was made in the amount. No complaint had ever been made against the accused charging him with petty larceny, and while this modern system of administering justice by agreement over the telephone in the absence from the court of the district attorney, the witnesses, and the accused, may have its advantages in the way of promptly dispatching such business, it is hardly such as is contemplated by statute and might be subject to legal objection. Without passing upon the validity of all the proceedings in the justice's court starting with the telephone conversation between the attorney and the justice as to what the latter should do which was after the money had been paid to the defendant, for the purposes of this

case, we will assume that they were all void. This makes all evidence pertaining to them harmless.

The trial court found that this money was paid to the defendant under no mistake of fact whatever; that it was paid to be applied according to the agreement; that at that time no fine had been assessed against Poydak, Jr., of which fact the plaintiff well knew; that the money was voluntarily paid under an understanding that it should be applied to the payment of a fine and costs with the understanding that the forgery charge should be dismissed; that the matter was fairly submitted to the plaintiff, and in making his decision there was nothing to prevent the free exercise of his will; that this money was paid as a fine, and in such cases it would ultimately reach the county treasurer; that it did so, although not through the regular channels; that it reached this depository before demand was made or suit instituted; that it was paid by plaintiff to defendant with the clear understanding of the facts; that the defendant received it in good conscience, and fairly carried out all that he had agreed to perform; that the object sought by plaintiff was accomplished. There is evidence to sustain these findings. The question then is whether, under such circumstances, the plaintiff can thereafter successfully maintain his suit against the deputy district attorney for the amount thus voluntarily paid in excess of the amount of the pretended fine first entered by the justice. According to the weight of authority, the answer must be in the negative. *Houtz v. Board of Commissioners*, 11 Wyo. 152, 70 Pac. 840; *Comstock v. Tupper*, 50 Vt. 596; *Elston et al. v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Bailey v. Incorporated Town of Paullina*, 69 Iowa, 463, 29 N. W. 418.

The judgment is affirmed.
Affirmed.

MUSSER and GABBERT, JJ., concur.

BLOOMER v. JONES.

(Court of Appeals of Colorado. June 10, 1912.)

1. APPEAL AND ERROR (§ 692*)—RECORD—SUFFICIENCY.

On appeal in an action to quiet title, an objection to the admission in evidence of a trust deed which conveyed land to plaintiff, on the ground that, since the parties deraigned title from different sources, all prerequisites contained in the trust deed which authorized foreclosure should have been shown before introduction of the deed in evidence, will not be reviewed, where neither the trust deed nor the trustee's conveyance is in the record, and their contents do not appear, since recitals therein may have rendered it unnecessary to show any of such matters by evidence aliunde.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.*]

2. COURTS (§ 170*)—JURISDICTION—AMOUNT IN CONTROVERSY—ALLEGATIONS IN PLEADING.

Under Const. art. 6, § 23, and Mills' Ann. St. § 1055, which limits the jurisdiction of the county courts to cases involving not more than \$2,000, a complaint to quiet title is insufficient to sustain the judgment, where it fails to state that the value of the property did not exceed \$2,000, though it contained a statement "that the amount herein involved and sued for does not equal nor exceed \$2,000," since the jurisdictional statement in the complaint, and not the ad damnum clause, must be looked to to ascertain the court's jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 170.*]

3. JUDGMENT (§ 489*)—COLLATERAL ATTACK—JURISDICTION OF COURT.

Under Const. art. 6, § 23, and Mills' Ann. St. § 1055, which limits the jurisdiction of county courts to cases involving not more than \$2,000, a decree quieting title is void and subject to collateral attack where the complaint fails to show that the amount in controversy did not exceed \$2,000.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.*]

4. APPEAL AND ERROR (§ 1078*)—REVIEW—WAIVER OF OBJECTIONS—FAILURE TO ARGUE.

Errors assigned, but not discussed, in appellant's briefs, will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4258-4261; Dec. Dig. § 1078.*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by H. Llewellyn Jones against R. H. Bloomer. Judgment for plaintiff, and defendant appeals. Affirmed.

August Muntzing and Egbert More, both of Akron, for appellant. John F. Mall, for appellee.

HURLBUT, J. Action to quiet title, by appellee (plaintiff) against appellant (defendant).

[1] Objection was made by appellant to the admission in evidence of the trustee's deed which conveyed the disputed premises to plaintiff. He contends that, because of the fact that appellant and appellee deraigned title from different sources, all prerequisites

contained in the trust deed which authorized the trustee to foreclose the same should have been shown by competent testimony prior to its introduction in evidence. As to this contention, we can only say that neither the trust deed nor the trustee's deed is incorporated in the bill of exceptions, nor can either thereof be found in the record of this case. We have no knowledge or information concerning their contents. For all that appears here, recitals therein may have rendered it unnecessary to show any of such matters by evidence aliunde. The record discloses a stipulation between the parties to the effect that they need not be copied in the bill of exceptions. Not having the deeds before us, we do not feel justified in passing on the court's action in admitting them in evidence, and will assume that they were properly admitted.

[2] Appellant further insists that the court erred in refusing to admit in evidence the decree and court files of the county court of Yuma county, which purported to quiet title to the premises in one Muntzing. The determination of this question is decisive of this appeal. Appellee insists that the court had no jurisdiction to render the decree, and that all proceedings in the case were wholly void, and ineffective to confer any title whatever in the premises on said Muntzing. The point on which appellee relies is that the complaint failed to state that the value of the property in controversy did not exceed the sum of \$2,000. The Constitution provides that the county court shall have no jurisdiction in any case where the debt, damage, or claim, or value of property involved, shall exceed \$2,000, except in cases relating to the settlement of estates of deceased persons. Article 6, § 23. In harmony with this constitutional provision, the Legislature enacted section 1055, Mills' Annotated Statutes, which reads as follows: "In order to give the said courts jurisdiction in any action, suit or proceeding, the complaint or complaints shall state that the value of the property in controversy or the amount involved for which relief is sought in such action, suit or proceeding, does not exceed the said sum of two thousand (2,000) dollars," etc.

Home et al. v. Duff et al., 5 Colo. 574, involved the title to mining property; the case having been tried in the county court. The Supreme Court reviewed the judgment on error and held that, as the complaint failed to state that the value of the property in controversy did not exceed the sum of \$2,000, the county court possessed no jurisdiction to hear the case and render judgment. To the same effect: Learned v. Tritch, 6 Colo. 432; Hughes v. Brewer, 7 Colo. 583, 4 Pac. 1115.

It is clear from the statute and authorities cited that the jurisdiction of the county court depends on a statement which must appear in the complaint. If the action be one to recover a money judgment, the com-

plaint must state that the amount involved, for which relief is sought, does not exceed \$2,000, unless it be otherwise shown therein that such is the fact. If the proceeding be a suit in equity, or an action at law affecting real or personal property, then the jurisdiction of the court to act in the premises must appear from a statement in the complaint to the effect that the value of the property in controversy does not exceed the sum of \$2,000. We must not be understood as holding that the exact wording of the statute must be followed. If the statute be not followed in *hac verba*, then the substituted statement must be equivalent in meaning and effect.

In the case at bar the county court complaint offered in evidence in this court below failed to show that the value of the property in controversy did not exceed the sum of \$2,000. This omission was fatal to the decree of that court. The phrase found in the complaint, "that the amount herein involved and sued for does not equal nor exceed the sum of \$2,000," was not a compliance with the statute. No money judgment was demanded. Whatever the amount involved and sued for might have been, it was no indication of the value of the disputed premises. The jurisdictional statement in the complaint, and not the *ad damnum* clause, must be looked to to ascertain the court's jurisdiction.

[3] Appellee contends that, while the law may be as above stated, the record shows that the objection to the admission of the county court decree and files was a collateral attack upon the same, and that, inasmuch as the county court has concurrent jurisdiction with the district court within its prescribed limitation, the law will presume the decree to be valid as against such attack. The case of *Bateman v. Reittler*, 19 Colo. 547, 36 Pac. 548, was one considered by the Supreme Court on error to the district court. It was a case which related to a collateral attack upon a judgment of the county court of Jefferson county, which judgment involved real estate. Justice Hayt, speaking for the court, uses this language: "If the court administering upon the estate had jurisdiction of the subject-matter and of the parties, its orders and judgments are not open to attack in this proceeding."

The absence of the above-mentioned jurisdictional clause from the county court complaint showed on its face that that court had no jurisdiction of the action. The decree founded thereon could be collaterally attacked. *Trowbridge v. Allen*, 48 Colo. 419, 110 Pac. 193; *Empire Ranch & Cattle Co. v. Coldren* (Sup.) 117 Pac. 1005.

[4] Appellant in his original brief did not make the slightest allusion to the rulings of the court upon other alleged errors, and particularly to that excluding from evidence

the tax deed offered by appellant in support of his case. Appellee, however, discussed at length the rulings of the court in that behalf, to which appellant filed a reply brief, and again ignored the question. We have heretofore held that errors assigned but not discussed in the briefs will not be noticed. Hence we assume that the district court properly excluded the tax deed from evidence when offered.

In view of the conclusions above expressed, the trial court did not err in excluding from evidence the decree and files of the county court of Yuma county.

Judgment affirmed.

(22 Colo. App. 417)

HENDRIE, County Treasurer, et al. v.
ACORN GOLD MINING CO. et al.

(Court of Appeals of Colorado. June 10, 1912.)

1. APPEAL AND ERROR (§ 14*)—APPEALABLE.—Under Mills' Ann. Code, § 388 (Rev. Code 1908, § 422), which authorizes an appeal from a final judgment or decree involving at least \$100, or relating to a franchise or freehold, an appeal by a county treasurer and a board of county commissioners from a decree annulling tax sales of mining property and certificates of purchase issued thereon, and enjoining execution of treasurer's deeds for such property, should be dismissed on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-57; Dec. Dig. § 14.*]

2. APPEAL AND ERROR (§ 435*)—DISMISSAL—RIGHT TO MOVE.

On appeal to the Supreme Court and on transfer of the cause to the Court of Appeals under Laws 1911, p. 266, motion by appellees to dismiss the appeal on the ground that the judgment was not one which could be taken to the Supreme Court by appeal is not subject to be stricken, because there was full appearance in the Supreme Court and submission to its jurisdiction by appellees.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2184-2190; Dec. Dig. § 435.*]

3. APPEAL AND ERROR (§ 14*)—MODE OF REVIEW—DISMISSAL OF APPEAL—REDOCKETING ON ERROR.

The former Court of Appeals act (see Rev. Code 1908, § 423) provided that whenever the Supreme Court or Court of Appeals should dismiss an appeal for lack of jurisdiction, and the court would have had jurisdiction if the cause had come up on writ of error, the court should order the action entered as pending on writ of error, and proceed thereon as if the action had originally been so brought. Laws 1911, p. 266, creating the present Court of Appeals, provides, by section 3, that it shall have appellate jurisdiction in civil cases pending on the docket of the Supreme Court, or wherein appeals were perfected prior to the act, or thereafter taken to the Supreme Court for review, except writs of error to county courts, by section 4 that all appeals pending in the Supreme Court and all appeals perfected but not docketed therein shall, on the taking effect of the act, be transferred to the Court of Appeals "for hearing and determination," and by section 7 that the Court of Appeals shall adopt rules of procedure therein similar to those in the Supreme Court, and shall also have power to issue all necessary and proper writs and processes in aid of its jurisdiction in the same manner and with the same effect as the Supreme Court. Held that,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as to an action pending in the Supreme Court on appeal improperly allowed from a judgment not reviewable in that manner, the Court of Appeals might re-enter the case as pending on error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 48-57; Dec. Dig. § 14.*]

Hurlbut, J., dissenting in part.

Appeal from District Court, El Paso County; J. W. Shearfor, Judge.

Action by the Acorn Gold Mining Company and others against Harry Hendrie, County Treasurer, and another. Decree for plaintiffs, and defendants appealed to the Supreme Court, whence the cause was transferred to the Court of Appeals. On appellees' motion to dismiss the appeal and on appellants' motion to strike appellees' motion. Appellants' motion overruled; appellees' motion sustained; and cause ordered entered as pending on error.

Tully Scott, Co. Atty., Thomas Bryant & Malburn, of Denver, and G. P. Nevitt, of Cripple Creek, for appellants. H. Frost, of Colorado Springs, and Schuyler & Schuyler, of Denver, for appellees.

PER CURIAM. [1, 2] This appeal was taken by appellants, who were, respectively, the county treasurer of Teller county and the board of county commissioners of the same county, from a final decree annulling certain tax sales of mining property belonging to appellees, and the certificates of purchase issued thereon, and enjoining the execution of treasurer's deeds for said property. The abstract of the record, together with the briefs of appellants and appellees, were filed, and the cause was ready for final hearing, in the Supreme Court, at the time the order was made transferring the cause to this court under chapter 107, Session Laws of 1911. Afterwards appellees filed their motion to dismiss the appeal, asserting that the judgment was not one which could be taken to the Supreme Court by appeal. Appellants moved to strike the motion of appellees from the files, for the reasons, as claimed, that this court is without authority to entertain such motion, after full appearance in the Supreme Court and submission to its jurisdiction by appellees, and that the latter are, for the same reason, estopped to question the jurisdiction on appeal. Counsel for appellants have not contested the claim of their opponents that there was no right of appeal from this judgment to the Supreme Court under section 388, Mills' Ann. Code (section 422, Rev. Code 1908), and the position of appellees in that regard is affirmed by the court.

[3] On the other hand, we cannot assent to the grounds of appellants' motion to strike, without running counter to previous decisions of this court, including the cases

of Western Lumber & Pole Co. v. Golden, 124 Pac. 584, and California M. & M. Co. v. Rocky Mountain National Bank, 124 Pac. 590, recently decided. In conformity with the rulings in the cases last mentioned, the motion of appellants must be denied, and the motion of appellees to dismiss the appeal will be sustained, provided, and it is further ordered, that the clerk of this court enter the cause as pending on writ of error, in the manner and with the effect, as provided in section 423, Code of Civil Procedure, Rev. Stat. 1908, and that this cause be set down for final hearing, as upon writ of error.

HURLBUT, J., concurs in the dismissal of the appeal, but dissents from the order entering the cause as pending on writ of error.

SCOTT, P. J., having been of counsel, does not participate.

COLLINS v. BAILEY et al.

(Court of Appeals of Colorado. April 8, 1912. Rehearing Denied June 10, 1912.)

1. NEW TRIAL (§ 18*)—RIGHT TO AMENDMENT OF ANSWER AFTER VERDICT.

Where, in an action for possession of lode mining claims from which defendants extracted ore as owners of a joint claim, the original answer merely denied plaintiff's ownership and right of possession, it was error to refuse plaintiff a new trial, where defendants were permitted, after verdict in their favor, to file an amended answer setting up an affirmative claim to a vein within plaintiff's ground by reason of defendants' claim of apex right.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.*]

2. MINES AND MINERALS (§ 38*)—LODE MINING CLAIMS—APEX RIGHTS—EVIDENCE—SUFFICIENCY.

In an action for possession of lode mining claims from which defendants extracted ore as owners of an adjoining claim, evidence held insufficient to show that defendants' operations in plaintiff's ground were in a vein apexing in defendant's claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

3. MINES AND MINERALS (§ 38*)—LODE MINING CLAIMS—ACTION FOR POSSESSION—INSTRUCTIONS.

In an action for possession of lode mining claims from which defendants, as owners of an adjoining claim, extracted ore under claim that they were operating in a vein apexing in their ground, an instruction that, in determining whether a vein is continuous in its downward course, it is not necessary that the vein should be open or disclosed for the entire distance, but that the jury should consider all the facts shown as to the dip or incline of the vein, its geological and mineral character, and the walls, and from the whole evidence determine whether it was the same vein, was erroneous as tending to mislead.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Eagle County; Chas. Cavender, Judge.

Action by Daniel Collins against John W. Bailey and others. Judgment for defendants, and plaintiff appeals. Reversed.

M. B. Carpenter, of Denver, for appellant.

SCOTT, P. J. On the 25th day of January, 1907, the plaintiff in this case filed his amended complaint in the district court of Eagle county, alleging, substantially, that on the 1st day of September, 1906, he was, and ever since and hitherto has been, the owner in fee simple of the Australian, the Shamrock, and the Hecla lode mining claims situated in the Holy Cross mining district in Eagle county; that he claims the right to occupy and possess said premises, and is entitled to the possession thereof, by a full compliance with the local laws and rules of said mining district, the laws of the state of Colorado, and by patents from the United States; and, further, that the defendant the French Mountain Mining Company, and the defendants John W. Bailey, W. B. Brown, and Edward Brown, on or about the 1st day of November, 1906, wrongfully entered into said claims, and have ever since unlawfully held possession of the same, and have been extracting therefrom, as plaintiff is informed and believes, ores of the value of \$100,000. The prayer was for recovery of possession of the several lode mining claims, for damages, and for costs of suit. To this complaint there were filed the separate answers of the defendants; but all of these were similar and alleged, in substance, that, as to whether or not the plaintiff was the owner of the claims mentioned in the complaint, defendants had not and could not obtain sufficient knowledge or information upon which to base a belief, and deny that on November 1, 1906, or at any other time, the defendants, or any of them, wrongfully or otherwise entered upon the said claims, or any of them, or at said date or since, or at any time, have wrongfully held possession thereof, and deny that said defendants, or any of them, have extracted ore therefrom of the value of any sum whatsoever.

Upon this complaint and these separate answers the case was tried to a jury which returned a verdict in favor of the defendants in the following words: "We, the jury, find the issues herein joined for the defendants, and that the defendants W. B. Brown and Edward Brown are the owners, and the defendant the French Mountain Mining Company is the lessee, and entitled to the possession, of the vein or lode opened and developed in the Hecla and Shamrock lode claims by what is known as the lower tunnel."

Pending a hearing on a motion for a new trial, the court permitted the defendants,

over the objection of plaintiff, to file a joint amended answer in which it was alleged, among other things, that the defendants further answering said complaint, and by way of counterclaim, allege that, at all times mentioned in plaintiff's complaint, the defendants W. B. Brown and Edward Brown were, and still are, the owners in fee simple of the Grand Trunk lode mining claim, situate in the Holy Cross mining district, state of Colorado; that on or about the — day of August, 1904, they gave or extended a lease of, or bond upon, said claim to the defendant John W. Bailey, who thereafter and in May, 1906, assigned said lease and bond to the defendant the French Mountain Mining Company, which, ever since said time, has been in the actual possession and occupancy of said lode and vein; that said Grand Trunk lode lies parallel and adjacent to the Australian lode claim; that the said Australian, Hecla, and Shamrock claims lie parallel to each other in one body with end lines practically upon one line; that the said defendant the French Mountain Mining Company cut and intersected, at a point within the exterior sidelines of the said Australian, Shamrock, and Hecla group, the Grand Trunk lode and the vein thereof; that said vein so drifted upon by said company is the vein in controversy in this action and is the only vein from which the defendants have extracted or taken out any ore in said tunnel. Defendants further allege that said vein is the Grand Trunk vein and has been disclosed and discovered along, upon, and in the said Grand Trunk lode, and that said vein throughout its entire depth is the property of the defendants as owners or lessees of the Grand Trunk vein, and as being a vein apexing upon and within the said Grand Trunk lode. It was further alleged that the plaintiff has no right, title, or interest whatever in or to said lode, and that, although the vein was cut at a point within the sidelines of the Australian, Shamrock, and Hecla group extended downwards vertically, the said vein was so cut because in its dip it crossed the vertical sidelines of the Australian lode, and that said vein in its dip extended into the ground beneath the surface of the said Australian and Shamrock claims, but continues at all times to the Grand Trunk vein apexing upon the Grand Trunk lode and belonging thereto, and that said vein where the same is cut and developed in said tunnel is the identical vein located, opened up, and developed on the surface of the Grand Trunk lode mining claim. Further, defendants disclaimed any right or title to said Australian, Shamrock, and Hecla claims except their right and title to the Grand Trunk vein so far as the same may lie beneath the surface boundaries of said Australian, Shamrock, and Hecla claims between vertical planes drawn down-

ward through the endlines of said Grand Trunk lode so continued in their own direction that such planes will intersect such exterior parts of such vein or lode, and their right to remove ore and other material from their said Grand Trunk lode. The defendants prayed that the defendants W. B. Brown and Edward Brown be adjudged to be the owners, and the defendant the French Mountain Mining Company be adjudged to be the lessee and entitled to the possession, of the alleged Grand Trunk lode or vein, cut within the sidelines of plaintiff's lode claims.

After this answer was permitted to be filed, the court overruled plaintiff's motion for a new trial and rendered judgment, in substance, that the defendants are entitled to the possession of the vein or lode in dispute in this action opened up and disclosed within the sidelines of the Hecla and Shamrock claims as a vein or lode apexing within the lines of the Grand Trunk lode and a part thereof, the defendants W. B. Brown and Edward Brown being so entitled as the owners thereof, and that plaintiff has no right, title, or interest therein whatever. It was further adjudged that said vein is in fact the Grand Trunk vein belonging to and having its apex upon the Grand Trunk lode, and that the title, rights, and interests of the defendants are hereby quieted and confirmed as against the said plaintiff and all persons claiming under him, and that said plaintiff, his agents, servants, and attorneys, are hereby enjoined and restrained from asserting or claiming any right, title, or interest in said vein, or in any ore taken from said vein, and from in any manner interfering with said defendants or their heirs or assigns, or any of them, in their working of said vein or lode upon the dip thereof, or in the extraction, treatment, sale, or disposal of ore therefrom, unless it shall hereafter be shown that the apex of said vein departs from the Grand Trunk claim, in which event the plaintiff shall have leave to apply for a modification of this order and decree to the extent owned by such departure.

The case was thereupon appealed to the Supreme Court and is now before this court for review. Before the case was submitted to the jury, plaintiff moved for a directed verdict upon the ground that defendants had not proved any continuous vein or body of ore from the ground of defendants into the patented ground of plaintiff, within the meaning of the acts of Congress, and that the continuity and dip were not established by competent or any testimony.

The following instruction is likewise complained of: "The jury are instructed that, in determining whether a vein is continuous in its downward course, it is not necessary that the vein should be opened up or dis-

closed for the entire distance; but you must take into consideration all the facts shown as to the dip or incline of the vein, its geological and mineral character, and of the walls, and from the whole evidence decide whether it is the same vein in fact."

It was agreed that plaintiff was the owner of the Australian, the Shamrock, and the Hecla lodes, and that the defendants were the owners and lessees of the Grand Trunk lode; that the ore being removed and the workings in dispute are within the lines of the Hecla, and between which and the Grand Trunk lie the Shamrock and the Australian, is likewise admitted. So that the claim of the defendants in this case arises solely upon their contention that the vein so being worked in the Hecla apexes in the Grand Trunk. The errors assigned, and which seem necessary to consider, are: (a) The refusal of the court to direct a verdict for the plaintiff; (b) the order of the court allowing defendants to file an amended answer to conform to the proof; (c) the giving of the instruction to the jury heretofore set out, over the objection of the plaintiff.

[1] It will be seen that the answer of the defendants upon which the case was tried was simply the denial of ownership and the right to possession by plaintiff of the lode claims set out in the complaint; while the amended answer, permitted to be filed after verdict was returned, set up an affirmative claim to the vein, admitted to be within the plaintiff's ground, by reason of defendant's claim of apex right. This was a new and different cause of action from that set up in the original answer and upon which the case was tried.

The appellate courts of this state have been liberal in the matter of the allowance of amendments to pleadings, and particularly so as applied to answers. In the case of Cartwright v. Ruffin, 43 Colo. 377, 96 Pac. 261, it was held that amendments to pleadings are largely in the discretion of the trial judge, and, unless clearly abused, such discretion ordinarily will not be interfered with on appeal. It was there further held that greater liberality is necessarily allowed in the matter of amendments to answers than to complaints, especially under Code practice, and that this liberality is sometimes extended to the admission of entirely new defenses.

While the question of the amendment presented for consideration in that case was not determined, yet it was characterized as radical. Neither do we find it necessary to determine whether or not the amended pleading in this case, as such, was allowable. Yet in view of the finding hereinafter stated, as to the failure of proof upon the part of the defendants, we hold that for such reason the amendment was not proper.

But if the amended pleading be considered as permissible and within the discretion of the court, then, under the practice, it was the duty of the court in this case to have granted a new trial, and to have thus permitted the parties to try the case upon the new pleadings.

"At common law the court has power to allow an amendment of the pleadings in a case until final judgment; and authority is given by statute in most of the states to allow amendments after as well as before judgment by the insertion of new allegations material to the case. Although this is an extraordinary power and should be sparingly exercised, amendments have been allowed under special circumstances even after satisfaction of the judgment. If the amendment is allowed, the judgment should be vacated in order to give the opposite party an opportunity to controvert the new allegations; or a separate trial should be had upon the new issues." 1 Am. & Eng. Enc. Pl. & Pr. 605, 606, 607.

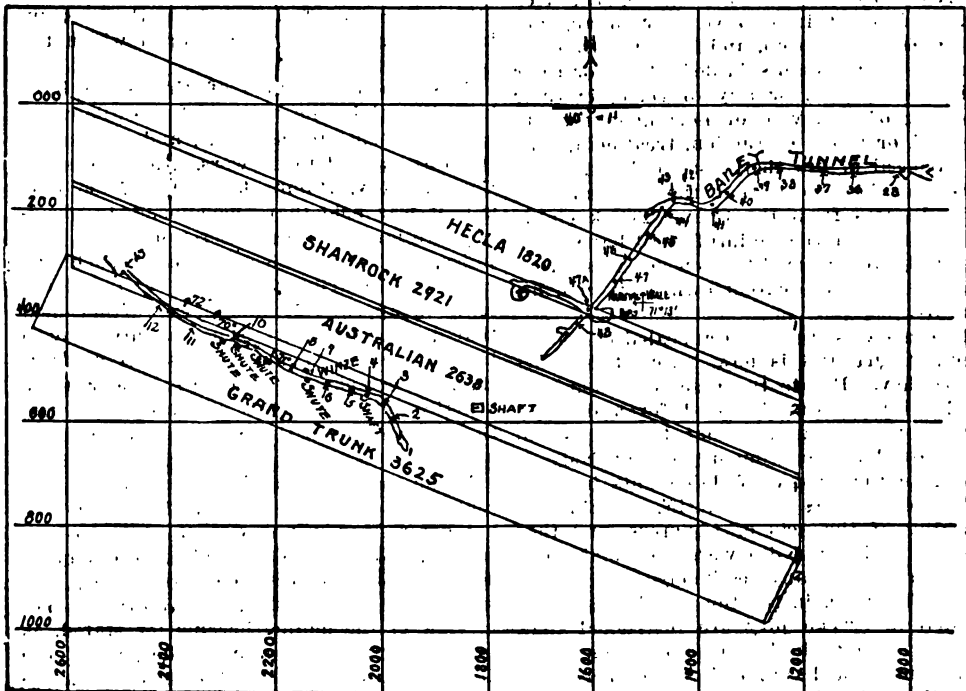
Therefore the refusal of the court to grant a new trial after allowing the amended answer to be filed, and thus to permit the case to be tried upon the pleadings as amended, was error. The verdict and the judgment were wholly at variance with the defendants' pleadings upon which the case was tried, and it has been held that the judgment obtained through a clear departure from the

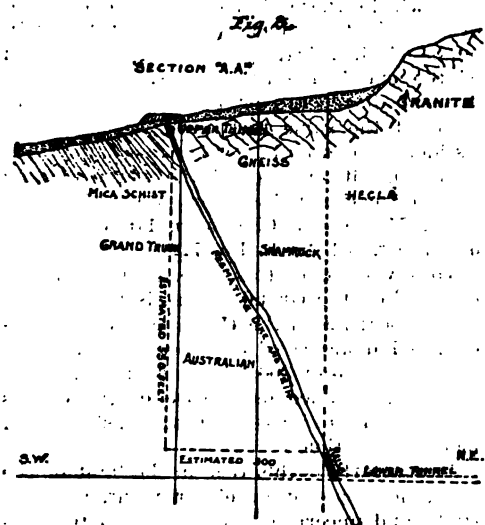
issues joined cannot be sustained. Jackson v. Ackroyd, 15 Colo. 583, 26 Pac. 132.

The court's action in allowing the amendment was also in violation of the Code provision requiring a showing to be made. Mills' Ann. Code, § 65. The motion for a new trial should have been granted.

[2] From what has been said the judgment should be reversed; but, inasmuch as the case may be again tried, it seems proper to consider the remaining questions. From a careful study of the record it seems quite clear that there was a failure of proof as to the defendants' claim of apex right. In order to understand the issue, it will be necessary to consider the following sketches, to which we will refer as figures "1" and "2," respectively. Figure 1 shows the surface lines and location of the lode claims involved. It also shows the line of the tunnel and the location of the shaft, also the workings on the Grand Trunk lode, referred to in the record as the "upper tunnel." Figure 2 is intended as a sectional view showing the shaft on the Grand Trunk sunk a short distance below the level of the upper tunnel, which last appears to be about 30 feet below the surface, and also shows what is known as the "up-raise" in the lower tunnel on the Hecla claim, as well as the supposed course of the vein between these points, an estimated vertical distance of 550 feet, all of which was wholly uncovered and unexplored.

FIGURE 1





The shaft on the Grand Trunk is testified to by the defendant Bailey as extending about 50 feet below the level of the upper tunnel, but by reason of water therein, not examined by other witnesses. The up-raise in the Hecla is estimated to be about 45 feet vertically upward from the level of the lower tunnel, but constructed through the ore in a sort of circular stairway form, reaching and exposing a small portion of both walls, but always at different places. Bailey testifies that the shaft from the tunnel level in the Grand Trunk follows the dip of a vein to the bottom of the shaft. These maps, and the record, except as to figure 1 where the surface lines are from actual survey, are made from alleged surveys of others, not in evidence, and the seeming guess and speculation of the makers of the maps. The dip of the vein in the Hecla, as far as exposed, seems to compare with the dip of the vein, so far as disclosed, in the Grand Trunk; but there seems to be so little of either vein exposed that estimates in that regard are, of necessity, largely conjectural. The character of the ore in the Grand Trunk tunnel is said to be the same as that in the lower tunnel, except that the ore in the Grand Trunk is oxidized. The witness Boehmer, for the defendants, says that he also bases his opinion that the vein disclosed on the Hecla and that appearing on the Grand Trunk are one and the same vein, because of a dyke running through the mountain, paralleling the supposed vein, and he designates this formation as mica-schist, gneiss, and granite, as indicated in figure 2. But where one of these formations begins and another ends is no clearer in the testimony than it appears in the map. Besides, there is no evidence as to the dyke in the several formations suggested, except as it may appear in the lower tunnel. It is true that Bailey says that the vein as disclosed in the Grand Trunk and in the Hecla is the only vein on

the mountain; but the witness Herace Havens testifies as to the Pelican and Pelican Extension veins which show on the surface for 1,000 or 1,500 feet, and that the Mollie vein has always been considered by those operating it as one of the strongest veins in that country. These veins are all in the same mountain as the ground in dispute. Havens further testifies that he had worked in all of these veins and was familiar with the ores in them, and that they were of the same character as that in the Hecla. He further testifies that all of these veins are of the same general dip and strike as those in the Hecla and Grand Trunk. Havens is corroborated in this testimony by the witness Happel, who testifies he has worked on his own claims, the Three Nations and the Mack, also the Virginian, Grand Trunk, Pelican, Comstock, and Great Western, all in the same locality, and that the veins are all similar, having the same character of ore, the same character of walls, and all about of the same dip. This, with other testimony in the case, seems to make the declaration of Bailey, that there are no other veins in that mountain, appear absurd.

Boehmer, the engineer, testifying for the defendants, on cross-examination says: "Q. Why did you mark this lower tunnel, when, as a matter of fact, the lower tunnel is 200 or 300 feet away? A. It is projected on. That dotting is on there to show that. Q. Why did you change the course and dimensions of that streak? A. I platted that from the dips that I took in the lower level. The average was 67 degrees. I drew that line 67 degrees, and the upper one I found 65 degrees, and I started that from the upper workings and then connected with an irregular line. Q. Had you projected with the 67 degrees, it would come out in the Australian? A. Yes, if that line was projected, it would come out in the Australian. Q. So if you take the dip of the vein, as shown in the lower workings and project that to the surface, with that same angle, it would come out in the Australian? A. Yes, it would. Q. And not on the Grand Trunk, at all? A. Yes, sir. Q. When you got about here to this line, between the Shamrock and the Australian, then you commenced to give off towards the Grand Trunk? A. Yes, sir. Q. Why? A. Because the vein up there is within the Grand Trunk, and not the Australian, and you have to connect vein with vein, and could not connect any dip you happen to find. Q. In other words, you must connect whether it is solid rock or not? A. Yes, sir; you must connect vein with vein. Q. Did you go up here to examine and find if there was a vein on the surface? A. No, I couldn't see anything there. Q. Then the upper exhibit is conjecture beyond the end of the drift so far as the lower tunnel is concerned, and conjecture so far as the upper tunnel is concerned down this way to the east? A. No, not the upper one. That is put on by the

evidence of Mr. Bailey. I didn't see that myself. Q. So far as you are concerned? A. So far as I am concerned, yes. Q. Why didn't you take Mr. Bailey's word for this up-raise in the lower tunnel workings? A. I could get at that." Transcript of Record, folios 182, 183, 184.

This testimony shows clearly that, if the vein continued on the angle of the dip estimated by the witness as being the angle in the lower tunnel, the vein would come to the surface on the Australian, and not on the Grand Trunk, as contended by the defendants. It likewise discloses the uncertainty of his information upon which he relied to make the map. Figure 2. This witness also testifies, and there seems to be no other contention, that the top of the up-raise in the Hecla is 550 feet lower, vertically, than the bottom of the Grand Trunk shaft, and also 300 feet distant, at right angles, from the bottom of the Grand Trunk shaft, as well as 200 feet nearer the southerly end-lines of the claims. It will be seen that, if this is a fair statement of the substance of the testimony, the conclusion that the workings in the Hecla are in the vein said to apex in the Grand Trunk is the result simply of conjecture and speculation; and, considered in its most favorable light for the defendants, is not sufficient upon which to base a verdict and judgment in their favor.

Section 2322, R. V. Statutes U. S. (U. S. Comp. St. 1901, p. 1425), conferring what is commonly known as the "apex right," is in derogation of the common law which granted to the owner of lands all veins within the vertical lines of his land to the center of the earth, and it has been generally held, in the determination of cases under this statute, that the presumption is with the owner of the lands as to his right to veins and ore bodies within his vertical sidelines.

It was said in *Stevens v. Gill*, Fed. Cas. No. 13,898, that "the burden of proof is upon the plaintiffs claiming the apex, both because they are the plaintiffs, and because they are seeking to go out of their own territory into that of others." This seems to be the universally accepted rule of appellate courts, including our own. Again, to establish such a claim, and from the very nature of the case, there should be at least a reasonable degree of certainty in the proof.

The following statement of the rule is perhaps as fair as can be selected from the reported cases in this regard: "The act of Congress (section 2322, Rev. St.) gives to the owner of a mineral vein or lode, not only all that is covered by the surface lines of his established claim as those lines are extended vertically, but it gives him the right to possess and enjoy that lode or vein by following it when it passes outside of those vertical lines laterally. But this right is dependent, outside of the lateral limits of the claim, upon its being the same vein as

that within those limits. For the exercise of this right it must appear that the vein outside is identical with and a continuation of the one inside those lines. But if the mineral disappears or the fissure with its walls of the same rock disappears, so that its identity can no longer be traced, the right to pursue it outside of the perpendicular lines of claimants' survey is gone." *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 6 Sup. Ct. 481, 29 L. Ed. 712.

To say then, in this case, that the alleged apex on the Grand Trunk is that of the vein appearing on the Hecla at a wholly unexplored distance of 550 feet, with a right angle distance of 300 feet, and an additional extended distance lengthwise of the claims 200 feet, is to base such conclusion upon mere speculation.

Particularly is this true in the light of the scant development at either point, and the slight and uncertain evidence as to the formation. Thus by these figures of the engineer from a point at the bottom of the shaft on the Grand Trunk to a point at the top of the upraise from the tunnel in the Hecla would be in a straight line through the earth a distance of approximately 657 feet, all of which is unopened, unexplored, and the character of which is wholly unknown. To conclude, under this state of facts, that this distance is traversed by a single continuous vein of which these two points are the only opened and exposed parts, is little short of absurd.

We can find no case wherein such a wild guess has been accepted as proof. In fact, the most that can be said in favor of such a conclusion is that it is the opinion of an engineer. But in view of the many worked and ore-bearing veins in the same locality, on the same mountain, with similar dip and strike, this opinion can be regarded as but little, if anything, beyond a guess, and mining engineers cannot be said to be infallible as guessers.

It was said in *Heinze et al. v. B. & M. Co.*, 30 Mont. 485, 77 Pac. 428: "The plaintiffs have not by their operations so developed their own workings from the apex of their vein down to the disputed territory as to furnish substantial evidence that their claim is probably well founded. Indeed, while they concede that there is a vein in the defendant's ground dipping to the south, their own contention is based exclusively upon the opinion of their engineers that, if the vein having its apex in the Minnie Healy ground continues to dip at the same angle from certain points where it is exposed in the upper levels in their workings, it will reach the point where the defendant is conducting its operations. This is not sufficient to overcome the presumption that the defendant owns the ores found beneath its own surface. This presumption may not be

overturned by speculative conjecture or even intelligent guess."

As we read the facts in the case of Colo. Cent. Con. Min. Co. v. Turck, 50 Fed. 888, 2 O. O. A. 67, they were much more favorable to the apex claimant in that case than in the case at bar. And the testimony was there held to be mere speculation. The proof was insufficient upon which to base a verdict and judgment.

[3] The instruction complained of was misleading, if not erroneous in this case. It might have been allowable in a case where a vein had been opened and identified for substantial distances and at points in close proximity, but even in that case it should have been qualified and amplified so as to permit a finding based only upon a state of facts sufficient to reasonably justify such a conclusion. It should have denied the right of the jury to guess, speculate, or conjecture.

Judgment reversed. All the Judges concurring.

(23 Colo. App. 286)

HALL v. RAMSEY & BYARS.

(Court of Appeals of Colorado. May 13, 1912.)

TRUSTS (§ 102*)—CREATION—CONSTRUCTIVE TRUST.

A bank contracted to sell land subject to an incumbrance, the purchase price to be payable in installments and a warranty deed to be delivered on full payment. After payment of the amount due above the incumbrance, the bank on payment of subsequent installments issued its cashier's checks for such installments, and attached them to the agreement. The bank subsequently became insolvent. The purchasers did not know there was any incumbrance on the premises, were not aware of the issuance of the cashier's checks, and there was no agreement by the bank to pay such incumbrance. Held, that the issuance of the cashier's checks created no fiduciary relationship between the purchasers and the bank, and they could not require the application of such amount on the incumbrance on the theory that it was a trust fund.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 153; Dec. Dig. § 102.*]

Appeal from District Court, Otero County; J. E. Rizer, Judge.

Proceedings on a claim of Ramsey & Byars against G. M. Hall, receiver of the State Bank of Rocky Ford. From an order allowing the claim, the receiver appeals. Reversed, with directions.

Fred A. Sablin, of La Junta, for appellant. John H. Voorhees, of Pueblo, for appellees.

SCOTT, P. J. This is an appeal from an order of the district court of Otero county allowing the claim of appellees as a trust fund in the matter of the receivership of the State Bank of Rocky Ford. There is no substantial conflict in the testimony, and from which we gather the following facts:

On the 15th day of December, 1902, the

State Bank of Rocky Ford was the owner of a lot and business building in the city of Rocky Ford, subject to an incumbrance of \$2,500 secured by trust deed on the premises. The title to the premises had been taken, and was then held in the name of E. J. Smith, cashier of the bank. On that day, and acting for the bank, Smith entered into a written contract with the appellees for the sale of the premises. It was understood by all parties that, while the title was in Smith and the contract was made in Smith's name, yet the property was that of the bank and that the contract was for the bank. The purchase price agreed upon and which agreement was denominated in "escrow agreement" was \$7,800. This was to be paid as follows: \$350 cash; \$350 on the 2d day of January, 1903; and a note of \$6,900, with interest at 8 per cent. per annum, due on or before 60 months from date, the principal and interest to be paid in monthly installments of not less than \$100 each month. A warranty deed for the premises, in terms conveying the property to appellees free and clear of all incumbrances, was executed as of even date with the agreement, and deposited together with it with the State Bank of Rocky Ford. The agreement further provided that appellees were to have possession of the premises on January 2, 1903, and were to pay all taxes and to keep the building on the premises insured in a sum not less than \$4,000 in favor of the vendor. On the 18th day of December, 1902, Smith executed his note to the bank in the sum of \$5,100 payable in 60 months. On the face of the note were written the words, "Ramsey and Byars deal." Smith testifies that this note was for the purpose of convenience in carrying the account on the books of the bank. The two cash payments of \$350 each, amounting to \$700 and the note for \$5,100, make a total of \$5,800, a discrepancy between that and the purchase price of \$7,800. What became of this is not clear from the record. On the 31st day of December, 1902, at the time of the failure of the bank, the appellees had paid all of the agreed purchase price except the total sum of \$700.55 due as principal and interest. The incumbrance of \$2,500 on the property had not been discharged by the bank. But, when all of the purchase price in excess of the amount of the incumbrance had been paid, the monthly payments were then received by Smith, who issued the bank's cashier's checks in each instance and attached these to the escrow agreement. These payments so made, and for which such cashier's checks were issued, amounted at the time of the failure of the bank to the total sum of \$2,000. The monthly payments were credited alike on the note of appellees to Smith and the note of Smith to the bank. The petition of appellees prayed the court to declare this sum of \$2,000 a trust fund, and that upon payment by appellees of the sum

For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of \$700.55 due on the purchase price the receiver be ordered to pay off the \$2,500 incumbrance, and deliver to appellees the said warranty deed, for the premises, then held by him. This was in substance the order of the court and of which the receiver complains. It appears, also, that prior to the filing of the petition in this case the appellees had paid to the receiver the sum of \$125, which he accepted, and still retains.

It will be seen that the only question for determination is as to whether or not the \$2,000, paid by the appellees to the bank under their contract of purchase, and for which cashiers' checks or certificates were so issued, constituted a trust fund within the meaning of the law.

Counsel submitted elaborate briefs, and have made extensive oral arguments upon the questions of tracing trust funds, of estoppel, of agency, and of the statute of frauds, all of which seem to have no place in the case, as we understand the facts.

It is contended by the appellees: (1) "That the money paid by appellees on their contract that is represented by cashiers' checks is a trust fund to be applied in paying for the property and paying off the incumbrance thereon." (2) This money was turned into the general funds of the State Bank of Rocky Ford and became a part of its assets.

The court seems to have adopted this theory of the case and to have rendered judgment accordingly. It is quite clear that, if the appellees have any claim at all, it is under and by virtue of their contract with the bank using the name of Smith for the purchase of the premises. This is the contention of appellees as set out in their petition and in the briefs. If, then, the contract was in fact the contract of the bank, though made in Smith's name, then there can be no element of agency or trust. In such case the bank agreed to sell, and Ramsey and Byars agreed to buy. The moneys paid by the latter were simply payments to the bank upon their contract with the bank. It may be presumed that it was the purpose of the bank to pay the incumbrance of \$2,500 when it had received the full consideration of the contract, and thereafter to deliver the deed. But there is no evidence as to any such agreement between appellees and Smith or any other officer of the bank.

The appellees seem to have made the monthly payments from first to last as agreed in the contract. It is not contended by appellees that they even knew cashiers' certificates were being issued, nor does it appear that there was any subsequent or different agreement than the original. We are unable to find in the record any evidence tending to show that at the time of the contract of purchase, or at any time before the failure of the bank, either Ramsey or Byars knew that there was an incumbrance on the premises. It is not referred to in the writ-

ten agreement, nor in the warranty deed executed at the time. The petition of appellees recites: "Your petitioners further allege that they are now informed and believe and so state the fact to be that said property is now and was at the time of said sale subject to a certain incumbrance in the sum of twenty-five hundred dollars (\$2,500.00), witnessed by one promissory note for said sum of twenty-five hundred dollars (\$2,500.00), dated January 11, 1899, payable to Thurlow, Hutton, and Williams on or before January 11, 1902, together with interest thereon at the rate of eight per cent. (8%) per annum, interest payable semiannually, secured by deed of trust upon said property, heretofore described, which said deed of trust was duly recorded in the office of the county clerk and recorder of Otero county, Colorado; that no part of said note has been paid save and except the interest thereon and the same has been extended from time to time; that there is now due upon said note as interest the sum of one hundred forty-one dollars and twenty-five cents (\$141.25) which together with the principal of said note makes the amount due thereon two thousand six hundred forty-one and ²⁵/₁₀₀ dollars (\$2,641.25)." From this allegation, and from an examination of the agreement as well as the deed, it would seem that appellees were without actual knowledge of any incumbrance on the property prior to the failure of the bank, and that they trusted and relied solely on the agreement of the bank to deliver to them a deed for the premises unincumbered upon the completion of the payments agreed by them to be made. The action of the bank, alone in issuing cashiers' certificates for certain payments made under the state of facts here can create no fiduciary relationship between the bank and the appellees. The appellees are simply unfortunate, in that they are the victims of misplaced faith and confidence in the integrity and stability of the bank with which they contracted.

Whether or not appellees may be held to be general creditors is not without difficulty, but it would seem that the issuance of the certified checks may be said to amount to an admission of indebtedness or liability under the contract, when considered with the whole conduct of the bank in relation thereto, and it would seem that equity should decree that they be declared general creditors to that extent. The question is not raised or discussed in the briefs.

We can find no legal basis, under the state of facts presented, for the order of the court holding the sums of money paid by appellees and for which cashiers' checks were issued, to be trust funds and entitled to preference, and must, therefore, hold such order to be error.

To that extent the order of the court is reversed, with instruction that the order be further modified, in that the sum of \$125

paid by appellants to the receiver be repaid to them.

Reversed, with instructions. All the Judges concurring.

(22 Colo. App. 532)

FLEMING v. HOWELL

(Court of Appeals of Colorado. June 10, 1912.)

1. TAXATION (§ 761*)—TAX DEEDS—SALE OF NONCONTIGUOUS TRACTS EN MASSE.

A tax deed showing a sale of several noncontiguous tracts to a county en masse, for a gross sum, and that the certificate of purchase on which the deed was based had been assigned by the county clerk more than three years after the tax sale and issuance of the certificate, was void on its face.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1510-1513; Dec. Dig. § 761.*]

2. TAXATION (§ 761*)—TAX DEED—REQUISITES.

Tax deeds omitting to recite as required by law, that the property had not been redeemed from tax sale, were insufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509-1513; Dec. Dig. § 761.*]

3. TAXATION (§ 805*)—TAX DEEDS—ACTION TO RECOVER LAND—LIMITATIONS.

Where a tax deed was void on its face, such deed and payment of all taxes assessed on the land for a subsequent period of seven years and four months were insufficient to set the five-year statute of limitations in motion in favor of the grantee.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509-1513; Dec. Dig. § 805.*]

4. ADVERSE POSSESSION (§ 79*)—COLOR OF TITLE—VOID TAX DEED.

A void tax deed is sufficient to confer color of title on a grantee from the date of its record.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.*]

5. ADVERSE POSSESSION (§ 85*)—REQUISITES.

Actual adverse possession cannot be established by inference or implication.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498-503, 556, 557, 560, 568, 568-590; Dec. Dig. § 85.*]

6. ADVERSE POSSESSION (§ 85*)—COLOR OF TITLE—EVIDENCE.

Adverse possession under color of title by the holder of a void tax deed was not established, where the proof did not show when such holder went into possession, nor that he was in actual and continuous possession of the land during the whole period of seven years required.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498-503, 556, 557, 560, 568, 568-590; Dec. Dig. § 85.*]

7. ADVERSE POSSESSION (§ 85*)—CONSTRUCTIVE POSSESSION—PRESUMPTIONS.

The holder of a perfect legal title has constructive possession, which is deemed to continue until interruption by the actual entry and adverse possession taken by another, or until payment of taxes on vacant and unoccupied lands for the requisite period, concurrent with color of title made in good faith, as provided by Rev. St. 1908, § 4090, shall have become in law an actual ouster or disseisin.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498-503, 556, 557, 560, 568, 568-590; Dec. Dig. § 85.*]

8. ADVERSE POSSESSION (§ 110*)—COLOR OF TITLE—STATUTES—PLEADING.

The benefit of Rev. St. 1908, § 4090, providing for adverse possession of unoccupied lands under color of title and payment of taxes, cannot be taken advantage of unless pleaded.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 638-645; Dec. Dig. § 110.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Lardner Howell against J. V. Fleming. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas B. Stuart and Charles A. Murray, both of Denver, for appellant. R. H. Gilmore, of Denver, amicus curiæ. John F. Mail, of Denver, for appellee.

KING, J. Appellee, as plaintiff, brought this action in the nature of ejectment, to recover from the defendant four certain parcels of land situate in Washington county, alleging his title in fee simple and right to immediate possession, and that defendant wrongfully withheld possession thereof. The defendant, among other defenses, pleaded title in himself by virtue of several tax deeds, also color of title under one of said deeds, and invoked the bar of the statute of limitations, pleading and relying upon both the short statute as applied to actions for recovery of land sold for taxes (Rev. St. 1908, § 5733; Mills' Ann. St. § 3904) and the seven-year statute, alleging his actual possession under claim and color of title made in good faith, with payment of all taxes legally assessed, for the full period required by said statute (Rev. St. 1908, § 4089).

Plaintiff deraigned title from the original patentee through several mesne conveyances. No serious objection was made to plaintiff's title, except that it was defeated by the several tax deeds and the statutes of limitation as hereinbefore set forth.

[1] Defendant's several tax deeds were refused admission as evidence of title, but admitted for the purpose of showing color of title. Each was void on its face. The first deed, because it showed the sale to the county of several noncontiguous tracts of land, en masse, for a gross sum, and that the certificate of purchase, upon which the deed was based, had been assigned by the county clerk more than three years after the tax sale and issuance of said certificate. *Emerson v. Shannon*, 23 Colo. 274, 47 Pac. 802, 58 Am. St. Rep. 232; *Page v. Gillett*, 47 Colo. 239, 107 Pac. 290; *Hughes v. Webster*, 122 Pac. 789, 790; *Carnahan v. Sieber Cattle Co.*, 84 Colo. 257, 82 Pac. 592; *Empire Ranch & Cattle Co. v. Goldren*, 117 Pac. 1005; *McLaughlin v. Reichenbach*, 122 Pac. 47. The second deed was made pursuant to the same tax sale as the first, upon an assignment of the certificate made by the county treasurer, by authority of the board of

county commissioners, but was void on its face because of the recital therein of the sale of noncontiguous tracts en masse, as in the first.

[2] The other two deeds omitted certain material recitations required by the statute to be made in the form prescribed for treasurer's deeds, to wit, that the property had not been redeemed from tax sale as provided by law. The deeds were therefore inadmissible as evidence for the purpose of showing title.

[3] Seven years and four months had elapsed after the first tax deed had been recorded, before suit was brought; and all taxes assessed upon said lands during that time had been paid by the defendant; but the deed, being void on its face, did not operate to bar the five-year statute of limitations in motion. *Gomer v. Chaffee*, 6 Colo. 314; Page v. Gillett, supra; Sayre v. Sage, 47 Colo. 559, 108 Pac. 160; *Hughes v. Webster*, supra.

[4] The tax deed relied upon by the defendant gave him color of title from the date of its record. *Morris & Thombs v. St. Louis National Bank*, 17 Colo. 231, 29 Pac. 802; Sayre v. Sage, supra; *Hughes v. Webster*, supra. But it is not necessary to decide whether the bar of the seven-year statute of limitations began to run from the date of such record, or whether the payment of taxes, admitted and otherwise established, was sufficient to constitute an effective bar to the suit, if compliance with other provisions of the said statute had concurred therewith; for the evidence does not prove such concurrence. It does not show when the defendant went into possession, nor that he was in the actual and continuous possession of said lands during the whole period of seven years mentioned.

[5] Actual adverse possession cannot be established by inference or implication. The admission that he was in possession at and for some time prior to the time when suit was commenced was not sufficient. The nature of the defense relied upon required strict proof.

[6] There was a complete failure of such proof to establish the possession as alleged. This failure is not cured, nor avoided, nor is defendant in any way aided, by the doctrine of constructive possession, for his void deed did not give him such possession.

[7] On the contrary, the grantee of the original owner had constructive possession by virtue of a perfect legal title, and such possession is deemed to continue until interrupted by an actual entry and adverse possession taken, by another (*Morris & Thombs v. St. Louis National Bank*, supra), or until the payment of taxes on vacant and unoccupied lands for the requisite period of years, concurrent with color of title made in good faith (as provided by section 4090,

Rev. Stats. 1908), shall have become equivalent in law to actual ouster or dispossession.

[8] The benefit of this latter statute was claimed by appellant in argument, but cannot be allowed, for the reason that its bar was neither raised by the pleadings nor sustained by the facts developed at the trial.

Express mention of other exceptions taken and assignments of error made by appellant is unnecessary, by reason of decisions of the Supreme Court upon the questions involved rendered since the briefs in this case were filed. And particular reference to the argument in the able and exhaustive brief of the amicus curiae is not made, for the reason that such brief is based upon, and the argument confined almost entirely to, those provisions of the statutes of limitation which are not properly raised by the pleadings nor sustained by the evidence herein, and therefore not applicable.

Finding no substantial error in the record, the judgment of the trial court will be affirmed.

(23 Colo. App. 120)

ROBERTS et al. v. SCURVIN DITCH CO.
(Court of Appeals of Colorado. April 8,
1912, Rehearing Denied June
10, 1912.)

EMINENT DOMAIN (§ 133*)—DAMAGES—VALUE OF IMPROVEMENTS.

On condemnation of land for an irrigation ditch right of way, the owners were entitled to an award for the value of an existing ditch useful for the purposes designed by, and to be used by, petitioner, though the ditch had been constructed and abandoned before the owners acquired title to the land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 358-361½; Dec. Dig. § 123.*]

Appeal from District Court, Larimer County; James E. Garrigues, Judge.

Condemnation proceeding by the Scurvin Ditch Company against George F. Roberts and another, partners as Roberts Brothers. From the judgment, defendants appeal. Reversed, with directions.

J. F. Farrar, of Ft. Collins, for appellants. Paul W. Lee, of Ft. Collins, for appellee.

SCOTT, P. J. This is an appeal from the judgment of the district court in a condemnation proceeding involving the right of way for an irrigation ditch. The judgment appealed from, after reciting the amount of damages to be allowed the appellants, by the commissioners theretofore appointed, to wit, \$175, as having been regularly and properly ascertained and determined and having been theretofore paid into court for the use of appellants, rendered judgment as follows: "Now therefore, it is ordered that the said petitioner shall be and become seised in fee of the following described land, and that it may take possession of and hold and use the same for the purpose specified in said

petition, and that it shall thereupon be discharged from all claims for any damages by reason of any matter specified in such petition and certificate of commissioners, that is to say: A strip of land extending through the N. W. $\frac{1}{4}$ of section 26 and through sections 23 and 13, all in township 10 N., range 70 west of the 6th P. M. in Larimer county, Colorado, the same being 100 feet in width. Fifty feet on either side of the center line of a certain ditch now constructed thereon, which line is described as follows: Commencing at a point on the canal of the North Poudre Irrigation Company whence the southeast corner of section 22, township 10 N. range 70 W. of the 6th P. M., bears N. 61° , $21'$ east, 1,190 feet; thence in a general northeasterly direction to a point 1,812 feet east of the quarter corner on the west side of section 13, township 10 N., range 70 W. of the 6th P. M., at which point the said constructed ditch terminates. And also continuing from the said last-mentioned point, a strip of land 100 feet in width, being 50 feet on either side of a line described as follows: From the end of said ditch above described, thence N. 9° east, 545 feet; thence N. 32° east, 300 feet, to a natural ravine or gulch following the center line or thread of said ravine in a northeasterly course, 3,884 feet, to a point on the east line of section 13, township 10 N., range 70 W., 378 feet south of the northeast corner of said section 13. The said land so to be taken being 38.36 acres." It further appears that the condemnation proceeding was instituted in compliance with the direction of the court in a judgment before rendered in an injunction proceeding, wherein the appellants sought to enjoin the appellee from entering upon and using said lands and a certain ditch or excavation, the land in question, alleged to be the property of the plaintiff.

The findings and judgment of the court in that proceeding were as follows: "And the court having heard the evidence adduced by the plaintiffs and the defendant as well, touching the allegations contained in the complaint and answer, and being now fully advised in the premises, doth find: That the equities herein are with the plaintiffs. That the allegations in the complaint contained are true. That the work of the construction of the Scurvin Ditch was begun about the year 1885, and that the same was never completed, but that the same was abandoned by the original projectors of the said ditch more than 20 years prior to the commencement of this action. That no easement was obtained by the original builders of said ditch through, over, and across the land now owned by the plaintiffs. That neither the North Poudre Land, Canal & Reservoir Company, nor its successors in interest, have done any work on the said ditch from the date of the cessation of work thereon in the year 1887 until the defendant entered thereon in May, 1908, to repair and complete the

said ditch. That the defendant herein obtained no right to possession of the said ditch, or right of way by virtue of its deed, dated April 8, 1908, from the North Poudre Irrigation Company, successor to the North Poudre Land, Canal & Reservoir Company, the original builder of said Scurvin Ditch; and the said defendant, the Scurvin Ditch Company, should be enjoined during the pendency of this action, and until the final hearing herein, from further occupancy or possession of the said ditch and right of way, as the same traverses the lands of the plaintiffs as herein above mentioned. And therefore, it is ordered, adjudged, and decreed that the defendant herein the Scurvin Ditch Company forthwith refrain from further occupying the line of ditch commonly known as the Scurvin Ditch, as the same traverses sections 13, 23, and the (N. W. $\frac{1}{4}$) of section 26, township 10 N., range 70 W., unless forthwith the said defendant shall elect to file its petition in condemnation to condemn a right of way for said ditch, as the same traverses the aforesaid lands; and thereupon the Scurvin Ditch Company files in this court its petition in eminent domain, being No. 2,313 of the files of this court to acquire the said right of way, to have adjudged the compensation therefor and the damages to be assessed in the manner provided by law, and in said proceeding this day obtains its order for temporary possession of the said right of way upon making the deposit in the registry of this court, as by the order in said case provided; and thereupon it appearing to the court that the matters in litigation between the parties hereto in the pending cause have been fully adjudicated and determined, and nothing further remains to be done in this action, therefore it is ordered that the said action be dismissed at the cost of the defendant."

There was no appeal from this judgment. The condemnation proceeding was then instituted, and commissioners duly appointed, who made report with the following findings: "That the value of the land of the respondents actually taken is \$115. That the damage to the residue of the land of the respondent is \$160. That the amount in value of the benefits to respondent is \$100. In making the above award we have not considered the value of the ditch excavation heretofore constructed upon said land."

Thereupon the appellants filed their verified motion to set aside and vacate the report and findings of the commissioners, and, in addition to the facts heretofore set forth, alleged: "That the respondents herein are the owners and in occupancy of section 23, the N. W. $\frac{1}{4}$ of section 26, and section 13 in township 10 N. of range 70 W., Larimer county, Colo. That in the years 1885, 1886, and 1887 there was partially constructed across the lands above mentioned, by one Scurvin, a ditch, excavation, said Scurvin being a contractor, as respondents are in-

formed and believed of one F. L. Carter Cotton. That the work of said ditch was abandoned by the said Carter Cotton and the said Scurvin more than 20 years ago, and that said work remained in said abandoned state and condition, unused by any persons whatsoever, until after respondents herein acquired title to said land, and until the winter of 1906 and 1907, when said respondents worked upon said ditch and enhanced its value with the expectancy and intention of using said ditch for the carriage of water." That "in due course the said commission proceeded to take and hear testimony as to the value of the land and the compensation which was proper to be allowed the said Roberts Bros., and at said hearing the said respondents offered evidence tending to show that the said ditch excavation hereinbefore referred to, the same being the property of the said Roberts Bros., had originally cost to construct a large amount of money, to wit, about \$10,000. That the same had a reasonable market value of a large sum of money, about \$3,000. That the said Roberts Bros. had done work heretofore toward completing and repairing said excavation expecting and intending to use it for irrigation purposes, and that said excavation would be a saving to the said Scurvin Ditch Company of approximately \$10,000. Testimony was further introduced, and it was admitted by the officers of the Scurvin Ditch Company that the work of building and constructing the ditch across said lands would not have been undertaken by them had they not expected to utilize said excavation and receive the benefit of said excavation and save the cost of construction thereof, and that the Scurvin Ditch Company had undertaken its irrigation project under the belief that they were the owners of said excavation." And further that "respondents would further show that at said hearing Paul W. Lee, Esq., attorney of record and appearing at said hearing for the Scurvin Ditch Company and E. C. Moore, the president of said Scurvin Ditch Company, over the objection of counsel for the respondents herein, stated to the members of this commission that this honorable court had, upon a hearing upon the application for the injunction in the case of the Roberts Bros. against the Scurvin Ditch Company, as hereinbefore referred to, ruled that the said Roberts Bros. were not entitled to any compensation by reason of the fact that there existed an excavation across said lands as above mentioned, and respondents would further show that, in computing the amount of damage to be allowed the said respondents and the compensation to be awarded them for a right of way across said lands, the said commission did not consider the value of the ditch excavation hereinbefore referred to, as appears from their report on file herein."

The record does not show that there was

any denial or reply filed to this verified motion, or that any testimony was taken concerning the same. So that it appears here simply upon objection to action of the court in denying the motion to set aside the findings and award of the commission, and the rendition of the judgment thereon.

It will be seen that, from the judgment in the injunction case which became final, the appellants were the owners in fee of the premises, and that the appellees at that time had no right therein, nor any easement thereover or thereon. It also appears from the verified motion to set aside the appraisal and award that, at the time of all the court proceedings above, there was upon the premises so to be condemned a ditch excavation which originally cost to construct about \$10,000, and which was of the reasonable market value of \$3,000, and which might be, and was intended to be, used by the appellants for an irrigation ditch to be constructed by themselves. That this excavation was not taken into consideration by the commissioners appears clear from the report which expressly recites: "In making the above award we have not considered the value of the ditch excavation heretofore constructed upon said land."

It seems, from the statements of counsel on both sides, that the lands in question were owned by the Union Pacific Railroad Company, and that one F. L. Carter Cotton secured a contract of purchase, and while so holding organized an irrigation company, which proceeded to make the excavation in question; that the land was afterward forfeited to the railroad company; and that the ditch was abandoned about 20 years before the injunction suit, and at which time appellants were the owners of the property in fee. Just when, or from whom, or how, appellants acquired title, does not appear. The situation is, then, that appellants were the owners of a certain tract of land upon which there was a ditch excavation useful for the purposes designed by appellees and to be used by them, and to which they were awarded by the decree and easement but a ditch which had been constructed at a large cost, prior to the securing of title by appellants. Then, under these circumstances, were the appellants entitled to have the value of this excavation considered by the commissioners in their finding and award, from which this is an appeal?

The circumstances are so varied as to make it difficult to lay down any fixed rule applicable in all cases as to the method of determining the value by appraisal of property to be condemned for public use.

The general rule in this regard, as stated by Mr. Justice Field in the case of *Boom Co. v. Patterson*, 98 U. S. 408, 25 L. Ed. 206, seems to be generally accepted, as follows: "The inquiry in such cases must be: What is the property worth in the market, viewed

not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subservient to the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated." This was a case where the landowner had three islands in the Mississippi river, specially fitted and located to form a boom for holding logs. The proceeding for condemnation arose in the state courts, and, after the commission appointed had made the award, was transferred to the United States court. The award by the commissioners was \$3,000, from which appeal was taken. The jury in the federal court allowed \$300 for the land used and \$9,068.23 for its value for boom purposes. The court refused a new trial upon condition that the judgment be reduced to \$5,500, and this judgment was affirmed in the case cited. The court said: "The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over 20,000,000 of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206.

Colusa County v. Hudson, 85 Cal. 633, 24 Pac. 791, was a case where the land condemned was to be used as a public road, and the court uses an illustration which in principle seems to apply here, as follows: "If a man had constructed a bridge across a stream on his own land, and for his private use, and if the county should lay out a highway to cross on that bridge, it would scarcely be contended that the county could condemn the bridge for the public use, without paying its reasonable value. We do not see that there is any distinction in principle between the bridge in the case supposed and the defendant's graded road in this case. The grade is there. It must have cost something, and is no doubt of some value. The county proposes to take it and use it as a part of the highway. If its existence will make the construction of the highway any less expensive, the county will get the bene-

fit, and ought to pay the value. The fact that defendant will have a public way in place of his private road is no answer to this proposition."

In the case of *Railway Co. v. Murphree*, 4 Wash. 448, 30 Pac. 720, it was urged that the trial court erred in permitting testimony to show the value of the land for the growing of hops, in that hops had never been grown on the land, although it was shown that the land was adapted to such crop. The court held this not to be error, and said: "The market value of property is its value for any use to which it may be adapted, and in estimating its value all the uses of which the property is susceptible should be considered, and not merely the condition in which it may be at the time and the use to which it may have been put by the owner." *Lewis on Em. Domain*, 478.

In a proceeding to condemn land for the purpose of a reservoir, it was held, in *San Diego Land Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83, that evidence of the value of the land as a reservoir site was admissible, although it had never been used for such purpose. This case cites many cases in support of the court's conclusion, and which tend to sustain the contention of appellants in this case.

In *Railway Co. v. Canal Co.*, 27 Hun, 116, a proceeding to condemn a tract of land for canal purposes, the court said: "The strip of land was practicable and desirable for the route of a railroad. The respondent was holding it for use or for sale for that purpose. The petitioner, in the construction of its railroad, wanted this property. It became simply a question of its value for the use and purpose for which it was owned and held by respondent, and wanted by petitioner. If an unimproved water power would be destroyed by the location of a railroad, ought not the owner to be compensated therefor? No doubt can exist. The damages would be, not the value of the use to the owner in its unimproved condition, but the market value of the property or water power, having reference to the use which could reasonably be made of it. The rule should be the same in the present case. Here was a narrow strip of land formerly used as a way and only of value for a way. The owner holds it for such purpose, only expecting the time will presently come when he can utilize it to his own profit or sell it to some one else for such purpose. Why then are not the purposes for which it is held and the uses to which it is adapted proper elements in its value? We think they are; and that the commissioners did not err in assessing compensation upon the basis of its value for railroad purposes."

So in this case the appellants were holding the land with the constructed ditch, suitable, and constructed for irrigation purposes, and intended to be used for such purpose by

them. The above citation is precisely in point.

This doctrine is sustained in *Colorado Midland Ry. Co. v. Brown*, 15 Colo. 193, 25 Pac. 87, wherein the appellee was permitted to show the market value of the water power, and its adaptability to the operation of mining machinery, and electric motors in and about the city of Aspen, though not so used at the time. The court in that case laid down the rule for recovery in such cases as follows: "Compensation for the land or property actually taken equal to the true and actual value thereof at the time of the appraisal. Damages to the residue of the land or property not taken, equal to the actual diminution of its market value, if any, for any use to which the same may reasonably be put; and in determining such damages the use to which the property taken is subjected, and the loss and inconvenience thereby occasioned may be taken into consideration, as the construction and operation of a railroad. *Eminent Domain Act* (approved February 12, 1877) § 17; *City of Denver v. Bayer*, 7 Colo. 113 [2 Pac. 6]; *Railroad Co. v. Allen*, 13 Colo. 229 [22 Pac. 605]; *Lewis, Em. Dom.* §§ 478, 487; *Railway Co. v. Vance*, 115 Pa. 331 [8 Atl. 764]; *Johnson v. Railway Co.*, 111 Ill. 413; *Weyer v. Railroad Co.*, 68 Wis. 180 [31 N. W. 710]." See, also, *Railway Co. v. Griffith*, 17 Colo. 599, 31 Pac. 171.

The appellee cites a line of authorities holding that, where a corporation vested with the power of eminent domain enters upon lands and places improvements thereon, such as pipe lines, railroad tracks, etc., these do not become a part of the realty and may be removed, or that in case, after condemnation by such corporation, the landowner is not entitled to the value of these as a part of his compensation. This is another and different rule and cannot apply in this case. In the first place, the ditch is simply an improvement in the matter of change in the form and location of the soil itself; and, secondly, it was judicially determined, before the condemnation proceeding was instituted: "(a) That no easement was obtained by the original builders of the ditch over and across the lands now owned by the Roberts Bros. (b) That neither the original projector nor its successor in interest did any work on said ditch from the date of cessation of work in 1887 until the Scurvin Ditch Company entered thereon in May, 1908. (c) That the Scurvin Ditch Company obtained no right to possession of said ditch or to the right of way by virtue of its deed, dated April 8, 1908, from the North Poudre Irrigation Company, the successors of the original projector." The appellee therefore stood in the same relation to the land as would any other corporation vested with the right of eminent domain in a proceeding

to obtain the right of way for a public purpose, and must be held to pay the market value of the lands taken for the purpose for which it was suited, whether used for such purpose at the time or not.

Judgment reversed, with instruction to sustain the motion to set aside the commissioners' report, and proceed in accordance with the views herein expressed. All the Judges concurring.

MODERN BROTHERHOOD OF AMERICA v. LOCK, et al.

(Court of Appeals of Colorado, June 10, 1912.)

1. INSURANCE (§ 687*)—FRATERNAL INSURANCE—STATUTES—APPLICABILITY.

A fraternal beneficiary association issuing certificates payable on the death of its members is a life insurance company, and its certificates are life policies, subject to statutory regulations, including Acts 1903, p. 257, providing that the suicide of a policy holder shall not be a defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1824; Dec. Dig. § 687.*]

2. INSURANCE (§ 445*)—FRATERNAL INSURANCE—STATUTES—APPLICABILITY.

Acts 1903, p. 257, providing that after its passage the suicide of a policy holder of any insurance company shall not be a defense, is not void as in contravention of the state or federal Constitutions.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1152-1158; Dec. Dig. § 445.*]

3. INSURANCE (§ 788*)—FRATERNAL INSURANCE—CONTRACTS—STATUTES.

A benefit certificate issued by a fraternal benefit association while Acts 1903, p. 257, providing that the suicide of a policy holder should not be a defense to the policy, was in force, makes the statute a part of the contract as a substitute for any provision in the certificate to the contrary, and a certificate with the statute read into it is not contrary to public policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.*]

4. INSURANCE (§ 788*)—FRATERNAL INSURANCE—STATUTES—CONSTRUCTION.

Laws 1907, p. 431, regulating insurance, and providing that its provisions shall not be applicable to fraternal and benevolent orders, is not a recognition of the law as interpreted by the courts when construing Acts 1903, p. 257, declaring that the suicide of a policy holder shall not be a defense, as applicable to all kinds of insurance, fraternal as well as old line, and does not require the courts to exempt fraternal orders from the provisions of the act of 1903.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. § 788.*]

5. STATUTES (§ 273*)—REPEAL—OPERATION.

The repeal of a statute which has become a constituent part of a contract of insurance will not be construed as retroactive in its operation, unless its terms clearly show a legislative intent that it should so operate.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 365; Dec. Dig. § 273.*]

6. INSURANCE (§ 788*)—CONSTITUTIONAL LAW (§ 106*)—OBLIGATION OF CONTRACTS—IMPAIRMENT—STATUTES.

A statute repealing Acts 1903, p. 257, declaring that the suicide of a policy holder

should not be a defense to an action on the policy, if construed to destroy the protective provisions of a certificate issued while the act of 1903 is in force, is invalid as impairing the obligation of contracts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1856; Dec. Dig. § 788; Constitutional Law, Cent. Dig. §§ 482, 483; Dec. Dig. § 166.*]

7, INSURANCE (§ 788*)—CONTRACTS—STATUTES.

The prohibition in Acts 1903, p. 257, declaring that the suicide of a policy holder should not be a defense, cannot be waived or abrogated by agreement of the parties made prior to or contemporaneous with a contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1856; Dec. Dig. § 788.*]

Appeal from District Court, El Paso County; J. W. Sheaffer, Judge.

Action by Edgar J. Lock and another, minors, by Hovena Spicer, their legal guardian, against the Modern Brotherhood of America. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. E. E. Markley, of Mason City, Iowa, and W. M. Swift and J. E. McIntyre, both of Colorado Springs, for appellant. Orr & Cunningham and H. M. Mason, all of Colorado Springs, for appellees.

KING, J. Plaintiffs brought their suit to recover from the Modern Brotherhood of America, a corporation organized and existing under and by virtue of the laws of the state of Iowa, engaged in the business of insuring the lives of its members through its subordinate lodges, upon a contract of insurance denominated a "membership certificate," dated January 21, 1904, issued by the defendant corporation to William B. Lock, payable upon his death to his son and daughter, the plaintiffs herein. The insured committed suicide on or about December 19, 1907. The certificate contained an express provision that if the holder thereof should die by his own hand, whether sane or insane, the certificate should be null and void; and the written application for said membership certificate, which, by the terms of both the application and the certificate, was made a part of the contract of insurance, contained an agreement that, in case of death of the member by suicide, the certificate should thereby become void. Defendant relied upon such forfeiture as its defense.

The case was submitted for determination upon a stipulation in writing which, among other things, contained the following: "That except for the fact that said William B. Lock committed suicide, the plaintiffs in this action would be entitled to recover the sum of \$2,000 at and of the date of the commencement of this suit; that proof of loss was duly made by the beneficiaries herein named, and the payment of any sum herein was refused by the defendant association upon the sole ground that because William B. Lock had committed suicide the certificate was

forfeited, and there was no liability on the part of the defendant association to pay the beneficiaries therein named any sum whatever. * * * It is therefore mutually agreed between the parties that this cause shall be submitted upon the pleadings and this stipulation of facts, and that if the court shall decide that the law of Colorado, providing that suicide shall not be a defense against the payment of a life insurance policy, is constitutional, and, second, that it applies to the defendant association, then the court shall render judgment against the defendant company in the sum of \$2,000, with interest from the date of the commencement of this suit; otherwise judgment shall be for defendant." Plaintiffs had judgment.

Appellant contends: (a) That it was not a life insurance company; (b) that the certificate of membership sued upon was not a life insurance policy, nor the member a policy holder; (c) that the act of April 11, 1903 (Laws 1903, p. 257), providing that thereafter the suicide of a policy holder of any life insurance company doing business in this state shall not be a defense against the payment of a life insurance policy, did not apply to the defendant, a fraternal beneficiary association; (d) that, if such act was applicable to the defendant, it was unconstitutional and void; (e) that the said act of 1903 was repealed by section 73, c. 198, Session Laws of 1907, and therefore its provisions were of no force or effect to bar the defense of suicide.

[1.] By the decision of the Supreme Court in *Head Camp Woodmen of the World et al. v. Sloss*, 49 Colo. 177, 112 Pac. 49, 81 L. R. A. (N. S.) 831, following and approving decisions of the same court in *Chartrand et al. v. Brace*, 16 Colo. 19, 26 Pac. 132, 12 L. R. A. 209, 25 Am. St. Rep. 235, and *Supreme Lodge, Knights of Honor, v. Davis*, 26 Colo. 252, 58 Pac. 595, it has become settled law in this state that, as regards the insurance feature, the defendant company was an insurance company, and its contract of indemnity, by whatever name it may be called, a life insurance policy, and the holder thereof a policy holder, and such contract subject to the same statutory regulations and limitations as those issued by old-line and mutual assessment companies, unless expressly exempted therefrom by statute; and, also, that the suicide statute of 1903 applied to such contracts and associations or companies, there being therein no exemption in favor of fraternal associations doing an insurance business. That the act was not void as being in contravention of the provisions of either the state or the federal Constitution is also settled by the same authority, and by the decision of the Supreme Court of the United States in *Whitfield v. Aetna Life Ins. Co.*, 205 U. S. 489, 27 Sup. Ct. 578, 51

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

L. Ed. 895. It is therefore obvious that the liability of the defendant depends upon the effect to be given to the act of 1907, effective July 1st of that year, by which the act of 1903 was repealed.

[3] The act of 1903 was a separate, independent, and complete enactment in and of itself, and in no sense amendatory of any previous legislative enactment (*Woodmen v. Sloss, supra*); the language thereof being as follows: "From and after the passage of this act the suicide of a policy holder of any life insurance company doing business in this state shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary, and whether said policy holder was sane or insane." Session Laws 1903, p. 257.

The General Assembly of 1907 revised, amplified, and codified the insurance laws by chapter 193, Session Laws of that year. By section 74, clause 15, of said chapter, the act of 1903 was specifically repealed, and, with slight modification, was substantially re-enacted as section 55 of said chapter, in the following words: "From and after the passage of this act, the suicide of a policy holder *after the first policy year*, of any life insurance company, doing business in this state, shall not be a defense against the payment of a life insurance policy, whether said suicide was voluntary or involuntary, and whether said policy holder was sane or insane." It will be observed that said section, by the new enactment, is no longer a separate and independent enactment in and of itself, as was said by Mr. Justice Bailey of the act of 1903, but is a component part of an entire chapter or Code dealing generally with the subject of insurance, and subject to such limitations as are contained therein, and applicable thereto. The first section of said chapter provides "that in this act, unless the context otherwise requires, 'company' or 'insurance company' shall include all corporations, partnerships, associations or individuals, engaged as principals in the insurance business, *excepting fraternal and benevolent orders and societies*"; and subdivision (1) of section 73 is as follows: "The provisions of this act shall not be construed so as to prevent any fraternal, religious or benevolent societies which conduct their business as fraternal societies, under the lodge system, * * * or those which limit their certificate holders to a particular order or fraternity, from issuing indemnity to any person, against loss by death, sickness or accident of any of its members; and *such society shall not be held amenable under, or governed by any of the provisions of any of the sections of this act pertaining to accident, health or life insurance.* * * *"

And if the contract or policy of insurance sued on herein had not been entered into pri-

or to the passage of the act of 1907 mentioned, its effect upon this suit might and probably would be as now contended for by the defendant. But we think decision of the present suit does not depend upon, and is not controlled or affected by, the repeal of the 1903 statute. We cannot agree with counsel for appellant in his position that, because the suicide statute is remedial, its repeal in 1907, subsequent to the contract of insurance and prior to the death of the insured, operated to make the defense of suicide available to the defendant in this case. The statute of 1903 not only made void and of no effect that portion of the policy or agreement relative to death by suicide, thereby leaving the contract silent on that subject, but, in legal contemplation the inhibition of the statute was substituted for the void clause and became an affirmative covenant, binding upon the parties, that as to that policy suicide could never be made a defense. *Jarman v. Knights Templars, etc., Co. (C. C.) 95 Fed. 70, 73; Cravens v. N. Y. Life Ins. Co., 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628; Equitable Life Assurance Society v. Clements, 140 U. S. 228, 233, 11 Sup. Ct. 822, 35 L. Ed. 497; McCracken v. Hayward, 2 How. 608, 612, 11 L. Ed. 397; State v. Berning, 74 Mo. 87.* And it is clear that such contract, with the statute so read into it, is not against sound morals, public policy, justice, or right. *Whitfield v. Aetna Life Ins. Co., supra.*

The object of the statute and the legislative intent, as tersely expressed by the late Mr. Justice Harlan, in the *Whitfield* case, *supra*, was to "cut up by the roots" any defense grounded upon the fact of suicide, and to make any inquiry as to suicide immaterial, and any contract, inconsistent with the statute, void; and, as said by Mr. Justice Bailey in the *Sloss* case, *supra*, to declare that it is against public policy to permit insurance companies to contract against the payment of their policies because the insured came to his death by his own hand.

[4] Nor do we agree with counsel for appellant that the act of 1907 is to be taken as a legislative construction of the act of 1903, different from the construction placed thereon by the Supreme Court, and therefore to be accepted by the courts as the law; but, rather, as a recognition of the law as interpreted and applied in the *Chartrand* and *Knights of Honor* cases as of practically universal application to insurance contracts, and a positive enactment limiting its prohibitive features thereafter to insurance companies other than those named in section 73 of the insurance code.

[5, 6] That the subsequent repeal of a statute, the provisions of which have become a constituent part of a contract such as this, will not be construed as retrospective in its operation, unless its terms clearly show a legislative intention that it should

so operate, is so well settled as to have become elementary; and it is equally certain that in this state, and in others having like constitutional provisions, such statute, if it attempted to destroy the protective provisions of a former statute, would be in contravention of the Constitution of the state, as well as of the provisions of the federal Constitution, which prohibit the states from passing any law impairing the obligation of contracts. *Gilliland et al. v. Phillips et al.*, 1 S. C. 152, 154; *Robinson v. Barrows*, 48 Me. 186; *Ludlow v. Hardy*, 38 Mich. 690, 692; *Mays, Adm'r, etc. v. Williams*, 27 Ala. 267, 271; *Wisdom v. Reeves*, 110 Ala. 418, 430, 18 South. 13; *Jarman v. Knights Templars, etc., Co.*, supra.

The repeal of the prohibitive statute cannot make valid, or breathe vitality into, a contract that was void when made because in violation of the statute. *Gilliland et al. v. Phillips et al.*, supra; *Ludlow v. Hardy*, supra.

[7] Nor can the statutory inhibition be waived or abrogated by agreement of the parties made prior to or contemporaneous with the contract of insurance. *Head Camp Woodmen of the World et al. v. Sloss*, supra; *Whitfield v. Aetna Life Ins. Co.*, supra.

From what has been said it necessarily follows that the judgment of the trial court was right and must be affirmed, and it is therefore unnecessary to consider in this opinion the question so ably and exhaustively presented in the briefs of counsel as to the appellant's having, by the pleadings and stipulated facts, shown itself to be within the class of associations exempted by sections 1 and 78 referred to. Our conclusion must be understood as applicable only to insurance contracts entered into prior to the taking effect of the insurance code.

The judgment is affirmed.

CUNNINGHAM, J., not participating.

(22 Coto. App. 419)

FISHBACK v. VINING et al.

(Court of Appeals of Colorado. June 10, 1912.)

1. BROKERS (§ 103*)—RATIFICATION—EFFECT.

Plaintiff's wife and his attorney, without authority, executed a bond for a deed to land owned by plaintiff, in consideration of which the purchaser paid the purchase price to a broker having no authority to receive payment, but who had authority to make a sale for \$450, in addition to incumbrances. The broker paid such \$450 to plaintiff, but by misrepresentations to the purchaser as to the selling price obtained \$200 more, which he retained. Plaintiff subsequently ratified the sale and brought suit for specific performance against the purchaser and broker, tendering the deed and demanding payment of \$200. Held, that plaintiff, by ratifying the sale, ratified the unauthorized act of the broker in ac-

cepting payment, and hence the action was not maintainable.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 147; Dec. Dig. § 103.*]

2. BROKERS (§ 34*)—FRAUD OF BROKER.

The purchasers not complaining of such misrepresentations by the broker, plaintiff had no right of action against the broker therefor.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 26; Dec. Dig. § 34.*]

3. BROKERS (§ 34*)—FRAUD OF BROKER.

Where an owner of land denied that a broker had any authority to sell it, or that his wife and his attorney had any authority to execute a bond for a deed, fraudulent misrepresentations by the broker to the wife and attorney did not give a right of action to the owner.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 26; Dec. Dig. § 34.*]

Appeal from District Court, Weld County; James E. Garrigues, Judge.

Action by Lincoln Fishback against William H. Vining and others. From a judgment for defendants, plaintiff appeals. Affirmed.

H. N. Haynes and H. E. Churchill, both of Greeley, for appellants. R. G. Strong, of Greeley, for appellees.

KING, J. Plaintiff (appellant) was the owner of a town lot in the city of Greeley, occupied by himself and wife as a home. The property was incumbered by two deeds of trust; the first given to secure the sum of \$1,300, payable to a building and loan association, and the second to secure notes in the sum of \$750, payable to the defendant Clayton. While plaintiff was absent from the state, H. N. Haynes, an attorney at law, by whom plaintiff had been employed as stenographer and law clerk, and plaintiff's wife, executed and delivered a bond for a deed which recited sale of the property by plaintiff to the defendants Vining for the consideration of \$450 in cash at that time paid, and the assumption by the purchasers of the incumbrances hereinbefore mentioned, and bound themselves in the penal sum of \$900 to secure execution and delivery by plaintiff of a deed conveying the property to said defendants, and of an assignment to them of certain stock in the building and loan association, subject to said incumbrances only, and for delivery of possession to the said defendants on or before March 17, 1908; the bond bearing date March 20, and further reciting that the said sum of \$450 cash was the full purchase price to be paid to the plaintiff, other than the assumption of said secured incumbrances. This bond was executed without express authority from plaintiff, but in the utmost good faith so far as the obligors in the bond were concerned, and in the belief that it was in accordance with plaintiff's desire and in his interest. The negotiations for said sale, as between the Vining and the obligors in the bond, were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made by the defendant McPherson, a real estate agent, who at that time professed and appeared to be acting upon authority from the plaintiff. No representations whatever were made by the Vinings. Plaintiff was notified of the transaction by a letter from his wife, dated March 3d, and which reached him some days thereafter, and no objection was made by him except that he had paid \$56 to the building and loan association which he thought could be adjusted when he returned home. In addition to the \$450 paid plaintiff or for him as the net purchase price, the Vinings on the same day paid the defendant McPherson \$550 to be used in settlement with the defendant Clayton, and of which \$350 were paid to the said defendant to be applied upon the second mortgage indebtedness, and in consideration of which he gave the purchasers a written agreement to withdraw foreclosure proceedings theretofore commenced, and to extend for one year the time for payment of the agreed balance, \$400, to be evidenced and secured by new note and deed of trust. The remaining \$200 was retained by the defendant McPherson. Possession of the premises was delivered to the purchasers by plaintiff's wife about March 17th, and they have ever since remained in possession and made some permanent improvements and changes thereon prior to the beginning of suit or notice of plaintiff's dissatisfaction. Plaintiff's wife, and plaintiff also from the date of his return about May 3d, boarded with the purchasers until July 3d.

Immediately upon his return, plaintiff learned from his wife, and soon thereafter from the purchasers, that they had bought the property upon representations from McPherson that the cost thereof to them would be \$2,600, consisting, as they understood, of \$450 cash to plaintiff, whatever amount of cash was necessary to be paid to Clayton, including attorney's fees and costs of foreclosure, and the unpaid balance of the incumbrances to be assumed, which total amount the purchasers had agreed with McPherson to pay or assume. A few weeks afterward plaintiff notified said purchasers that the bond had been executed without his authority, and that McPherson had no authority to bind him; that McPherson had retained \$200 in excess of the amount required to satisfy the incumbrances, and demanded that they compel McPherson to repay that amount, but at the same time told the purchasers he would protect them in the sale. About June 3d he demanded payment of the sum of \$200 from the purchasers themselves, and in July, when he vacated the premises as boarder, demanded payment of a larger sum, and thereafter began his suit to recover from the purchasers \$276.85, alleged to be the balance of the unpaid purchase price upon the oral contract as made between the Vinings and McPherson; his action being

in the nature of a suit for specific performance, the deed and stock being tendered. Judgment was also asked against McPherson in the sum of \$200 alleged to have been secured and retained by deceit and fraud, such amount to be applied for the use and benefit of plaintiff or the purchasers, and prayed judgment against the defendant Clayton requiring indorsements to be made upon the incumbrance. The Vinings pleaded purchase in good faith; payment in accordance with the contract, and estoppel by ratification, tendered payment of certain sums as herein after mentioned, and asked for specific performance of the agreement as set forth in the bond.

The cause was tried to the court without the intervention of a jury. The court made findings of fact that plaintiff had authorized defendant McPherson to find a purchaser for the property at \$450 net to plaintiff; that the bond executed and delivered was without authority; but that the sale and the bond had been ratified by plaintiff, and rendered judgment in favor of the defendants, requiring delivery of deed and stock upon payment by the purchasers of a sum of money which they had offered to pay by reason of certain payments having been made by plaintiff to the building and loan association and to Clayton, of which the purchasers had no knowledge at the time of the contract, and required the defendant Clayton to make certain indorsements and perform certain acts, which he also offered to make and perform.

[1] The evidence in regard to the authority of the defendant McPherson to offer the property for sale is not wholly convincing, but is supported by some positive testimony and corroborating circumstances, and, so far as is necessary to be considered, the findings of the trial court in that respect will be regarded as binding upon this court. The bond was executed without authority. Defendant McPherson had no authority, express or implied, as shown by the evidence, to receive money for and on behalf of the plaintiff, and plaintiff, upon his return and learning of the facts, was at liberty to repudiate, not only the written agreement, but all unauthorized acts of McPherson; and, upon return or tender of the amount of money which had been paid on the contract and applied to his use, could have ejected the purchasers from the premises, unless they could have successfully defended their right of possession under the parol contract with McPherson, which is not necessary to decide. Plaintiff did not repudiate the sale. He undertook to protect his wife and Mr. Haynes, who were bound in the sum of \$900 to secure execution and delivery of the deed and assignment of the building and loan stock. He retained and still claims the benefit of the money paid by the purchasers, and brought his suit to enforce specific performance, not of the written agreement, but of the oral one.

ratification of which he admits. Plaintiff utterly denies and repudiates the authority of the defendant McPherson to act for him in any of the negotiations leading up to or connected with the transaction.

It is settled law that ratification in part of the unauthorized acts of one not an agent, but assuming to act as such, is a ratification of such acts in toto. If plaintiff ratifies part, he must ratify all, or, if he repudiates part, he must repudiate all. *Burkhard v. Mitchell*, 16 Colo. 376; 890, 28 Pac. 657; *Moffitt-West Drug Co. v. Lyneman*, 10 Colo. App. 249, 50 Pac. 736; *Gaines v. Miller*, 111 U. S. 395, 398, 4 Sup. Ct. 428, 28 L. Ed. 466; *Clark & Skyles, Law of Agency*, §§ 108 and 140, and cases cited. Whether the ratification by plaintiff was of the bond or the oral agreement is immaterial. He ratified the sale; and by so doing, so far as the purchasers are concerned, he likewise and to the same extent ratified the unauthorized acts of the defendant McPherson in accepting payment, which was a part of the same transaction. There was nothing disclosed by the evidence which shows or tends to show misrepresentation or bad faith upon the part of the purchasers or the defendant Clayton.

[2, 3] It is impossible to justify some of the statements made by the defendant McPherson as testified to by plaintiff's wife, Mr. Haynes, and the Vinings, which, so far as made to Mrs. Fishback and to Mr. Haynes, had a tendency to deceive them as to the amount the purchasers were willing to pay, and, as made to the purchasers, to deceive them as to the amount necessary to be paid to cover the incumbrances, costs of foreclosure, etc. But the purchasers are not complaining, and the representations to them did not, in a legal sense, concern the plaintiff in this case. The alleged deceit may be cognizable in foro conscientie, but, although McPherson was not wholly an interloper, according to plaintiff's own testimony and pleadings he sustained no fiduciary relation to plaintiff, and therefore his failure to fully or truthfully state the conditions to those assuming, but not authorized, to act for plaintiff cannot avail the plaintiff in this proceeding.

The judgment of the trial court is affirmed.

(22 Colo. App. 271.)

HALL v. BEYMER,†

(Court of Appeals of Colorado. May 13, 1912.)

1. BANKS AND BANKING (§ 227*)—COLLECTIONS—DISPOSITION OF PROCEEDS.

In an action against an insolvent bank's receiver, evidence held to show that the bank held proceeds of a collection made for plaintiff as his bailee and not as a deposit.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 871-878; Dec. Dig. § 227.*]

2. BANKS AND BANKING (§ 2163*)—INSOLVENCY—TRUST FUNDS.

On insolvency of a bank, one for whom the bank held the proceeds of a collection in trust sufficiently traces the fund by tracing it to another fund with which it was commingled.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 574-578, 586; Dec. Dig. § 168.*]

3. BANKS AND BANKING (§ 227*)—INSOLVENCY—PROCEEDS OF COLLECTIONS.

In an action against an insolvent bank's receiver to impress a trust upon funds on account of the proceeds of a collection made by the bank for plaintiff, evidence held insufficient to show a waiver of plaintiff's rights by permitting the proceeds to remain in the bank before it closed.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 871-873; Dec. Dig. § 227.*]

Appeal from District Court, Otero County; J. E. Rizer, Judge.

Action by R. S. Beymer against G. M. Hall, Receiver of Court for State Bank of Rocky Ford. Order and judgment in plaintiff's favor, and defendant appeals. Affirmed.

Fred A. Sabin, of La Junta, for appellant. John H. Voorhees, of Pueblo, for appellee.

SCOTT, J. [1] On the 4th day of January, 1908, the district court of Otero county entered an order appointing G. M. Hall receiver for the State Bank of Rocky Ford in a case entitled *Henry M. Beatty, as State Bank Commissioner of the State of Colorado, Petitioner, v. State Bank of Rocky Ford, Respondent*. It appears from the record that the State Bank of Rocky Ford transacted business until the close of banking hours on the 31st day of December, 1907, and thereafter did not open its doors again for business.

This action is upon the part of the appellee alleging that on the 20th day of December, 1907, he delivered to the State Bank of Rocky Ford a promissory note signed by H. W. Wyman for the principal sum of \$800 due December 24, 1907, which with interest amounted to a total sum of \$822.85; that the note was left with the State Bank of Rocky Ford for collection, and by that bank forwarded to Colorado Springs, Colo., where the same was paid and the amount thereafter transmitted to the State Bank of Rocky Ford. The petitioner prayed the court for an order that this be declared a special or trust fund in the hands of the receiver.

On the 17th day of October, 1908, and upon a hearing of the matter, the district court adjudged that the sum of money involved was the proceeds of a note left for collection by the petitioner, and is a trust fund, and directed the receiver to pay the same to the claimant. This proceeding is an appeal from such order.

Upon the hearing, the parties entered into the following stipulation of fact: "It is stipulated between counsel that the State Bank of Rocky Ford received for collection Decem-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 125 P.—36

† Rehearing denied July 8, 1912.

ber 20, 1907) a note for \$600 from R. S. Beymer; that said note was sent to a Colorado Springs bank, and by it collected, and a draft of remittance made on the 27th day of December, 1907, which draft was received by the State Bank of Rocky Ford on December 28, 1907, and in turn on said date sent to the First National Bank of Pueblo, to the credit of the State Bank of Rocky Ford; that on the 31st day of December, 1907, the State Bank of Rocky Ford sent to the petitioner, Mr. Beymer, a statement of the collection of said note, advising him that they had collected the \$600, together with \$22.85 interest, less 63 cents exchange, leaving a balance of \$622.85; that on said date they placed to his credit on his bank book said amount."

The appellee testified at the hearing that he left the note at the bank for collection with Mr. Gooding, its president, and with directions to the president as follows: "Q. You may state what direction you gave Mr. Gooding. A. Mr. Gooding wanted to know if I wanted to place it in as a deposit. I said, 'No.' I wanted it for myself. I wanted the collection." He further testified that on the 30th day of December he called on the bank and inquired of Mr. Barkley, the assistant cashier, as to whether or not they had heard from the collection; and was informed that they had not. He further testified that on the afternoon of the 31st, at about 3 o'clock, Barkley called to him and said, "We have heard from that Colorado Springs collection; what shall I do with it?" and that he replied he wanted to save it; he wanted it for himself. He said that he was in a hurry, having another party in the buggy at the door of the bank waiting for him, and that he did not wait to get the money at that time. Upon that point Barkley testified that he called to Beymer, who was going by the window, and said, "We have heard from that collection;" but does not recall that Beymer said anything in reply; that up to that time he had made no entry of the same, but just noticed they had received the collection. The appellee's testimony is undisputed in this record. Appellee further testified that on the afternoon of the 31st day of December, at the time he was advised that the collection had been made, he handed his passbook to the bank to be balanced; it being the last day of the month.

It appears from the stipulation that Beymer was given credit for the amount collected as the proceeds of the note on the 31st day of December, as evidenced by Beymer's passbook received by him later and handed to the officer of the bank to be balanced at about the closing hour of the day of the 31st. It appears also from the stipulation that the note was received by the bank for the purpose of collection; that it was collected, and the proceeds in the form of a draft received by the bank on the 28th day of December. It appears further from Beymer's

testimony that there was special direction at the time the note was delivered to the bank for collection, that the proceeds were not to be deposited, and this appears to have been understood by the bank, for, although the draft in payment of the collection was received by the State Bank of Rocky Ford on the 28th day, the amount was not placed to the credit of Beymer until the 31st day of December, the day that the bank closed its doors for business. Clearly, then, from this stipulation and from the testimony without apparent contradiction, the bank did not receive the proceeds of the note for and as a deposit, but with special instructions to the contrary, and that in all respects the bank was acting solely as the agent of Beymer in the matter of the collection, and was holding the proceeds after collection solely as the bailee of Beymer.

[2] Much is said in appellant's brief and the argument, as to, the necessity of tracing this fund into the funds of the bank, but, in the light of stipulation, of fact, we are unable to see how this is pertinent in this case, for it is stipulated, "which draft was received by the State Bank of Rocky Ford on the 28th day of December, 1907, and in turn on said date sent to the First National Bank of Pueblo to the credit of the State Bank of Rocky Ford." Clearly, in thus having the amount of the draft placed to its credit with the Pueblo Bank, there was a commingling of this fund with those of its own.

The principle controlling this case was announced in *First National Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986, 8 L. R. A. 788, 20 Am. St. Rep. 257, where it was held that, so long as trust property could be traced and followed, it should remain subject to the trust, and, wherever, trust funds were mingled with another's assets, the whole would be treated as trust property, except in so far as the defaulting trustee might be able to distinguish his own property from the trust estate. In that case the court said: "Is it not clear that Everett received the fund in a fiduciary capacity? Does it not follow that the instant it passed into his hands a trust arose by operation of law in favor of plaintiff in error? Did not the trust follow the fund when it passed to the hands of defendant in error? If it was mingled with the assets of the decedent, is not the estate impressed with the same trust? Can it be possible that the fact of death increases a man's estate by adding thereto all property which may be in his hands? Can a man, by an abuse of trust or violation of his fiduciary relations, acquire moneys for distribution among his general creditors at his decease?" It will not be contended that the rule in case of insolvency would be different.

The doctrine in that case is reiterated by the Court of Appeals upon a retrial of the same matter, reported in *Hummel v. First Nat. Bank of Central City*, 2 Colo. App. 571,

32 Pac. 72. These cases were cited and approved by the Supreme Court in McClure v. La Plata County, 19 Colo. 122, 34 Pac. 763, where the court said: "It is a well-settled rule that, where property held in trust has been misapplied and diverted from the purpose of such trust, it may be followed wherever it may be traced and subjected in its new form to the cestui que trust." The bank will not be permitted to take advantage of its own wrong, nor will the character of the transaction be changed by transferring the amount of the collection to its own account in the Pueblo Bank, nor by wrongfully entering the amount to the credit of the appellee, and particularly, as appears in this case, at a time after the bank failed and had ceased to do business as a bank. "A bank cannot divest itself of a trust relation and assume the other at its own convenience. The transformation does not affect the depositor unless this is known by him, either by agreement or usage." 5 Cyc. 516. "The rule is perfectly plain. The money of the real owner went to swell the assets of the bank. The bank knowingly mingled the fund of which it was the trustee with the funds which it owned, hence the beneficiary has the right to have the whole fund impressed with the trust in his favor." Zane on Banking, § 341.

[3] Counsel contends that there was a waiver by appellee presumably by his failure to take the funds from the bank at the particular moment when he was advised that the collection had been made, and cites many authorities upon the subject of waiver.

As we read the record, we fail to find any testimony whatever that may be reasonably construed to be an intent to waive any right in this respect, or to depart in the slightest degree from the original agreement and understanding at the time the note was delivered to the bank for the purpose of collection. "It may not be necessary to show the actual intent to waive where the conduct of the party has been such as to estop him. See *Boes v. Swan*, 7 Lea (Tenn.) 467. In this case, *Fresman*, Judge, said: 'To make out a case of abandonment or waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to estoppel on his part.' 28 Am. & Eng. Enc. 528.

The order and judgment of the district court is affirmed. All the Judges concurring.

JOHN THOMPSON GROCERY CO. v. PHILLIPS.

(Court of Appeals of Colorado. June 10, 1912.)

1. NEGLIGENCE (§ 184*)—INJURY TO SHOPPER—EVIDENCE.

Evidence, in a patron's action against a grocery company for injuries from slipping

upon the floor of the store, held not to show defendant's failure to perform any duty resting upon it.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-273; Dec. Dig. § 184*]

2. NEGLIGENCE (§ 184*)—PROOF REQUIRED.

Facts constituting negligence must be proven and not be left to inference.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 267-273; Dec. Dig. § 184*]

3. NEGLIGENCE (§ 32*)—INJURY TO SHOPPER—LIABILITY.

A grocery company is not liable for injuries to a patron from a fall due to her slipping upon a fatty substance on the floor, unless it or its agents knew, or by the exercise of reasonable diligence could have known, of the presence of such substance.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 42-44; Dec. Dig. § 32*]

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Eva I. Phillips against the John Thompson Grocery Company. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Bicksler, Bennett, Dana & Blount, of Denver, for appellant. Redd, Stidger & Benson, of Denver, for appellee.

SCOTT, J. This is an action to recover damages for injuries to the appellee alleged to have been occasioned through the negligence of the John Thompson Grocery Company, which at the time conducted a retail grocery and market in the city of Denver. The plaintiff below obtained a verdict and judgment against the appellant in the sum of \$1,000, and from which this appeal is taken.

The complaint charged, in substance, that the defendant so negligently operated and conducted its market as to cause to be thrown and left upon the floor certain kinds of animal grease or meat substance, the same being tallow or some other greasy substance, leaving the same lie upon the floor at its place of business where customers were accustomed to walk about while doing their trading. That on the 27th day of November, 1907, and while trading at defendant's store, and without fault upon her part, and without knowledge that the said greasy substance was upon the floor, the plaintiff walked and stepped upon the same, slipped on said substance and fell, and thereby received the injuries complained of, and which she alleged to be serious and permanent. The defendant answered specifically and generally denying the acts of negligence charged, and pleaded contributory negligence.

[1] Aside from the physicians, whose testimony was confined to the character of the injuries and the treatment thereof, the only witness for the plaintiff was herself. From this it appears that at the time of the accident the plaintiff was a woman 46 years

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes.

of age and earned her living in the principal occupation of a laundress; that she was well and strong, and had a good earning capacity; that she had been a patron of the store for seven or eight years; that she entered the store of defendant on the morning of the 27th day of November, 1907, between 7 and 8 o'clock, for the purpose of purchasing a turkey for Thanksgiving. That, entering the front of the store, she walked down the aisle between the counters, where meat products were kept, and approached a clerk standing where turkeys were exposed for sale. That she stopped and was about to make inquiry of the clerk having in charge what she wanted to purchase, when she slipped and fell. That both her feet slipped from under her; that she was then assisted to her feet and walked toward the rear of the store where a box was provided, and upon which she sat down, and where she remained for from 20 to 30 minutes, when she walked over to the city hall and was attended by the city surgeon. While sitting on the box, the plaintiff says she found and removed from her foot a piece of fatty substance about as wide as her two fingers and about an inch and a half long. She does not know exactly what this substance was, but that it was greasy, looked like tallow, and might have been tallow; that she found it on her foot between the ball of the foot and the instep, and that she threw it up against the wall and under the telephone.

The plaintiff further says that she did not call the attention of any person to the existence of the fatty substance, and does not know that it was seen by any one aside from herself. She was assisted in one way and another until she left the store by three different employes, one of them binding a piece of meat on the injured arm. The plaintiff says that the storeroom was well lighted, that her eyesight was good, and that she was looking where she walked and did not see the substance on the floor which she afterward found on her shoe.

Three physicians testify that the injury was a Colle's fracture of the arm. The injury was not healed at the time of the trial in May, 1909, and, in the opinion of each of the physicians, it was permanent. An operation was had in April after the injury, so that, if there is liability upon the part of the defendant, the verdict rendered by the jury would appear to be in no sense excessive.

At the close of plaintiff's testimony the defendant moved for a nonsuit, which was denied by the court. Again the defendant, at the close of the trial, moved the court for a directed verdict upon grounds substantially as offered in the motion for a nonsuit as follows: "First. The evidence on the trial fails to show in any manner any negligence on the part of the defendant contributing to the injury received by the plaintiff. Second. There is no evidence whatever that the defendant caused to be thrown upon the floor

of its meat market and left upon such floor any tallow, animal substance, or other greasy substance as charged in the complaint. Third. The evidence fails to show any failure on the part of the defendant to exercise ordinary and reasonable care under the circumstances as required by law. Fourth. The evidence affirmatively shows that the defendant did exercise ordinary and reasonable care to keep its floors in a suitable condition. Fifth. There is no evidence whatever from which any presumption of negligence on the part of the defendant could be inferred. Sixth. The evidence shows that the plaintiff was negligent herself, and by the exercise of ordinary care could have seen the tallow which she claims was upon the floor, if it had been there. Seventh. The evidence fails to show that plaintiff's present condition and injuries are a direct, proximate, and immediate result of defendant's negligence. Eighth. Even if it should appear from the evidence that there was grease upon the floor which caused plaintiff's fall, the evidence fails to show that the defendant did not exercise reasonable and ordinary care to keep the floor in good condition, and the mere fact that the grease was present, if it was, is not of itself a fact of negligence sufficient to charge the defendant in this action." This motion was likewise overruled, and the ruling of the court upon these motions, together with certain instructions tendered by defendant and refused by the court, are assigned as error.

Of the rulings of the court upon the two motions, it will be necessary to consider only that denying the motion of defendant for a directed verdict, for, in proceeding with the introduction of its testimony after the denial of its motion for a nonsuit, the defendant assumed the risk of any evidence beneficial to the plaintiff from its own witnesses.

The defendant offered the testimony of three witnesses, two in its employ both at the time of the trial and at the time of the accident, and one in the employ of the defendant at the time of the accident, but not at the time of the trial. These all agree upon certain points as follows: That the defendant caused its floors to be scrubbed once a week; that it caused its floors to be swept from four to five times each day, and always once in the morning, between the time of opening and 7:30 o'clock; that they assisted the plaintiff at the time of the accident; that the floor was swept that morning, and before the accident; that they saw no such or any grease or fatty substance, or any such substance on the floor, or on plaintiff's foot; that plaintiff did not suggest that she had found any such substance; that immediately after the accident each examined the floor where plaintiff fell and could find no grease or evidence that there had been such on the floor, or any indication that such had been mashed as if by crushing with the foot; that no such fatty or greasy substance as describ-

ed by plaintiff was kept on either of the counters between which plaintiff fell.

The witness Albin says that the plaintiff came into the store between 7 and 8 o'clock in the morning; that she came toward him, he was looking at her all the time; expecting to take her order; that she was walking as if in a hurry and, when opposite his block, she turned suddenly as if she was going into the grocery department and fell; that when he was assisting her to arise she said, "I guess I was in too big a hurry."

The witness Kroeger testifies that he was not at the time of the trial in the employ of defendant, but at the time of the accident was assistant manager of defendant's meat department; that at the time he had just finished sweeping the floor, and had placed the broom away, intending to clean the block, and had just reached the block about eight feet from plaintiff when she fell.

Then, taking the testimony in its most favorable light for the plaintiff, we find that she had been for some years a patron of the store, in good health, with good eyesight, in a well-lighted room, walked down an aisle in the meat department of the store that had just been swept, paused at a counter near a clerk to whom she was about to give an order, slipped and fell, sustaining the injuries complained of, and, after being seated, found a piece of fatty substance on her shoe between the ball of the foot and the instep. There is at least no stronger evidence as to defendant's negligence, and there was no testimony offered tending to contradict the evidence of the defendant as to the custom and efforts to keep its store clean and free from refuse or debris upon the floors. Neither is there any testimony tending to show, that defendant could, by the exercise of diligence have discovered the existence of the particular substance in question upon its floor, if it in fact was there, which at best can only be inferred from plaintiff's testimony to the effect that she found such upon her shoe after the accident.

Mr. Thompson in his work on Negligence suggests, as perhaps the best definition of negligence of the many quoted and discussed, the following: "Failure to observe for the protection of safety of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand," and says further that "the same conception, possibly better expressed is found in the definition that negligence is the failure to exercise such care, prudence, and forethought as duty requires to be given or exercised under the circumstances." The author further declares: "An essential ingredient in any conception of negligence is that it involves the violation of a legal duty which one person owes another—the duty to take care for the safety of the person or property of the other—and the converse proposition is that, where there is no legal duty to exercise care, there can be no actionable negli-

gence. Therefore it is reasoned that a plaintiff, who grounds his action upon the negligence of the defendant, must show, not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed to him." 1 Thompson on Negligence, 4 and 5.

No rule can be laid down that will fairly apply to all classes of cases relating to actionable negligence; and we must therefore look for guidance to those adjudicated cases which involve similar circumstances as in the case at bar, and in this case the duty of storekeepers for the just protection of their patrons, or those lawfully on or within their premises. In the very comprehensive brief of appellee we find a very full discussion of this subject, with numerous authorities cited.

In *Larkin v. O'Neill*, 119 N. Y. 221, 23 N. E. 563, cited by appellee, the rule was stated as follows: "The defendant was a dry goods dealer, transacting a very extensive business. A large number of people frequented his store every day. The business that he was conducting was, from its very nature, an invitation to the public to enter upon his premises. He was bound to use reasonable prudence and care in keeping his place in such a condition that people who went there by his invitation were not unnecessarily or unreasonably exposed to danger. The measure of his duty was reasonable prudence and care." And for this cited *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, and *Bennett v. R. R. Co.*, 102 U. S. 577, 26 L. Ed. 235. The court in speaking of the facts in that case further says: "There is no proof in the case from which it could be found that the defendant neglected any duty that he owed to the plaintiff. She was not exposed to any unreasonable or concealed danger. She fell while walking down a broad, carpeted stairway, between 4 and 5 o'clock in the afternoon. There was nothing in the manner in which the stairs were constructed, used, or kept from which such a result could reasonably be anticipated. It is quite probable that the accident occurred from slipping, or from a misstep by the plaintiff. But, whatever caused the injury, it is quite clear that it could not be attributed to any want of care on the part of the defendant. The language of the court in *Grafter v. Metropolitan Railway Co.* (L. R. [1 C. P.] 300) applies: 'The line must be drawn in these cases between suggestions and possible precautions, and evidence of actual negligence, such as ought reasonably and properly to be left to a jury.'"

There is no testimony in the case at bar that can in any sense be said to show want of "reasonable prudence and care," or that the plaintiff was "unnecessarily or unreasonably exposed to danger." At best the testimony in this case can show only by inference that the greasy substance was on the floor.

Then the only fact that the jury could find in this connection was that the plaintiff

found the substance on her shoe after the accident and while sitting down. May the jury infer that, because of this fact, the defendant negligently permitted this substance to be on the floor and that plaintiff stepped on it, and by reason thereof fell and so sustained the injury. If the jury are permitted to so speculate, may they not have concluded with equal degree of certainty that because the plaintiff was looking where she was walking and did not see the substance on the floor, that the fatty matter having been found neither on the heel or ball of the foot where the weight of the body would necessarily rest, that because she did not experience any sense of stepping on such substance, that because the floor had been swept immediately previous to the accident, that because an examination made immediately after disclosed no grease spot or other evidence of the marking of the substance on the floor, and without which it could not have caused the fall, that because no such pieces of fat were kept on the defendant's counters near that point, and that all the meats were cut on blocks behind the counters, that therefore and because of these facts the substance became attached to her foot in some other place and at a different time.

[2] Facts constituting negligence must be proven. In this case the only alleged fact from which negligence might be inferred is in itself doubtful. Appellee cites the case of *Market Co. v. Claggett*, 19 App. Cas. 12, where the plaintiff upon entering the market, without being able to see clearly what was in her path, stepped upon some fish and ice that had been spilled on the floor, and sustained the injury in question. But the doctrine declared in that case is not materially different from that before stated. There the court said: "It was the duty of the Market Company to guard against danger to their patrons, and if, by reason of the unsafe condition of the premises, an injury to a patron be sustained, without fault on his part, the onus is upon the market company to show that it could not, by the exercise of reasonable care by those for whose acts and omissions it was liable, have prevented the accident. Judge Cooley in his work on Torts, pp. 604-607, says that, when one 'expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them to danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.' And in the leading English case of *Indermaur v. Dames*, L. R. 1 C. P. 274, and 2 Id. 511, where the question was fully considered as to the rights of persons who, upon invitation, either express or implied, visit premises upon business which concerns the owner or occupier, the court said: 'that it was settled law that a visitor of that class, using reasonable care on his part for his own safety,

is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know.'" In that case there was no question but that the fish and ice were on the floor where it ought not to have been, nor was there any question but that the plaintiff slipped by stepping on the fish and ice, and so caused the fall and the injury. Besides, a witness, employed by the party owning the particular stall in the market, testified that he had seen the fish and ice on the floor in the aisle a short time before the plaintiff came in, but he was engaged, and did not stop to take them up but did so after the accident, so that, the danger being shown, the question of knowledge or opportunity to know of it upon the part of defendant was clearly a question for the jury.

[3] But assuming that the grease was on the floor and was the cause of plaintiff's fall, before plaintiff can recover there must be some evidence, at least, tending to show that defendant or its agents knew, or by the exercise of reasonable diligence could have known, this fact, before it may be held guilty of negligence.

In *Reeves v. 14th Street Store*, 110 App. Div. 735, 96 N. Y. Supp. 449, the plaintiff fell on defendant's stair, claiming she slipped on what "looked as though some one had spit up a lot of phlegm and it had laid there the way it was for two or three days, for it was dried around the edges, and that is what I took it I fell on." Mr. Justice Gaynor said: "The verdict was not justified either on the law or the facts. There was no evidence that the defendant knew of the mess on the stairway described by the plaintiff and her husband, nor from which it could be found that it was there so long that in ordinary care the defendant should have known of it and removed it. It could not remain there long with people constantly walking over it, to say nothing of the store being swept and cleaned daily."

We hold it to be the rule that in the case of a merchant, where the public are invited on his premises to inspect and purchase his goods, he is held to a greater degree of care and diligence than otherwise, yet he cannot be held to be an insurer of the safety of his patrons.

In this case we are unable to find any evidence of negligence at all, and, in addition to what has been said in that regard, the defendant's assistant foreman of the market testified that it was his duty, and to which he attended, to walk about the floor and to pick up matches, cigar stubs, and other debris that he might find. It was therefore the duty of the court, in the absence of any evidence as to negligence upon the part of the defendant, to have directed a verdict in its favor.

In this the case of a working woman, dependent upon her labor for support, and with a probably permanent injury, is presented

one which strongly appeals to both a court and jury, but to determine otherwise than we do would be to hold that the mere fact of the accident is sufficient in itself to charge the defendant with the fault, for there does not appear from the evidence a failure upon its part to perform any duty which the law enjoins.

The judgment is reversed and the case remanded. All the Judges concurring.

(32 Colo. App. 333.)

WARD v. COLORADO EASTERN R. CO.

(Court of Appeals of Colorado: May 18, 1912.)

1. MUNICIPAL CORPORATIONS (§§ 680, 681*)—USE OF STREETS—POWER TO GRANT FRANCHISE.

Const. art. 20, created a municipal corporation known as the city and county of Denver, and provided that the charter of the city of Denver, so far as applicable, should be the charter of the new corporation until a new charter was adopted as therein provided. Section 4 of that article provided that no franchise relating to any street should be granted except on the vote of the qualified taxpaying electors, but made no special provision for the calling and conduct of an election to vote on proposed franchises. *Held*, that the old charter was the charter of the new corporation only so far as not in conflict with article 20, that the provision of section 4 was effective as soon as adopted, and hence that a franchise granted by the city council thereafter but prior to the adoption of a new charter was void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.*]

2. CONSTITUTIONAL LAW (§ 12*)—CONSTRUCTION—LIBERAL OR STRICT CONSTRUCTION.

The provision of Const. art. 20, that the charter of the city of Denver should be the charter of the city and county of Denver until the adoption of a new charter, being intended for temporary purposes only, should be strictly construed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 12.*]

3. CONSTITUTIONAL LAW (§ 12*)—CONSTRUCTION—LIBERAL OR STRICT CONSTRUCTION.

The provision of Const. art. 20, § 4, that no franchise relating to any street of the city and county of Denver shall be granted except on the vote of the qualified taxpaying electors, being intended to protect the interests of the people, should be liberally construed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 12.*]

4. MUNICIPAL CORPORATIONS (§§ 684*)—USE OF STREETS—GRANTS OF PRIVILEGES.

A franchise to a railroad company authorizing the use of a public street granted by the council of the city and county of Denver, which is void under Const. art. 20, § 4, requiring such franchise to be granted only on the vote of the taxpaying electors, is not good as a permit or license.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1481; Dec. Dig. § 684.*]

5. RAILROADS (§ 76*)—STREETS—FRANCHISES AND PRIVILEGES—CONSTRUCTION AND OPERATION.

If a railroad company under a franchise granting it the use of city streets had power to alter or change its route, such right was not absolute to be exercised at will and without

regard to vested rights of those injured, and such absolute right could not be derived from a subsequent void franchise.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 195, 196, 199-201; Dec. Dig. § 76.*]

6. RAILROADS (§ 79*)—STREETS—OBSTRUCTIONS—SUIT BY PRIVATE PERSON.

An owner of property not abutting on that part of a street on which it is proposed to construct a railroad, but which would be specially injured by such construction, may maintain a suit for relief against such obstruction of the street.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 192, 193, 202, 203; Dec. Dig. § 79.*]

7. RAILROADS (§ 79*)—STREETS—OBSTRUCTIONS—ACTION FOR INJUNCTION.

The construction of a railroad on a city street under the authority of a void franchise, being a public nuisance, may be enjoined at the suit of a property owner suffering special injury therefrom, and he is not required to resort to an action at law for damages.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 192, 193, 202, 203; Dec. Dig. § 79.*]

Appeal from District Court, City and County of Denver; Carlton M. Bliss, Judge.

Action by Edward F. Ward against the Colorado Eastern Railroad Company. From an order dissolving a temporary injunction and a decree dismissing the bill, plaintiff appeals. Reversed and remanded, with directions.

John A. Rush, for appellant. Rogers, Ellis & Johnson, for appellee.

CUNNINGHAM, J. In order to make as clear as possible the discussion of the points presented for consideration by this appeal, we shall first state chronologically the historical facts out of which they spring. The italics used throughout are ours.

In January, 1888, the council of the city of Denver passed an ordinance granting to the Denver Railroad & Land Company the right to lay and operate a single track of three feet gauge on a short section or portion of Wewatta street; the distance on said street covered by the grant being but a few blocks. Said track was to be used for general steam railway purposes. Sections 6 and 7 of said ordinance read as follows:

"Sec. 6. That the *existence and duration* of the privileges hereby granted is upon the condition that the tracks of said company shall be completed and that trains shall be in actual and regular use each day for the carriage of freight and passengers *within six months from the date of the publication of this ordinance*; that the duration of the said privileges shall only continue so long as trains are in regular use as aforesaid, otherwise this ordinance is to be null and void, and the said privileges forfeited, unless legally obstructed by adverse proceedings.

"Sec. 7. That the privileges hereby granted to said company *shall not be subject to*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Not Series & Rep'r Indexes

†Rehearing denied July 8, 1912.

transfer or assignment either voluntarily or by operation of law, except by the consent of the city council of the city of Denver first had and obtained."

In March of the year following, 1887, an ordinance was passed by the said city council, recognizing a change of the corporate name from the "Denver Railroad & Land Company" to the "Denver Railroad, Land & Coal Company." By said ordinance of 1887 the company was also given the right to make the road standard gauge by laying a third rail and to extend the same on Wewatta street some five or six blocks farther than by the first ordinance it was permitted to do. Section 3 of the ordinance of 1887 reads as follows: "Sec. 3. *That the terms and requirements of said ordinance No. 8 of the series of 1886, so far as applicable, shall apply to and constitute the term and requirements in the laying of said additional rail and in the extension of the track of said company within the city and the provisions in said ordinance as to laying the tracks in the center of the street, placing the same at grade, and the changing, elevating or lowering the same by requirement of the city council, and in general all the provisions of said ordinance No. 8 shall be held to apply specifically to the additional grant or franchise herein conferred upon said company.*"

At the November election in 1902, an amendment to the Constitution of this state was adopted, which amendment is known as article 20; the last paragraph of section 4 of said amendment reading as follows: "No franchise relating to any street, alley or public place of the said city and county shall be granted *except upon the vote of the qualified taxpaying electors*, and the question of its being granted shall be submitted to such vote upon the deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise." This amendment, by proclamation of the Governor duly issued, went into effect on or about December 1, 1902. On October 5, 1903, almost a year after the adoption of the aforesaid amendment, the city council, proceeding under the old city charter, passed an ordinance purporting to grant to defendant company a right of way or franchise over certain streets and alleys of said city and county of Denver, on which it had not theretofore claimed or been granted any privileges. This ordinance was to take effect upon the company accepting the conditions of the same, among which was one annulling the Wewatta street franchise or grant. We assume, nothing in the record to the contrary appearing, that the company accepted the conditions of the ordinance, and relinquished whatever right it possessed in virtue of the former ordinance in and to the Wewatta street grant. The right of way which the last ordinance attempted to vest in the company passed along and over a portion of Cline street in the city and county of

Denver, on which is a two-story brick hotel property, in which plaintiff resided, and which he owned and operated as a hotel.

The amendment of the Constitution, referred to, provides, among other things, for the adoption of a new charter by the consolidated municipality of the city and county of Denver, which its adoption created; but the new charter had not been adopted at the time of the passage of the third ordinance above referred to. The amendment contained a provision reading as follows: "The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver." Notwithstanding the conditions in section 7 of the ordinance of 1886, forbidding the grantee or beneficiary therein named to transfer the franchise by said ordinance granted it, the corporation appears to have given a trust deed, early in 1887, which included said franchise. This trust deed was later foreclosed, and it is admitted that whatever rights appellee ever had in and to the Wewatta street grant were transferred to it by one Burke, who bought the property under the foreclosure of the trust deed aforesaid.

Although almost 20 years had elapsed between the date of the Wewatta street grants and the passage of the ordinance of 1903, no attempt appears to have been made by the company to construct a road on Wewatta street, or otherwise comply with section 6 of the ordinance of 1886. Whatever right appellee has in Cline street is dependent wholly upon the last of the three ordinances; that is, the one passed in 1903.

The plaintiff, Ward, filed his bill of complaint in the district court, alleging that the defendant company was preparing to grade and lay its tracks across Cline street, at a considerable elevation above the natural surface of said street, in the vicinity of his property, in such a manner as to intercept travel, seriously curtail his trade, and thereby greatly diminish the income which he enjoyed therefrom, and depreciate the market value of his real estate, consisting of six lots and the hotel building. He further charged that the defendant was thus proceeding in the construction of its roadbed and in the laying of its tracks without warrant, right, or authority. He asked that the defendant be enjoined and restrained from proceeding with said work. A temporary restraining order was granted. The defendant answered, asserting, among other things, its right to lay the track under the ordinance of 1903. A hearing was had, resulting in the dissolution of the temporary restraining order, and the dismissal of plaintiff's bill, from which order and decree the plaintiff prosecutes this appeal. No evidence was offered on the hearing by the defendant. The evidence produced by the plaintiff clearly established his

contention that the completion of defendant's road across Cline street would result in substantial damage to his business, reducing most seriously the daily income which he derived from his hotel property, and depreciate the market value of his real estate (estimated to be \$50,000) fully one-half.

[1] 1. If the ordinance of 1903 was valid, then the judgment of the trial court is manifestly correct, and plaintiff's relief is not by injunction. The validity of the ordinance turns upon the proper construction of that portion of article 20 of the Constitution which provides for the submission of all proposed franchises relating to streets and alleys to a vote of the qualified taxpaying electors.

Succinctly stated, defendant's position as to article 20 is that the power of the city and county of Denver to grant a franchise remained unchanged and unaffected by the amendment until the new charter of the city and county of Denver had been adopted and gone into effect. In other words, the amendment constituted the fundamental law of the city and county of Denver only after the taking effect of the new charter. Any other interpretation of the amendment, say counsel for the defendant, would give a retrospective effect to it, and would make of article 20 an amendment to the old and then existing charter of the city of Denver, which, by the amendment, was made the charter of the newly created municipality, *as far as applicable*. Plaintiff insists that by the adoption of article 20 all power and authority to grant such franchises as the one under consideration was so instantaneously taken from the city council and vested in the taxpaying electors. In short, the plaintiff affirms, and the defendant denies, that the provision of the amendment pertaining to franchises was self-executing.

Article 20 of the Constitution has received the attention of the courts of review of this state upon several occasions.

In *McMurray v. Wright*, 19 Colo. App. 22, 73 Pac. 259, Thompson, P. J., speaking for the court, said: "The old charter of the city of Denver, in so far as it is the charter of the city and county of Denver, is likewise to be considered in determining the extent of the council's authority. But that charter is not the charter of the city and county except *qualifiedly*. It is such a charter only in so far as it is applicable to the constitution of the new corporation." Here we find an answer to the question: What is meant by the phrase as used in article 20, "as far as applicable"? That is, applicable to what? The Court of Appeals, in the quotation just made from the *McMurray* case, says it means "applicable to the constitution of the new corporation," and it also says that the old charter is only qualified by the charter of the new corporation. It would seem plain, from this announcement of the Court of Appeals, that

article 20, upon its adoption, became at once effective, at least in certain particulars, and required no legislation to put it into effect. In other words, defendant's contention that it was intended as a part of the fundamental law of the new charter of the city and county of Denver only, and was intended merely as a guide to the charter convention in framing the new charter, would seem unsound.

In *Hallett v. Denver*, 46 Colo. 487, 104 Pac. 1038, the Supreme Court had under consideration section 4 of article 20. In this case it was contended by the plaintiff that, during the interim between the disincorporation of the former municipality and the adoption by the new city of a new charter and ordinances, the city council was without authority to make public improvements (in that case levying sidewalk assessments). While the Supreme Court in the *Hallett* case found that the city council might, by virtue of their authority under the old charter, properly levy such assessment, it reached that conclusion upon the ground, as announced on page 489 of 46 Colo., 104 Pac. 1038, that article 20 contained nothing which makes inapplicable to the new city during this interim its possession of the power to initiate and complete public improvements. On the contrary, by a strong implication at least, as the court pointed out, article 20 directly provided for such improvements by the continuance in office of the board of public works until its successor had been elected and qualified. As the court announced in the *Hallett* case, the board of public works would be a useless body were not special powers at the time and by the amendment conferred upon it, since the board of public works was intrusted, under the old ordinances, with the supervision of public works like that involved in the *Hallett* case. The Supreme Court, in that case, announces squarely that the phrase in section 4 of article 20, "so far as applicable," has reference to article 20, thus agreeing with the Court of Appeals in the *McMurray* opinion. In the *Hallett* case the Supreme Court used this language: "If there is nothing in that article [article 20] which renders inapplicable the charter and ordinances of the former city, then they are the charter and ordinances of the new city and county of Denver for the time being only." It would seem plain, by a parity of reasoning, that the Supreme Court would have held, had the question been before it, that, if there was anything in article 20 which rendered inapplicable the charter and ordinances of the former city, then such charter and ordinances would not become the ordinances of the new city and county of Denver for the time being, or at all.

Counsel for defendant well say: "It was, however, foreseen by the Legislature that some time must necessarily elapse, and that a long time might elapse, before a new charter would be adopted." The prescience of

the Legislature in this behalf was abundantly vindicated by the events which followed. The interpretation insisted upon by defendant's counsel would make the provision of the twentieth amendment read, in effect, as follows: "No franchise relating to any street, alley or public place of the said city and county shall be granted, except upon the vote of the qualified taxpaying electors, *unless those desiring such franchise can induce the council to act upon the application before the new charter shall be adopted and take effect.*"

[2, 3] We are unwilling to place this interpretation upon the language of article 20, and we cannot bring ourselves to believe that such was the legislative intent, or the understanding of the voters when the amendment was acted upon at the polls. The power left remaining in the old officials, and in the old charter, was designed for temporary purposes only, and to prevent governmental chaos in the new municipality. Hence we think such power and authority should receive a strict construction; but the amendment to the Constitution, being designed to protect the interests of the people, should be liberally construed, to the end that its beneficent designs may be effectuated. If the language of article 20 should receive the construction contended for by defendant, then the old council was left in a position to dispose of franchise privileges, during the interim between the adoption of the amendment and before the taking effect of the new charter, to an extent that could practically nullify the purpose of the amendment for 20 years. This interpretation would also operate to prevent, or at least to delay, the adoption of the new charter indefinitely, or might well do so, at least, while the adoption of the interpretation contended for by the plaintiff would tend greatly to accelerate its adoption.

The prime purpose of the constitutional amendment was to bestow upon the inhabitants of the city of Denver, and certain surrounding territory, a very greatly increased measure of home rule, and the object of the provision now under consideration was to give the taxpaying electors of the aforesaid territory absolute control over the granting of franchises. It must be clear that the Legislature in framing and submitting the amendment, and the people in adopting it, had these purposes in mind. Therefore it cannot be assumed that either the Legislature or the people deliberately incorporated in or omitted from the amendment provisions calculated to work powerfully against and greatly delay the adoption of the charter for which the amendment provided, and which was one of its important purposes.

Again, if the old charter provisions regulating the granting of franchises be held to be operative after the adoption of article 20 and before the adoption of the new char-

ter, then the city council was given a tremendous power which it had never theretofore enjoyed, namely, the granting of franchises over the streets and alleys and public places of all that territory which had not, before the adoption of the amendment, constituted a part of the city of Denver, but after its adoption had become a part of the new municipality, and thus article 20 would in truth and in fact become an amendment to the old charter, at least in effect.

In *McMurray v. Wright*, supra, Presiding Judge Thompson uses the following language: "The mayor and the persons composing the council of the city of Denver became, *by virtue of the amendment*, the mayor and council of the city and county of Denver. The mayor and members of the council, as well as all other officers of the new corporation, derived their title to office *solely from the amendment. They have therefore such powers as it expressly confers, or are legitimately deducible from it and consistent with it, and no other.*" We think it can hardly be seriously contended that anywhere within the four corners of the amendment (from which the city council, who attempted to pass the ordinance of 1903, "derived their title to office") is power expressly conferred upon said council to grant a franchise such as the one in question; no more do we think it can be contended that there will be found any such authority legitimately deducible from the amendment and consistent with it.

In *People v. Adams*, 31 Colo. 476, 73 Pac. 866, the twentieth amendment was before the Supreme Court for interpretation. In this case the Governor, proceeding upon the assumption that section 45 of the old charter of the city of Denver, in so far as it pertained to his power to remove certain city officials, was still in force and applicable to the condition then existing (the new charter not yet having been adopted), attempted to remove certain of the city officials from office and to appoint successors in their place. We have examined the original briefs filed in that case, and also the briefs filed on rehearing. Brilliant counsel pressed the Governor's contention upon the court. It was pointed out that the amendment made no provision for the removal of officers, and if the courts should hold that section 45 of the old charter, which permitted the Governor to remove certain officers of the city, had been annulled by the adoption of article 20, then the power of removal rested nowhere. A most appalling picture was painted, by the attorneys representing the Governor, of the results that might follow such a construction of the act. The attention of the court was drawn to the fact that, no matter how corrupt or inefficient the city officials might be, they must remain in power indefinitely, and even though they might have been stricken with insanity, or had removed permanently

from the city and state. Even the police force, it was contended, could not, under such interpretation of article 20, be diminished by the discharge of a single patrolman. Yet the court, in the face of this showing, answered thus: "The avowed object of the General Assembly in submitting, and the presumed intent of the people in ratifying, this amendment must be given effect if the language therein employed will allow, even if the result be a withdrawal of restraints upon the officers which heretofore have been deemed by the General Assembly expedient to prescribe, or the consequences destructive of high efficiency in the discharge of public duty." Mr. Chief Justice Campbell, speaking for the court, continuing, said: "It is the duty of every member of the court to give effect to the article in accordance with the intent of its framers as far as it can be done consistent with the language in which that intent has been manifested." And again: "Certainly, one object was to take from the General Assembly all control of the local affairs of the inhabitants of the territory included within the new body politic, and to withdraw from the Governor the power which he theretofore possessed to appoint and remove the members of its fire and police board." And further Chief Justice Campbell said: "Doubtless it is wise to lodge somewhere the power of removal from office, and usually it is safe to intrust it to the appointing power. * * * While we appreciate the force of the argument of learned counsel that power of amotion should be lodged somewhere, and that, without such check upon official action, gross abuse of authority may be perpetrated by public officers, still courts cannot interpolate such absent authority into a statute from which it is omitted, and thus remedy defective legislation." In concluding the opinion in the Adams Case, 31 Colo. at page 482, 73 Pac. at page 868, Chief Justice Campbell used this language: "The language of section 4, by which the charter of the old city was continued in force, *does not prolong the life of this removal clause*, for it is not only inconsistent with the right of the defendants to hold until their successors are elected, but it is inapplicable to the condition confronting the Governor, since the power of removal therein delegated accompanies only appointments made by the Governor himself." So, if the annulling of any portion of the old charter amounts, as counsel for defendant seem to insist, to its amendment, then the Supreme Court has clearly held, in the Adams Case, that article 20 did amend the old charter. But it is not profitable to draw nice distinctions between *annulling* and *amending* that instrument. Certain it is that both the Court of Appeals and the Supreme Court have held that upon the taking effect of article 20 the old charter lost much of its vitality, and the city council, of course, lost

correspondingly in the matter of its authority.

Many authorities are cited by counsel on behalf of the defendant to support the elementary principle that a constitutional amendment cannot operate retrospectively. No contention is made on behalf of plaintiff, indeed none could be made, that, if the ordinance of 1903 had been adopted prior to the November election of 1902, it would not be in every respect valid, in so far as article 20 of the Constitution is concerned. Therefore, clearly, these authorities are not in point.

It is true, as pointed out by defendant's counsel, that article 20 of the Constitution makes no special provision for the calling and conducting of an election to vote on any proposed franchises. Neither did this amendment provide for the discharge or removal of unnecessary, inefficient, or corrupt public officials during the interim between the adoption of the amendment and the new charter; but, as we have pointed out above, it was held by the Supreme Court in the Adams Case that, while it is wise to lodge somewhere the power of removal from office, courts cannot interpolate such absent authority in a statute from which it is omitted, and thus remedy defective legislation. We think it will be conceded that it was quite as important to the welfare of the city and county of Denver that corrupt or inefficient public officials should be removed from office, as that a corporate franchise should be granted to the defendant in this case. Article 20 did provide a method for the speedy adoption of a charter whereby it (the amendment) could be supplemented so that franchises might, by a vote of the people, be granted. We prefer the view which would operate to impede, temporarily, the granting of franchises, rather than the interpretation which would hold the constitutional amendment in abeyance while the friends and foes of a home-rule charter fought out their differences in convention.

We reach the conclusion, without hesitancy or misgiving, that, immediately upon the taking effect of article 20, the power to grant franchises like the one in question was thereby transferred from the city council to the qualified taxpaying electors of the new municipality. Hence it follows that the ordinance of 1903 was null and void, and "upon authority to hold that the ordinance in the case at bar was void and conferred no authority whatever upon the defendant, and cannot be invoked to give it protection." D. & S. Ry. Co. v. Denver City Ry. Co., 2 Colo. 683.

[4] 2. It is contended on behalf of defendant that the ordinance of 1903, even if void as a franchise, nevertheless constitutes a valid permit or license which remained good as against plaintiff and as against the city, until the same was revoked by the au-

thority that attempted to make the grant, namely, the city. Under the law existing prior to the adoption of article 20, this contention may have been sound; that is, the council having under the previous law authority to make the grant, a defective attempt by it to grant a franchise might operate as a license or permit. But the law with reference to grants of this character was so radically and fundamentally altered by the constitutional amendment as to make prior decisions on this point inapplicable. The council being wholly without authority to grant a franchise in 1903, its abortive attempt so to do conferred no right whatever upon the defendant company. *D. & S. Ry. Co. v. Denver City Ry. Co.*, supra. Especially is this true where the attempted grant was designed to confer a right on the company to construct the main line of its road over the streets of the city. The council being without power to make grants of this character, we are not called upon, under the facts disclosed by the record in this case, to consider and determine its power and authority to grant permits for local or limited incidental privileges such as that involved in the case of *McPhee & McGinnity v. U. P. Ry. Co.*, 158 Fed. 6, 87 C. C. A. 619, to which our attention has been directed.

[5] 3. Whether the defendant company had, for any reason, forfeited its right to occupy Wewatta street, or to construct its road thereupon, at the time of the passage of the ordinance in 1903, or whether any such right was ever acquired by the defendant company, are likewise questions not before us for consideration. Indeed, it is said in the brief of the defendant company that "it is immaterial whether the appellee had any franchise on Wewatta street at the time the ordinance of 1903 was adopted." The company may have had power, under the charter and general law, to alter or change its route, as is contended in its behalf that it had; but it will not be seriously urged that such right was absolute, or that it could be exercised at will, and without regard to the vested rights of those who would be injured by such change. Nor could the company acquire such right from a legislative body which had, by a constitutional amendment, been deprived of all authority in the premises. *D. & S. Ry. Co. v. Denver City Ry. Co.*, supra.

[6] 4. It is next contended by the defendant company that the plaintiff may not maintain this action, because the defendant's tracks, about to be laid, would not pass directly in front of plaintiff's property; plaintiff's property does not abut upon that portion of Cline street over which it is proposed to construct plaintiff's tracks. It is alleged in the defendant's answer, and established by the proof, that the line of road or route as surveyed and located crosses the east line of said Cline street at a point between

65 and 70 feet distant from the northwest corner and nearest point of plaintiff's lots. The evidence shows that the line crosses Cline street at a point between plaintiff's property and the stockyards, and crosses at such a grade as to make travel from the stockyards to plaintiff's property impracticable, if not impossible. The greater part of plaintiff's business, as shown by the evidence, comes from those frequenting the stockyards or having business there.

In *Railroad Co. v. Foley*, 19 Colo. 280, 35 Pac. 542, appears the following: "It is settled in this state that unlawful obstruction of a business street more or less remote from abutting property, if it causes a special injury thereto, entitles the owner of such property to recovery therefor"—citing *Jackson v. Kiel*, 13 Colo. 878, 22 Pac. 504, 6 L. R. A. 254, 16 Am. St. Rep. 207. See, also, *Brunswick Co. v. Hardey*, 112 Ga. 604, 37 S. E. 889, 52 L. R. A. 396; *Adams v. Ry. Co.*, 39 Minn. 288, 39 N. W. 629, 1 L. R. A. 493, 2 Am. St. Rep. 644; *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123. Under these authorities, it would seem that plaintiff's right to maintain the action does not turn upon whether his property abuts directly upon defendant's proposed line of road or not. It is sufficient, if the location of defendant's tracks be such as to result in direct, serious, and special injury to plaintiff's property.

[7] 5. The only question remaining which we think demands consideration is as to the right of the plaintiff, under the pleadings and the proof, to injunctive relief. It is stoutly contended by counsel for the railroad company that plaintiff's only remedy is an action at law for damages. Much of the defendant's argument on this point is based upon the untenable assumption that the action of the city council in passing the ordinance of 1903 vested in it either a valid franchise or a revocable permit. If this position were sound, then many of defendant's authorities, such, for instance, as *Haskell v. Denver Tram. Co.*, 23 Colo. 60, 46 Pac. 121, *D. & S. Ry. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777, and *D. U. P. Ry. Co. v. Barsaloux*, 15 Colo. 290, 25 Pac. 165, 10 L. R. A. 89, would be in point, and would seem to sustain its contention in this behalf. But we need not go out of our own state for authorities to support the doctrine that the construction and maintenance of a railway over the streets of a city (especially a steam road) without authority constitutes a public nuisance, and may be enjoined at the suit of any individual who suffers a special injury as a result thereof.

In *D. & S. Ry. Co. v. Denver City Ry. Co.*, supra, after holding that an ordinance and resolutions of the city council attempting to confer authority to construct a railway track was void, it is said: "What was the legal character of the acts of the defendants in the construction of a railway in Holladay and Twenty-Third streets? Upon the estab-

lished fact we must say they created a public nuisance. If authorized by law, its acts might have been justified, no matter how much inconvenience to the public they may have occasioned; but, being without right, no matter how little inconvenience this permanent appropriation of a part of the street may occasion, they cannot defend themselves from the charge of nuisance. The authorities for this position are consistent and uniform, and leave no doubt on the question. {Davis v. Mayor of City of New York} 14 N. Y. 524 [67 Am. Dec. 186], and cases cited. * * * In this feature of the case the complainant is entitled to relief just so far as its allegations sustained by proof will justify a court of equity in interfering in its behalf. In so far as it suffers from the wrongful acts of the defendants, in common with the public generally, it cannot have relief; but to the extent that its private rights are invaded or threatened by a wrongdoer, it is the duty of the court to protect it."

In *High on Injunction*, vol. 5 (4th Ed.) § 823, it is said: "Even where the road is being built without authority of law, it will not be enjoined at the suit of one who owns no real estate over or adjoining which it is to pass, and who will not be specially injured by its construction; but where the plaintiff owns real estate abutting upon a public street or alley, and will be subjected to injury differing in kind from that suffered by the public, such as the impairment of an easement in the highway as a means of ingress and egress to his property, resulting in serious and substantial injury thereto, the rule is well settled that an injunction will lie to restrain the illegal and unauthorized construction of a railroad in the highway, as, for example, where the work is proceeding under an ordinance or license which the municipality has no power to grant." In support of this statement, Mr. High cites numerous cases from Alabama, Minnesota, Tennessee, and Missouri.

"Streets and highways cannot be obstructed or encroached upon by a railroad without lawful authority for such act, and where a railroad is constructed upon a street without such authority, it will constitute a public nuisance, and in such a case, one showing a sufficient injury by reason thereof will be entitled to bring an action to enjoin the same." Joyce, *Law of Nuisances* (1906) § 246.

In the third edition of Pomeroy's *Eq. Jur.* vol. 5, § 478, the following is quoted from *Wahle v. Reinbach*, 76 Ill. 322: "Where the injury resulting from the nuisance is in its nature irreparable, as when loss of health, loss of trade, or destruction of the means of subsistence, or permanent ruin to property, will ensue from the wrongful act or erection, courts of equity will interfere by injunction in furtherance of justice and the valid rights of property." Several other Illinois cases

are cited by Mr. Pomeroy to support the above quotation.

Mr. Elliott, in his work on *Roads & Streets*, at section 394, makes this statement: "The destruction of valuable property rights, by raising the grade of a street, however, is more than a mere fugitive trespass, and an injunction will be awarded."

The contention made that the right of the defendant to use the street could only be challenged by a proceeding in quo warranto brought on behalf of the city is effectually disposed of by Circuit Judge Woods, in the case of *General Electric Railway Co. v. Chicago, I. & L. Ry. Co.*, 107 Fed. 771, 46 C. C. A. 629. The same case was also considered by the Circuit Court of Appeals of the Seventh Circuit in 98 Fed 907, 39 C. C. A. 345, 58 L. R. A. 231; both opinions being by Judge Woods. In the course of a remarkably vigorous opinion in 107 Fed. 774, 46 C. C. A. 631, Judge Woods says: "Ordinarily a void thing may be ignored by any one concerned. On questions of public policy it has been ruled, and doubtless wisely, that an individual asserting only an injury for which suitable compensation may be obtained at law may not attack a public ordinance formally adopted, and under which a public work, perhaps of great importance, is being prosecuted; but if the doctrine is to be applied when private injury is about to be inflicted, for which the relief obtainable at law could not be even approximately adequate, it becomes a bald denial of justice. The like of it has found recognition thus far, we believe, only in briefs, to which, in the face of criticism at the bar of the court, counsel have not shown an unflinching adhesion. * * * In the nature of things and on principle, there is the same right to go into equity for an injunction against a threatened irreparable injury as there is to go into a court of law to recover damages for a compensable wrong. If the laying of the street railway be fully authorized, as by a valid ordinance, there can, of course, be no injunction, if there be no actual taking of property outside of the limits of the street; * * * but what good reason can there be for the application of that rule when the ordinance under which an inestimable damage is about to be inflicted is void? Why should there be an estoppel against denying the validity of the invalid—against denouncing as void an act which is in fact void, under which it is proposed to inflict an irremediable wrong? If there were no pretense of an ordinance or of other form of authority for the proposed invasion of the street, is it to be said that the owner of abutting property threatened with injury may not have relief by injunction, but must look only to the uncertain and insufficient remedies of the law? Would a forged ordinance, put upon the records of the common council without the knowledge or consent of the body by whom it purported to have been en-

acted, be beyond impeachment except by a public prosecutor, who, as the Supreme Court of the state [Illinois] has held, could move only in the public interest, at the risk of the dismissal of the proceedings if shown to be for the protection of private rights—the only rights, in most instances, likely to be imperiled? But if the work of laying a street railway, prosecuted without pretense of authority or under a forged ordinance, may be enjoined at the suit of one threatened with irreparable wrong, why should it not be enjoined in a like case if prosecuted under an ordinance which for any reason is illegal and void, not voidable merely? Judge Woods closes this feature of his discussion with the statement that "It is useless to talk of relief through the public prosecutor or Attorney General of the state."

In the two opinions by Judge Woods, referred to, he had under consideration the case of *Doane v. R. R. Co.*, 165 Ill. 510, 48 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265, a case that has attracted much attention, and one of the cases cited and relied upon by the defendant in this case. It is believed that the rule laid down in the *Doane* case has been, by construction, modified by the Supreme Court of Illinois itself. In *Nelson v. Randolph*, 222 Ill. 531, 78 N. E. 914, a case for obstructing a highway, it was held: "Conceding that, in order to maintain a suit by an individual to enjoin the obstruction of a public highway, some special or peculiar injury must be shown, the fact that members of complainant's family are buried in the cemetery to which the highway leads, and that complainant and others have cared for the cemetery, are sufficient." The quotation is from the syllabus, which is supported by the text.

It is said by Judge Elliott, in his work on *Roads & Streets* (2d Ed.), in a note to section 394: "It seems to us that the tendency of modern thought is to extend the remedy by injunction, and this we believe to be wise and expedient."

It must be clear that in the instant case plaintiff's injury was a continuing one, in so far, at least, as it affected his trade or business, and the damage ensuing would be impossible to definitely establish. Wrongs of this character the authorities universally hold to be cognizable at equity. The fact that no actual damage can be proved, so that in an action at law the jury could award nominal damages only, and such an action at law would necessarily be ineffectual, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuing one. *Platte Co. v. Lee*, 2 Colo. App. 185, 29 Pac. 1036; *Medano Ditch Co. v. Adams*, 29 Colo. 328, 68 Pac. 431; *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. 760; *City v. Manning*, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.)

272; *Angell, Highways* (2d Ed.) § 283; *Pomerooy, Eq. Jur.* (4th Ed.) vol. 5, § 516; *Wahle v. Reinback*, 76 Ill. 322.

In *Elliott on Roads & Streets* (2d Ed.) § 665, it is said: "It has also been held that the injury must be irreparable, or at least incapable of full and complete compensation in damages. This is no doubt a fair statement of the general law; but the phrase 'irreparable injury' is apt to mislead. It does not necessarily mean, as used in the law of injunction, that the injury is beyond the possibility of compensation or damages, nor that it must be very great. * * * But if the nuisance is a continuing one, invading substantial rights of the complainant in such a manner that he would thereby lose such rights entirely but for the assistance of a court of equity, he will be entitled to an injunction upon a proper showing, notwithstanding the fact that he might recover some damages in an action at law."

For further authorities on the legal significance of the phrase "irreparable injury," see *Words & Phrases*, vol. 4, p. 8772, where the subject is thoroughly covered.

For the reasons hereinabove pointed out, the trial court committed error in dissolving the temporary injunction, and in dismissing plaintiff's bill. The judgment therefore must be reversed and remanded, with instructions to the trial court to make the temporary writ of injunction permanent.

Reversed and remanded, with directions.

BURNEHAM et al. v. GRANT, et al.

(Court of Appeals of Colorado. July 8, 1912.)

1. COURTS (§ 213*)—APPELLATE JURISDICTION—CASES INVOLVING FREEHOLD.

Where substantially all of a testator's estate consists of a one-third interest in his brother's unsettled estate, which consists largely of land, but it is not certain that there will be anything left after the settlement, and that if there is it will be in the shape of land, a freehold is not involved, and an appeal is not within the jurisdiction of the Supreme Court.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* §§ 517-519, 522-526; *Dec. Dig.* § 213.*]

2. COURTS (§ 213*)—APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY.

Under *Laws 1911*, p. 269, § 6, which provides that, where a judgment amounts to more than \$5,000, exclusive of costs, the Court of Appeals, upon its transfer, may, upon advice of either party, remand the case to the Supreme Court, the judgment itself must show that the jurisdictional amount is involved, so that a mere showing that it is a witness' impression that the amount was involved is insufficient to call for a remand.

[Ed. Note.—For other cases, see *Courts, Cent. Dig.* §§ 517-519, 522-526; *Dec. Dig.* § 213.*]

3. COURTS (§ 213*)—APPELLATE JURISDICTION—INTEREST OF OFFICERS.

The Court of Appeals will not remand to the Supreme Court a case transferred to it by that court on the ground that one of the appellees is the clerk of the court on that its pre-

*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes*

siding judge is one of the attorneys for the appellees.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 517-519, 522-526; Dec. Dig. § 213.*]

Appeal from District Court, Teller County; W. S. Morris, Judge.

Action by Fred B. Burnham and others against A. W. Grant and others. From a judgment for defendants, plaintiffs appeal to the Supreme Court, whence the case was transferred to the Court of Appeals. On motion to remand to the Supreme Court. Denied.

William C. Robinson, of Colorado Springs, for appellants. Horace N. Hawkins, of Denver, and Guy P. Nevitt, of Cripple Creek, for appellees.

CUNNINGHAM, J. Appellants have filed their motion to remand this cause to the Supreme Court upon the following grounds: First. That a decision in said cause necessarily involves and relates to a freehold. Second. That the judgment in said cause amounts to and in effect is a judgment for more than \$5,000 exclusive of costs. Third. That A. W. Grant, one of the appellees, is the clerk of this court. Fourth. That the Honorable Tully Scott, the presiding judge of this court, is one of the attorneys for the appellees in this cause.

[1] 1. A proper determination of the first and second grounds of the motion requires a brief statement of the case. Frank J. Burnham died, leaving an instrument purporting to be his last will. Substantially all of the decedent's property consisted of a one-third interest which, as held at law, he had in the unsettled estate of his brother Thomas. The estate of his brother Thomas consisted largely of land, and for this reason the appellants insist that a freehold is involved. The action here involves the validity of the will of Frank J. Burnham, which was called in question by the appellants, who contended that he was not of sound mind at the time the will was executed. The appellants are brother and sister of Frank J. Burnham. The sole legatee under the will of Frank J. Burnham bears no relation to him. Both the county and district courts found the testator to be of sound mind, and therefore upheld the will. The disposition of the case in this court will not necessarily take the title of the land belonging to the estate of Thomas Burnham from one of the litigants and vest it in the other. Indeed, various things may transpire during the course of the settlement of either one or both of the Burnham estates, whereby not only will no real estate pass to the legatee under the Frank Burnham will, if the same be upheld, or to the heirs at law, if it shall be determined by this court to be a void instrument, but no cash or property of any sort may be left for distribution. For instance, it may become

necessary to sell the real estate in order to pay debts, or it may be found impossible or impracticable to make distribution in kind, in which event the real estate would be sold and distribution, if any there be, be made in cash.

Counsel for appellants says in his brief that "the record shows that the only unpaid claim against the estate of Thomas H. Burnham is a claim of this same Frank J. Burnham, and that the estate is entirely solvent, so that the record shows that the title to the real estate of Thomas H. Burnham, which vested in Frank J. Burnham, is good." Counsel does not call our attention, either in his opening brief or in his reply brief, to that portion of the record which supports the statement we have just quoted from his brief. It is true that the only claim against the Thomas Burnham estate referred to in the record is the claim of Frank Burnham. But we are not able to find in the record anything stating that this is the only claim against the Thomas Burnham estate. On the contrary, we do find, at folio 1326, 1327 of the record, that one Craft was still pressing a claim which he held against the Thomas Burnham estate, and apparently threatening to bring suit upon it.

[2] 2. The evidence as to the value of the estate of Frank J. Burnham is not explicit or satisfactory. Only one witness gave testimony on this point, fixing the value, in his judgment, at approximately \$10,000; but this valuation, the witness testified, was based upon an offer that had been made for the land belonging to the estate of Thomas Burnham. When the offer was made does not appear; nor do we know whether it was made by a responsible party. Moreover, there is nothing in the record to indicate what claims there may be against the estate of either Thomas or Frank Burnham, or what the cost of administering these estates will amount to. Hence it cannot be determined from the record before us whether a dollar will ever pass to the legatee, or to the heirs at law. All the evidence we have on the subject is that the approximate gross value of the property that would come from Thomas Burnham's estate to Frank J. Burnham's estate is \$10,000. Even this does not appear by the pleadings, and only crops out incidentally as the judgment or opinion of one witness. The trial court, made no finding whatever on the subject, and, for this reason, I think the judgment is not one covered by section 6 of the act of 1911 (Laws 1911, p. 269), creating this court. *Conly v. Boyvin*, 25 Colo. 499, 85 Pac. 782; *Bank v. Follett*, 27 Colo. 512, 62 Pac. 361.

In the *Conly* Case, it is said: "The parties themselves, neither in their pleadings nor by stipulation, can fix the value of the property in controversy, so as to confer appellate jurisdiction." In *Fischer v. Hanna*, 21 Colo. 13, 39 Pac. 422, the Supreme Court indicates,

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at least, that under the statute regulating appeals (Code 1867, § 388), which is very similar to section 6, a money judgment is contemplated; for the court says: "Counsel for appellants recognize that a money judgment against the parties appealing was essential," etc. See, also, 2 Cyc. 543, 544; also Alexander Nesbit, Sheriff, etc., et al. v. Sigel-Campion Live Stock Co. (No. 7,807) 125 Pac. 524, decided by the Supreme Court during the present month.

The evidence, unsupported by pleadings or any judgment of the court, is not the correct test of the amount involved. *Kane v. Kane's Adm'r*, 146 Mo. 605, 48 S. W. 448. "Generally speaking, the value or amount in controversy must be made to appear affirmatively. If it cannot be ascertained, the appeal will be dismissed, and the burden is upon appellant to establish the jurisdiction. Mere uncertain inferences or speculations are not sufficient." 2 Cyc. 555; *Crum v. Pump & Lbr. Co.*, 163 Ind. 596, 72 N. E. 588.

Under the authorities cited, we think that, not only is the burden upon the appellant, or the one claiming some right or benefit which must be determined entirely by the size and character of the judgment, to establish that the judgment is of the character and amount necessary to confer upon him the right or privilege for which he contends, but he must also see to it that the trial court makes a specific finding and renders judgment or enters a decree thereon to that effect. The mere impression of a witness that there is \$5,000 involved falls far short of a judgment, which is the only thing we may properly consider.

[3] 3. If we knew of any authority that would warrant this court in remanding the cause to the Supreme Court for the reasons set forth in the third and fourth grounds of the motion, or either of them, we should promptly avail ourselves of the same and grant the motion; but no such authority has been called to our attention. The motion to remand must therefore be denied.

Motion to remand denied.

SCOTT, P. J., not participating.

McARTHUR v. BRIGHAM.

(Court of Appeals of Colorado. July 8, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 455*)—ACTION—CONTROL—HEIRS—DISMISSAL OF APPEAL.

Motion of an administrator de bonis non to dismiss the appeal on behalf of the estate

will prevail, as against a protest filed by an attorney of some of the heirs of the estate, not supported by a showing justifying denial of the right of said administrator to control the litigation.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1929-1940; Dec. Dig. § 455.*]

Appeal from District Court, Arapahoe County; Charles McCall, Judge.

Action between Hugh F. McArthur, as administrator of Catherine W. Skelton, deceased, and Charles C. Brigham. From an adverse judgment, the administrator appealed. On motion to dismiss, against which John T. Barnett, representing certain heirs, protests. Appeal dismissed.

Crump & Allen and J. E. McCall, all of Denver, for appellant. Stuart & Murray, of Denver, for appellee. John T. Barnett, pro se.

PER CURIAM. Appellant moves to dismiss the appeal. Against granting said motion protest is filed by an attorney representing some of the heirs of the estate for which appellant is administrator de bonis non. The protest is not supported by any showing sufficient to justify a denial of the right of the administrator to control this litigation.

The protest is overruled, and the motion to dismiss the appeal is granted.

FARMERS' HIGH LINE CANAL & RESERVOIR CO. et al. v. WOLFF et al.

(Court of Appeals of Colorado. May 13, 1912.)

Appeal from District Court, City and County of Denver; George W. Allen, Judge.

Proceedings by John Wolff and others against the Farmers' High Line Canal & Reservoir Company, and others for permission to change the point of diversion of decreed water rights. From a judgment for plaintiffs, defendants appeal. Motion to remand cause to Supreme Court denied.

C. B. Whitford and Henry E. May, both of Denver, for appellants. Thomas & Thomas and John R. Smith, all of Denver, for appellees.

KING, J. Motion is made to remand this cause to the Supreme Court, for the reason that the decision necessarily relates to or involves a freehold. The judgment appealed from was rendered by the district court in a statutory proceeding for permission to change the point of diversion of decreed water rights. The facts and conditions of this cause, so far as material in considering this motion, are so nearly the same as in *Monte Vista Canal Co. et al. v. Centennial Irrigating Ditch Co.*, 123 Pac. 881, in which opinion was handed down at this term, that the reasons and conclusions therein announced are controlling, and under that authority the motion herein to remand will be denied.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CONSUMERS' LEAGUE OF COLORADO v. COLORADO & S. RY. CO. et al.
(Supreme Court of Colorado. May 8, 1912.
Rehearing Denied July 1, 1912.)

1. CARRIERS (§ 1*)—REGULATION—STATUTORY PROVISIONS.

The General Assembly had power, under the Constitution, to create the State Railroad Commission, and to authorize it to regulate and control the service of common carriers and the rates charged for such service.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 2; Dec. Dig. § 1.*]

2. CONSTITUTIONAL LAW (§ 48*)—VALIDITY—PRESUMPTION IN FAVOR OF VALIDITY.

The presumption is that every statute is valid and constitutional, and the burden is on the person attacking its validity to demonstrate clearly and beyond reasonable doubt that it is repugnant to a provision of either the state or federal Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. § 48.*]

3. CONSTITUTIONAL LAW (§ 209*)—EQUAL PROTECTION OF THE LAWS.

The General Assembly has power to classify subjects for legislation, and, if the classification is not wholly unreasonable and arbitrary and the statute is uniform as to all members of the class, no one is denied the equal protection of the laws.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 678; Dec. Dig. § 209.*]

4. CARRIERS (§ 2*)—CONSTITUTIONAL LAW (§ 241*)—REGULATION—STATUTORY PROVISIONS—DISCRIMINATION.

Act March 22, 1907 (Laws 1907, p. 531), to regulate common carriers, is not rendered invalid by the provision of section 1 that it shall not apply to mountain railroads operating less than 20 miles of road, the principal traffic of which is the hauling of mineral from, and supplies to, mines, this discrimination not being an arbitrary classification without reasonable basis, but being based on a substantial difference in location, length, and character of traffic of the two classes of railroads.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.* *Constitutional Law*, Cent. Dig. §§ 700, 701; Dec. Dig. § 241.*]

5. CONSTITUTIONAL LAW (§ 47*)—DETERMINATION OF VALIDITY—SCOPE OF INQUIRY.

When a statute on its face is general in terms and applicable alike to all members of a class, evidence will not be taken to show that such classification is not a legal one.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. § 47.*]

6. CARRIERS (§ 12*)—REGULATION—STATUTORY PROVISIONS.

Section 3 of the act of March 22, 1907 (Laws 1907, p. 532), to regulate common carriers, provides that all charges for transportation shall be just and reasonable, and declares unlawful every unjust and unreasonable charge. Section 12 authorizes the State Railroad Commission to execute and enforce the provisions of the act. Section 13 authorizes the commission to investigate alleged violations of that act. Section 14 requires it, on making an investigation, to make a report stating its conclusions, together with its decision, order or requirement. Section 15 authorizes the commission, if of the opinion that any of the rates, regulations, or practices of any com-

mon carrier are unjustly discriminatory or preferential, to determine in what respect and to what extent they are discriminatory or preferential, and what regulation or practice is just, fair, and reasonable, and to make an order that the common carrier shall cease violating the act, and provides that the carrier shall thereafter conform to the regulations so prescribed. *Held*, that the commission has power to regulate rates and to prohibit unjust and unreasonable rates, even if not discriminatory and preferential.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 7-20; Dec. Dig. § 12.*]

7. CARRIERS (§ 2*)—REGULATION—STATUTORY PROVISIONS.

The act of March 22, 1907 (Laws 1907, p. 531), to regulate common carriers, is remedial, and should be liberally construed to accomplish its objects and purposes.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Proceeding by the Consumers' League of Colorado against the Colorado & Southern Railway Company and others, brought before the State Railroad Commission, and appealed to the district court. Judgment was rendered reversing the order of the Commission and dismissing the complaint, and the plaintiff brings error. Reversed and remanded.

Benjamin Griffith, Atty. Gen., Theodore M. Stuart, Jr., Asst. Atty. Gen., John T. Barnett, Atty. Gen., James H. Teller, Asst. Atty. Gen., and Vogl & Whitehead, of Denver (Horace Phelps, of Denver, of counsel), for plaintiff in error. E. E. Whitted and J. M. Cates, both of Denver, for defendants in error Colorado & S. Ry. Co. and another. Hughes & Dorsey and E. I. Thayer, both of Denver, for defendant in error Union Pac. R. Co.

MUSSER, J. The plaintiff in error, a domestic corporation, began a proceeding before the State Railroad Commission relating to freight rates on coal from the northern Colorado coal fields to Denver. From the order made by the Commission, the defendants in error appealed to the district court. There the companies concerned filed a motion to reverse the order of the Commission and to dismiss the complaint. The court sustained the motion, and dismissed the complaint upon the ground that the law under which the order of the Commission was made was unconstitutional and void, and adjudged that all acts and orders of the Commission were without authority of law. The matter was brought here for review on error, and came on for final hearing as soon as the parties had framed the issues in this court. The Sixteenth General Assembly passed an act approved March 22, 1907, (Laws 1907, p. 531), to regulate common carriers in this state, creating a State Railroad Commission and prescribing its powers and duties and the mode of procedure to be fol-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lowed in matters brought to its attention. The defendants in error contend, first, that the act aforesaid is unconstitutional; second, that, though the act is constitutional, the Commission had no power under it to fix rates, and for that reason the judgment should be sustained. The constitutional question will first be considered. Section 1 of the act is as follows: "That the provisions of this act shall apply to common carriers and to any corporation or any person or persons engaged in the transportation of passengers or property, or the receiving, delivering, storing or handling of property shipped or carried from one point or place within this state to any other point or place within this state: Provided, however, that this act shall not apply to mountain railroads operating less than twenty miles of road, the principal traffic of which is the hauling of mineral from and supplies to mines. This act shall not apply to the ownership, or operation, of street railways conducted solely as common carriers in the transportation of passengers, within the limits of cities and towns, nor to the ownership or operation of private railways not used in the business of any common carriers." It is claimed that the provision in the act that it "shall not apply to mountain railroads operating less than twenty miles of road, the principal traffic of which is the hauling of mineral from and supplies to mines," is class legislation, and denies to the defendants in error due process and equal protection of the law, contrary to the Colorado and federal Constitutions.

[1] At this day it is unnecessary to discuss the question of the existence of the power of the General Assembly, exercised within constitutional limits, to create a State Railroad Commission, and to authorize it to regulate and control the service of common carriers in this state and the rates charged the public for such service. This must be taken as an established and acknowledged power of the General Assembly. *Granger Cases*, 94 U. S. 118, 24 L. Ed. 77; *Railroad Commission Cases*, 118 U. S. 307, 6 Sup. Ct. 334, 338, 1191, 29 L. Ed. 636.

[2] The objects and provisions of the act in question being within the acknowledged power of the General Assembly that enacted it, it is well to refer to a well-established rule that should govern this court in its consideration of the constitutional question presented. The presumption is that every statute is valid and constitutional, and such presumption is to be overcome only by clear demonstration. In case of doubt every possible presumption and intentment should be made in favor of the constitutionality of the act, and it is to be overthrown only when it is clear and unquestioned that it violates the fundamental law. *People, etc. v. Rucker*, 5 Colo. 455, at 458 (quoting from and approving *Sedgwick Stat. and Com. Law*, 409). "To declare an act of the Legislature un-

constitutional is always a delicate duty, and one, which courts do not feel authorized to perform unless the conflict between the law and the Constitution is clear and unmistakable." *People v. Goddard*, 8 Colo. 432, 437, 7 Pac. 301, 304. "The doctrine is elementary that no act of the General Assembly should be declared unconstitutional unless it is clearly and palpably so." *People v. Commissioners*, 12 Colo. 89, 93, 19 Pac. 892, 894. "A fundamental principle of construction requires those who seek to overthrow a statute on account of its repugnance to a constitutional provision to show the unconstitutionality of the act beyond all reasonable doubt." *Denver City v. Knowles*, 17 Colo. 204, 211, 30 Pac. 1041, 1044 (17 L. R. A. 135). "When an act of the Legislature is attacked as in violation of the Constitution of the United States or of the state, by familiar rule, we are required to uphold the legislation, unless its unconstitutionality appears beyond all reasonable doubt." *Ind. Ditch Co. v. Agr. Ditch Co.*, 22 Colo. 513, 523, 45 Pac. 444, 450 (55 Am. St. Rep. 149). "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained." *Munn v. People*, 94 U. S. 113, 24 L. Ed. 77. It is evident from the foregoing judicial declarations that the burden is upon the defendants in error to demonstrate clearly, and beyond all reasonable doubt that the statute in question is repugnant to a provision of either the state or federal Constitution.

[3] They do not deny, and in fact their argument and the authorities cited by them show, that the General Assembly has the power to classify subjects for legislation. If this classification is not wholly unreasonable and arbitrary, so that the statute is uniform in its operation upon all the members of the class to which it is made applicable, no one is denied the equal protection of the laws guaranteed by the federal Constitution. *N. Y., etc., R. Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; *Dow v. Beidelman*, 125 U. S. 680, 691, 8 Sup. Ct. 1028, 31 L. Ed. 841; *C. R. I. & P. Ry. Co. v. Ark.*, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290.

[4] The contention is that the exemption of mountain roads less than 20 miles in length, whose principal traffic is the hauling of minerals from and supplies to mines, is an arbitrary classification without any reasonable basis. It seems to us that there is a substantial difference between the inconsequential roads exempted from and the roads embraced within the operation of the act. That distinction is based upon location, length, and character of traffic. A difference in either one of these things is a real difference. We are not called upon, however, to determine whether a classification, based upon one of these differences, would be arbi-

trary or not, for the exempted roads must possess every one of the three distinguishing elements. That is certainly a grouping together of roads in a class based upon a real and substantial difference. The exempted roads are really and clearly different from the others. They form a distinct and real class by themselves, possessing clear and well-defined differences. There is no arbitrary selection in such a classification as this. It is not a lifting of one road from among others that to all intents and purposes are clearly surrounded by substantially the same conditions and circumstances, nor does it clearly appear that there is no reasonable basis for this classification. There is a difference in the cost of construction, and it may be said of operation in the mountains and on the plains. The very character of the traffic of these short roads implies that they are constructed in the most mountainous and rugged portions of the state. Their traffic is subject to the interruptions occasioned by mountain snows and slides. It cannot be said that such short roads built as they are in the mountains for a short distance, for the sole purpose, as it were, of tramping ore from the mines to the principal lines of general transportation of the state or to a mill, enter very largely or at all into the general commerce of the state, which it was the evident purpose of the act to regulate as far as transportation is concerned. The ore transported by them is not a subject of merchandise to be sold in the market to the general public for use at prices affected by the cost of transportation like coal, lumber, and other necessities or commodities or even logs that are made into lumber and sold in the general market. There is no permanency in these exempted roads. There is no enduring scenery or fertile valleys along their route to attract people. The very character of their location and business has a temporary promise only. Every car of ore hauled over them lessens their span of life, for their supply of traffic depends upon the mines, which sooner or later become exhausted when the industries carried on about them and the roads themselves must pass away. Even before the mines become exhausted, or if practically inexhaustible, established ore bodies are depleted, and a cessation or decrease in the supply for transportation takes place. Upon further consideration, other matters, great or small, might be mentioned that would support the reasonableness of the classification made. It thus appears, upon the face of the act itself, in connection with such physical and geographical facts, of which the court may take judicial notice, that the exempted roads are in a class distinct from any other road in the state. It thus appears that the classification is not an arbitrary, but a real one, and has a reasonable basis upon which to rest. How can it be said, then, that this law is unconstitutional, when, before it can

be declared unconstitutional, it must appear beyond all reasonable doubt that the classification was arbitrary and unreasonable? Even were there doubt as to these matters, nevertheless, under the authorities cited, the statute would have to be upheld.

[5] Some claim is made that there was certain evidence in another case that establishes that the classification was not a legal one. If there was such evidence in any such case, it is not presented to us in this case in the transcript or the abstract. Surely we need not go beyond these into some other case to find something upon which to base a holding that the act is unconstitutional. It has been seen that on its face the statute is valid and regular, and that it is general in its terms, and is applicable alike to the class to which it is made applicable. In such a case evidence need not be taken to show that the statute is unconstitutional. In *N. Y. Elevated R. R.*, 70 N. Y. 327, 351, the court said: "Can a court take proof for the purpose of showing a statute valid and regular upon its face to be unconstitutional? And does the validity of a law which is required to be general, and which is general in its terms, depend upon the number of subjects upon which it can operate, or upon the size of a class to which it applies? These questions must be answered in the negative." This was approved in *State v. Nelson*, 52 Ohio St. 88, 39 N. E. 22, 28 L. R. A. 317. With the presumption always in favor of the validity of legislation, if the law stood by itself, the courts would be compelled to presume that the different circumstances and conditions surrounding the location, length, and character of traffic of the respective classes were such as to justify a different rule in respect to them. All that is necessary to uphold the law is that there be an actual, reasonable, and substantial difference, and that existing it was for the Legislature to determine whether separate legislation shall be applied to the two classes. Given the fact of such a difference, it is a part of the legislative power to determine what difference there should be in the prescribed regulations. *Erb. v. Morasoh*, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. Ed. 897. In *Denver v. Bach*, 28 Colo. 530, 58 Pac. 1089, 46 L. R. A. 848, an ordinance affected alike all engaged in selling clothing, but, as a matter of fact, the classification was clearly arbitrary, and not based on reason. There was no real difference between clothiers and other persons selling merchandise under the same circumstances and conditions. Hence the ordinance was held to be class or special legislation. On the other hand, saloon keepers, one class of merchants, may be staged out and made to close their places of business on Sunday. There is a clear difference between saloon keepers and other merchants, based on reason, so wit, public morals, but the law must act uniformly on all saloon

keepers included in its terms, else it becomes class or special legislation. A statute of New York provided that it should be unlawful for any steam railroad to heat its passenger cars in a certain way and exempted from its provisions roads less than 50 miles in length. It was contended that this exemption nullified the act, and the Supreme Court of the United States in *N. Y., N. H. & H. R. R. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853, in reviewing the act, after stating certain reasons why the exemptions of the roads might be considered reasonable, said: "In any event, there is no such discrimination against companies having more than 50 miles of road as to justify the contention that there has been a denial to the companies named in the act of the equal protection of the laws. The statute is uniform in its operation upon all railroad companies doing business in the state of the class to which it is made applicable." A statute of Arkansas classified railroads according to their length, and provided a maximum schedule of passenger rates varying with the length of the road. The Supreme Court of Arkansas, in *Dow v. Beldelman*, 49 Ark. 325, 5 S. W. 297, held that the act operated uniformly on every class, and was not special legislation within the constitutional prohibition. The Supreme Court of the United States, in reviewing the judgment of the state Supreme Court, in 125 U. S. 680, 691, 8 Sup. Ct. 1028, 1031 (31 L. Ed. 841), said: "The Legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freights carried, or of the gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the Legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws." A statute of Michigan classified the roads for the purpose of fixing passenger rates. The maximum rates in the upper peninsula of Michigan were made higher than those in the lower peninsula. Here was a distinction based on location. The distinction between railroads in the upper and lower peninsula of Michigan are no more marked than the distinction between railroads in the mountainous half of Colorado and those on the plains of the state. Speaking with reference to this, the Supreme Court of Michigan, in *Wellman v. C. & G. T. Ry. Co.*, 83 Mich. 592, 47 N. W. 460, said: "And the distinction between the roads of the upper and lower peninsulas must be considered, in the absence of any showing to the contrary, to be a reasonable one." And, after mentioning

the facts upon which to base the reasonableness of the distinction, the court further said: "The conclusion, then, is that the Legislature has the power, under the constitutional provision contained in article 19a, and also independently of it, as shown by the cases cited, to classify the railroads of this state, as it has, according to the amount of business done, and also as to their location in the upper and lower peninsulas." In Arkansas a statute provided that no railroad company should equip any of its freight trains with a crew consisting of less than an engineer, a fireman, a conductor, and three brakemen; but lines of road less than 50 miles in length were exempted from the operation of the act. The Supreme Court of the United States in *C., R. I. & P. Ry. Co. v. Ark.*, 219 U. S. 453, 466, 31 Sup. Ct. 275, 279 (55 L. Ed. 290), said: "Under the evidence there is admittedly some room for controversy as to whether the statute is or was necessary; but it cannot be said that it is so unreasonable as to justify the court in adjudging that it is merely an arbitrary exercise of power, and not germane to the objects which evidently the state Legislature had in view. It is a means employed by the state to accomplish an object which it is entitled to accomplish, and such means, even if deemed unwise, are not to be condemned or disregarded by the courts, if they have a real relation to that object. And, the statute being applicable alike to all belonging to the same class, there is no basis for the contention that there has been a denial of the equal protection of the laws." Thus we have presented statutes classifying railroads as to location, as to character of traffic, and as to length of track, each of which has been held a reasonable classification and not special or a denial of the equal protection of the laws. A statute of Illinois provided for the inspection of coal mines in the state and payment of a fee therefor. The act first provided that it would be unlawful for any person, company, or corporation to operate any coal mine in the state without first having complied with all the conditions of the statutes and paying all inspection fees. Later, the act was so amended that it applied only to coal mines where more than five men were employed at any one time, thus exempting mines where less than five men were employed. The United States Supreme Court in *St. Louis Cons. Coal Co. v. Ill.*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872, upheld this act, and said that that was a species of classification which the Legislature was at liberty to adopt, provided it was not wholly arbitrary or unreasonable, and further held that it was a reasonable classification. A similar statute in Arkansas that applied to coal mines where ten or more men were employed underground and not to mines where a less number were employed was upheld by the Supreme Court of the United

States in *McLean v. Ark.*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315, wherein the court held it was a reasonable foundation for the discrimination, and that it did not deny the equal protection of the law because it applied only to mines employing ten or more men. The court said: "There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the state employing more than ten men underground. It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state and affecting but few men, and not requiring regulation in the interest of the public health, safety, or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the Supreme Court of Arkansas, which has affirmed its validity."

Many other citations could be made showing that courts have upheld statutes classifying subjects of legislation based upon location, or character of traffic, or length of railroad lines. In New Jersey a statute (Supp. Revision 1886, p. 834, § 42) provided that, if any railroad in the state failed to run daily trains for the space of 10 days, a receiver might be appointed for the road, and by the following proviso exempted certain roads, to wit: "Provided, that this act shall not apply to any railroad company whose road is constructed at any seaside resort, not exceeding four miles in length, and which was built and intended merely for the transportation of summer travelers and tourists." Here, precisely as in the Colorado statute, the classification was made with respect to the location, length, and character of traffic of the roads exempted, and the Supreme Court of New Jersey upheld the classification as made. After maintaining that the roads might be classified with respect to location and character of traffic, the court said: "Nor does it appear to us that it was legally objectionable for the Legislature to constitute this special class by a reference to the length of the roads for the purpose of classification. The roads could be grouped in no other way, and, looking at the definition of the objects to which this proviso is to be applied, we cannot say that it is either too broad or too narrow, for it appears to embrace the whole of the class to which it properly relates, and nothing more." *Del. B. & C. M. R. R. Co. v. Markley*, 45 N. J. Eq. 139, 16 Atl. 436. Further authorities could be referred to, but enough has been said to clearly demonstrate that the classification made in the act under consideration is not palpably arbitrary or without reasonable basis, and that, being so,

the only duty remaining for a court is to uphold it. Three cases are cited by the defendants in error, which they insist should govern the disposition of this case. The first is that of *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. There the Legislature passed an act, though general in its terms, but which included only one stockyard, while all other stockyards, surrounded by like circumstances and conditions, were exempted. This appears from the following language of the court: "It may be assumed, for the purposes of the question now to be considered, that, so far as the Constitution of Kansas is concerned, its Legislature may enact a law, general in its terms, and yet so phrased as necessarily to have operation only upon a single individual or corporation, but, while making that concession, we cannot shut our eyes to the fact that this act is precisely the same in its effect as though the Legislature had said in terms that the Kansas City stockyards alone shall be subjected to its provisions." And at the close of the opinion it plainly appears that the judgment of the court in holding that the statute was in violation of the fourteenth amendment was put on the ground solely that it applied only to the Kansas City Stockyards Company, and not to any other company in the state in the same circumstances and conditions. It was a lifting of one stockyards company out of a class to which it undoubtedly belonged, and made the law applicable to it only. Such a law is precisely on the same footing that a law would be lifting out the Colorado & Southern Railroad and making it subject to the law, while all other roads like it would be exempted. Certainly this would be an arbitrary and unreasonable classification, but we have no such a law before us. Such a statute is clearly distinguished in *St. Louis Cons. Coal Co. v. Ill.*; supra, from the one under consideration. Another case cited is that of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. In that case there was under consideration a statute of Illinois defining a trust and declaring illegal "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations," and provided severe penalties for every person violating its provisions. There was exempted from the provisions of the act agricultural products or live stock while in the hands of the producer or raiser. It was pointed out in that case that the agricultural products and live stock in Illinois constitute a very large part of the wealth and property of the state; that persons engaged in trade or in the sale of merchandise and commodities, within the limits of the state, were in the same class as agriculturists and raisers of live stock—that is, that they were all engaged alike in do-

mestic trade—that the exemption of the two particular industries from the statute was not of small consequence, but that it included a large part of the property and of the wealth engaged in domestic trade within the state; that agriculturists and stock raisers could form combinations that would affect the people of the state as greatly as any persons engaged in trade or in the sale of merchandise or commodities in the state; that the two industries which the statute attempted to exempt were engaged in the sale of merchandise to a similar extent and under like circumstances that others were who were subjected to the provisions of the statute. This was all so clearly pointed out by the court that the statute was made to appear like a statute would appear were the common carriers of this state subjected to regulations, and the Colorado & Southern and Union Pacific Railroads exempted from its provisions. There is no such a statute presented to us for consideration, and therefore the case is inapplicable. The same is true of *L. & N. R. Co. v. Railroad Commission* (C. C.) 19 Fed. 679, the third case relied upon by defendants in error.

From what has been said we conclude that the reasons given why the act is unconstitutional are insufficient, and do not demonstrate clearly, palpably, and beyond all reasonable doubt, or at all, that the statute is special legislation, or denies the equal protection of the laws, and in such a case the plain duty of a court is to uphold the act.

[8] The defendants in error contend that, though the law was constitutional, the Commission had no power by the act to fix rates, and that, having exceeded its powers, the complaint was correctly dismissed. It is not clear that the defendants in error have any right to raise such a question on this record, nor is it clear that the district court made a proper disposition of the case even if it be assumed that the Commission had no power to make the order that it did. However, the defendants in error strongly urge this question, and they cannot complain if it be now taken up and determined. What the Commission did was to find what would be a reasonable and remunerative rate, that the rate charged was an unreasonable one, and ordered that the railroad companies should desist and abstain from charging more than the rate found to be reasonable. No claim is made that the rate found to be proper is too low. The act in question is a long one, and, in order to show how far reaching it is, it will be abstracted with some detail. Its intent is to regulate common carriers in this state, and in this regard is very comprehensive as is shown by its title, which is as follows: "An act to regulate common carriers in this state, to create a State Railroad Commission, to prescribe and define its duties, to fix the salaries of the commissioners and of the employés of the Commission, to

prevent the imposition of unreasonable rates and charges, to prevent unjust discriminations, to insure an adequate railway service, to prevent the giving or receiving of rebates, to prescribe the mode of procedure and the rules of evidence in relation thereto, to prescribe penalties for violations of this act, to exercise a general supervision over the conduct and operations of common carriers, and to repeal," etc. Section 1 of the act deals with its application. Section 2 relates to definitions of terms. Section 3 provides that all charges for transportation of property shall be just and reasonable, and prohibits, and declares to be unlawful, every unjust and unreasonable charge for such service or any part thereof. Section 4 prohibits, and declares unlawful, rebates and discriminations. Section 5 provides that it shall be unlawful to give any undue or unreasonable preference or advantage to any shipper or freight traffic, or to subject any particular shipper or freight traffic to any undue or unreasonable prejudice or disadvantage. Section 6 provides that every common carrier shall file and keep schedules of rates, prescribes what the schedules shall contain, and that they shall be posted for inspection. Section 7 provides that no change shall be made in the rates until after 30 days' notice. Section 8 provides that in case any common carrier, subject to the provisions of the act, shall do, cause, or permit to be done anything in the act prohibited or declared to be unlawful, or omit to do anything required to be done, such common carrier should be liable to the one injured for the full amount of damages sustained; and provides for the issuance and effect of bills of lading. Section 9 makes violation of the act a misdemeanor, and provides a penalty. Section 10 makes a soliciting of rebates a misdemeanor, and provides a penalty. Section 11 creates the State Railroad Commission, and provides for the qualification, terms, selection, etc., of commissioners. Section 12 is in part as follows: "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it is created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act, and upon the request of the Commission it shall be the duty of the Attorney General to institute all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof." The section then proceeds further with matters of detail. Section 13 provides that any person, firm, corporation, or association, or any mercantile, agricultural, or manufac-

turing society, or any body politic, or municipal organization, complaining of anything done or omitted to be done by any common carrier, subject to the provisions of the act, or in contravention of any of its provisions, may apply to said commission by petition, and prescribes what the petition shall contain; that the statement of the charges should be forwarded by the Commission to the common carrier complained of, who shall be called upon to satisfy the complaint or to answer the same. If the common carrier makes reparation for the injury alleged, it is relieved of liability for that particular violation of law. If the common carrier does not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Commission to investigate the matter in such manner and by such means as it shall deem proper. Section 14 provides that, whenever an investigation shall be made by the commission, it shall make a report which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises, and these reports shall be furnished to the party who may have complained and to any common carrier that may be complained against and published. Section 15 is as follows: "That the Commission is authorized and empowered and it shall be its duty, whenever after full hearing upon a complaint made as provided herein, or upon complaint of any common carrier, it shall be of opinion that any of the rates, or charges complained of and demanded, charged or collected, by any common carrier or common carriers, subject to the provisions of this act, for the transportation of property, as defined by this act, or that any regulation or practice whatsoever of such common carrier or common carriers affecting such rates or charges, are unjustly discriminatory or unduly preferential, in violation of any of the provisions of this act, to determine and prescribe in what respect and to what extent such rates or charges are so discriminatory or preferential, and what regulation or practice in respect to such transportation is just, fair and reasonable to be thereafter followed, and to make an order that the common carrier shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and such common carrier or common carrier (carriers) shall thereafter conform to the regulation or practice so prescribed. All orders of the Commission shall take effect within such reasonable time not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended, modified or set aside by the Commission, or be suspended, modified or set aside by a court of competent jurisdiction." Section 16 provides that, if after a hearing

the Commission shall determine that a complainant is entitled to damages under the act, it shall make an order directing the common carrier to pay the amount of damages to which complainant is entitled; that it shall be the duty of every common carrier to comply with the order, and, if the order is not complied with, the common carrier so failing shall forfeit to the state the sum of \$1,000 for each offense, and provides for the collection of the forfeiture. Section 17 provides that, if any parties are injured by the failure or neglect of the common carrier to obey any order of the Commission, such party or the Commission itself may apply to a district court for the enforcement of the order, and provides a method of procedure. Section 18 provides for rehearings and pleadings. Section 19 relates to matters of detail. Section 20 gives the district courts jurisdiction, upon the application of the Attorney General, to issue writs of mandamus, commanding common carriers to comply with the provisions of the act. Section 21 provides for an appeal from any order of the Commission to the district court, and from the district court to the Supreme Court. The balance of the act relates to the furnishing of cars to shippers, accidents which result in death, repairs, and increased facilities, all of which are to be controlled and regulated by order of the Commission, and provides for penalties and damages with respect thereto. The defendants in error contend that section 15 of the act, quoted above, gives the Commission whatever authority it may have respecting rates, and that its power as to rates is confined to those that are discriminatory or preferential, and not to those that are unreasonable. It may be said in passing that the Commission found that the rate charged from Walsenburg, in the Southern coal fields, to Denver (a distance of 175 miles, largely on an upgrade), was \$1.60 per ton, a rate less than one cent per ton per mile; and from Trinidad to Denver (a distance of 210 miles, largely on an upgrade) the rate is less than one cent per ton per mile; while from Louisville, in the northern district (an average haul of 25 miles on a practically level grade), the rate was 80 cents per ton, or a little over three cents per ton per mile. Here is a difference in the rate charged, which the Commission, in its findings, substantially said was an unjust discrimination and undue preference shown between different sections and shippers in the state. The defendants in error admit that unjust discriminations and undue preferences to shippers can be corrected by order of the Commission, and it can be said that the effect of the order made is to correct such a condition. But if, however, as defendants in error contend, the order of the Commission deals only with rates from the standpoint of reasonableness, it was nevertheless within the powers of the Commission.

The defendants in error cite the case of *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243, and contend that that decision is controlling here. That opinion was based upon the original Interstate Commerce Act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]); and, if the act of our General Assembly was no stronger in this respect than that act, the case might be controlling. It was held in that case that Congress might itself prescribe the rates, or might commit to some subordinate tribunal that duty, or might leave it to the companies subject to regulations and restrictions. It did not hold that the power to fix rates could not be implied from the language of an act. It did hold that such power is not to be implied from any doubtful and uncertain language. It held that incorporating into a statute the obligation making all charges reasonable and just and directing the Commission to execute and enforce the provisions of the act did not of itself, by implication, carry to the Commission the power of prescribing rates, and that such a power was not expressly granted, and could not be implied from any language of the act. This is far from saying that the power must be expressly given, and that it never can be implied. From what is herein-after said we think that it clearly appears that our Commission was given the power to regulate common carriers, and that this necessarily involves a regulation of rates. Given the regulation of rates, the right to establish a maximum of charge as one of the means of regulation is implied. *Munn v. People*, 94 U. S. 113, 24 L. Ed. 77. Furthermore, as will be seen, our statute expressly authorizes the Railroad Commission to make an order with respect to unjust and unreasonable rates.

The commerce and business of the people of this state, and their prosperity, progress, and equality in such commerce and business are dependent in a very large degree upon the conduct and operations of the common carriers whose business it is to render carrier service to the public. The statute was intended to afford the public means whereby to remedy mischiefs that might arise in this public service. One of the greatest mischiefs that can arise is the charging of unjust and unreasonable rates.

[7] The act is essentially remedial, and, being so, should be liberally construed, to the end that its objects and purposes may be accomplished; that is, "It is the business of the courts so to construe the act as to suppress the mischief and advance the remedy." *State v. F. E. & M. V. R. R. Co.*, 22 Neb. 313, 35 N. W. 118.

As shown by its title set out above, the objects and purposes of the act are broad and comprehensive in relation to common carriers. That title discloses that it was in-

tended thereby to regulate common carriers in the state and to exercise a general supervision over their conduct and operation, and it must be taken that by the act as framed and worded the General Assembly intended to accomplish the design thereof which it expressly stated in the title. As one of the agencies through which the avowed purposes of the act was to be accomplished, the General Assembly created the State Railroad Commission, and in section 12 and elsewhere throughout the act clothed it with extensive authority, and, among other things, the Commission was "authorized and required to execute and enforce the provisions of this act." Section 3 of the act provides that all charges for transportation of property shall be just and reasonable, and declares to be unlawful, and prohibits every unjust and unreasonable charge. As seen in the *Interstate Commerce Commission Case*, supra, the incorporation into the statute of the prohibition against unjust and unreasonable rates, and directing the Commission to execute and enforce the provisions of the act, does not of itself, by implication, carry to the Commission the power to fix a maximum charge; but there is more than that in the present act from which that power must, we think, necessarily follow.

Section 13 provides that every person, etc., may complain, in a petition to the Commission, of anything done, or omitted to be done by any common carrier, or in contravention of any of the provisions of the act, and that if the complaint is not satisfied upon notice, or if there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Commission to investigate it. The charging of an unjust and unreasonable rate is certainly in contravention of section 3 of the act, and can be made the basis of a complaint for an investigation by the Commission under section 13. Section 14 of the Interstate Commerce Act provided that, whenever an investigation shall be made by the Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured and such findings so made should be deemed prima facie evidence as to each and every fact found, and all reports of investigations should be furnished to the party who may have complained and to the common carrier that may have been complained of. It will be noticed that, under that section, all that the Interstate Commerce Commission could do was to make a report which should contain its findings and recommendation. Herein section 14 of our act is essentially different from section 14 of

the Interstate Commerce Act under consideration in 167 U. S., 17 Sup. Ct., 42 L. Ed. Section 14 of our act provides that, whenever investigation shall be made by the Railroad Commission, it shall be its duty to make a report which shall state the conclusion of the Commission, together with its decision, order, or requirement in the premises, and, in case damages are awarded, said report shall include the findings of fact on which the award is made. Our act thus expressly says that the Railroad Commission may make a decision, order, or requirement in case of an investigation of a complaint of anything done in contravention of the act, which includes a complaint of an unjust and unreasonable charge, while the Interstate Commerce Commission could only make a finding and recommendation. Now, if the Commission may make a decision, order, or requirement upon investigation of a complaint of an unjust and unreasonable charge, in the discharge of its duty to execute and enforce the provisions of the act, it certainly may make such order or requirement as is necessary to carry out the purposes of the act. As one of the purposes of the act was to prevent unjust and unreasonable charges and to have the Commission investigate such a complaint, the Commission can certainly make a decision, order, or requirement with reference thereto under the express provisions of section 14. If it decides that the rate is unjust and unreasonable, it would necessarily, in the discharge of its duty, order or require the carrier to abstain from the prohibited charge, else its order or requirement would be a vain and useless thing. When the General Assembly said that the Commission may make an order or requirement upon investigation of a complaint, it certainly included a complaint based on an unjust and unreasonable charge, for there is no language in the statute excluding such a complaint from being investigated and having an order or requirement made thereon. Here is a mode of procedure to enable the Commission to execute and enforce the provisions of the act that embraces a complaint and investigation of a reasonable charge, and certainly the General Assembly did not exclude such complaint and investigation from the procedure provided by it, for there is no language in the act that would point to such exclusion. In making such an order or requirement the Commission would necessarily have to prescribe what a just and reasonable charge would be and order an abatement from the excess. This essential difference pointed out between the present act and the old Interstate Commerce Act alone removes the applicability of that decision to the present act. But there are other essential differences between the acts that fortify us in this conclusion. Section 15 of the Interstate Commerce Act provides that if in any case in which an investigation shall be made it appears to the Commission that anything has been done or omit-

ted to be done in violation of the provisions of the act, or that any injury or damage has been sustained by the party complaining in consequence of any such violation, it is the duty of the Commission to cause a copy of its report in writing thereon to be delivered to such common carrier, together with a notice that it desist from the violation within a reasonable time, and, if within the time specified it appears that the common carrier had ceased from the violation and had made a reparation in compliance with the report and notice of the Commission or to the satisfaction of the party complaining, a statement to that effect should be entered of record by the Commission, and the common carrier would be relieved of further liability. There is certainly very little power granted in that section. Section 15 of our act, however, which is quoted in full above, is much stronger. The defendants in error seek to confine that section to cases of unjust discrimination or undue preference, and not to the unreasonableness of charges. But that section itself expressly states that the Commission may prescribe what regulation or practice in respect to transportation is just, fair, and reasonable to be thereafter followed. It expressly deals with unreasonableness, and the construction of the defendants in error that it deals only with discrimination or preferences is entirely too narrow when the purposes of the act, and the very language of the section itself are kept in view. The charging of any rate for transportation is a regulation with respect thereto. The common-law rule which requires the charge to be reasonable is itself a regulation as to price. *Munn v. People*, supra. The prescribing of a reasonable rate to be thereafter followed is the prescribing of a regulation with respect to transportation to be thereafter followed. And section 15 expressly says that the Commission may do this, and that the common carrier shall thereafter conform to the regulation so prescribed.

More applicable to the Colorado act is the opinion of the court in *State v. F. E. & M. V. R. R. Co.*, 22 Neb. 313, 35 N. W. 118. In respect to this Nebraska case, the Supreme Court of the United States in the Interstate Commission Case, 167 U. S., 17 Sup. Ct., 42 L. Ed., supra, said that, though patterned largely after the Interstate Commerce Act, it gave the Nebraska Commission, called "a board of transportation," wider and more extensive powers than the federal act gave the Interstate Commerce Commission, and thus distinguished the decision. As has been seen, this distinction holds good for the Colorado act. We can say no more in confirmation of our conclusion that the order of the Commission in the present case was within the powers granted it than the Nebraska court said with reference to the act in that state. The quotation reads in great measure as though directed to the Colorado statute when the objects and purposes of the latter act are

kept in view. Beginning on page 828 of 22 Neb., page 125 of 35 N. W., the Nebraska court said: "Here is an act which declares that all charges shall be just and reasonable, prohibits and declares unlawful all unjust and unreasonable charges, which requires schedules of such just and reasonable charges to be posted for the use of the public, and prohibits an advance in rates except upon certain conditions, which prohibits any preference in favor of or against any person or place, which requires the board to investigate all complaints against any railway corporation doing business within the state, and gives such board power to call for persons and papers in order that their investigations may be thorough and the report thereof based upon facts, and also makes their finding of fact prima facie evidence thereof, and requires said board to investigate and prevent any unjust discrimination against either any person, firm, corporation, or locality. These are broad powers. They are not to be restricted. Such powers were conferred for the express and declared purpose of fixing charges which shall be reasonable and just, and prohibiting unjust and unreasonable charges and unjust discrimination. The court has no authority to limit the board in any respect in that regard. Such board is to determine, in the first instance, at least, what are reasonable and just charges, what unreasonable and unjust, and when any person, firm, corporation, or locality is unjustly discriminated against. There can be no restriction of the word 'locality.' It may refer to a village, city, county, or portion of the state, the meaning in each case to be determined by the territory which the board shall find to be unjustly discriminated against. If there is discrimination against any person, firm, or corporation, it is the duty of the board so to find, and to require the railway company to cease its discrimination. To do so such board has the authority to require such railway company to reduce its rates to a reasonable and just standard. The power to fix a reasonable and just rate is clearly conferred on the board, as also the power to determine what rates are unjust and unreasonable. It is the duty of the board to prevent unjust discrimination in all the forms mentioned in the statute, and to do so it may determine what is a proper charge, to and from any points within the state, and its order in that regard based on its findings of facts will be prima facie evidence of the correctness of the order. In the case, under consideration the board found that the rates and charges of the respondent were excessive; in other words, that there was unjust discrimination against that part of the state, and, having so found, the board is clothed with ample power to require such railway company to reduce its rates and charges. The power of the board therefore to establish and regulate rates and charges

upon railways within the state of Nebraska is full, ample, and complete."

From what has been said, it is apparent that the judgment of the district court was wrong, and must be reversed, and it is so ordered and the cause remanded.

Reversed and remanded.

CAMPBELL, C. J., not participating.

(33 Colo. 100)

KENDALL v. PEOPLE ex rel. HOAG.

(Supreme Court of Colorado. May 6, 1912.

Rehearing Denied July 1, 1912.)

1. STATUTES (§ 181*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

In construing statutes, the intention of the General Assembly should be ascertained, if possible; and enforced.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

2. STATUTES (§ 211*)—CONSTRUCTION—TITLE.

In ascertaining the intention of the Legislature in enacting a statute, recourse may be had to the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. § 211.*]

3. CARRIERS (§ 2*)—REGULATION—STATUTORY PROVISIONS.

Laws 1910, p. 45, amending and re-enacting as amended Act March 22, 1907 (Laws 1907, p. 531), to regulate common carriers, did not repeal the earlier act, but merely amended it, repealing its inconsistent provisions, and hence the provisions of the earlier act, not repealed, are to be regarded as having been the law continuously since their first enactment, and the new provisions as having been enacted when the amended act took effect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

4. CARRIERS (§ 10*)—REGULATION—STATUTORY PROVISIONS.

Section 11 of the act of March 22, 1907 (Laws 1907, p. 535), to regulate common carriers, provided for a commission to be known as the "State Railroad Commission." Section 11 of Laws 1910, p. 51, amending the act of 1907, provides for a commission to be known as the "State Railroad Commission of Colorado." Held, that the amendment merely changed the name, and not the identity of the commission, that the office of Railroad Commissioner was the same office under both acts, and the terms of the commissioners the same terms, especially in view of the express provision of section 11 of the act of 1911 that the commissioners then in office should be commissioners for the term for which they were elected.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 14-20; Dec. Dig. § 10.*]

5. CARRIERS (§ 10*)—REGULATION—STATUTORY PROVISIONS—"HEREAFTER."

Section 11, Act March 22, 1907 (Laws 1907, p. 535), to regulate common carriers, provided for a State Railroad Commission composed of three commissioners to be elected at the following general election for two, four, and six years, one commissioner being thereafter elected at each general election for six years. Section 11 of Laws 1910, p. 51, provides for three commissioners, "who shall hereafter be appointed by the Governor," one to be appointed for a term beginning on the second Tuesday in January 1911, and one every two years thereafter. This act went into ef-

fect February 15, 1911, previous to which date the commissioner elected under the earlier act had taken office for the term commencing on the second Tuesday in January. Held, that the provision for the appointment of the commissioner by the Governor for that term was inoperative because impossible to carry out, the word "hereafter" referring to a time subsequent to February 15, 1911, at which time there was no vacancy, and hence the commissioner elected under the old act was entitled to the office for the six year term.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 14-20; Dec. Dig. § 10.*

For other definitions, see Words and Phrases, vol. 4, pp. 3277-3279.]

En Banc. Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Action in the nature of quo warranto by the People, on the relation of Frank S. Hoag, against Sheridan S. Kendall. Judgment for the relator, and the respondent brings error. Reversed and remanded, with directions.

Horace Phelps, of Denver, for plaintiff in error. M. G. Saunders and E. F. Chambers, both of Pueblo, for defendant in error.

MUSSER, J. At the general election held on the 8th day of November, 1910, Sheridan S. Kendall, the respondent below, and plaintiff in error here, was elected to the office of Railroad Commissioner for a term of six years, beginning on the second Tuesday in January, 1911, under the provisions of an act entitled "An act to regulate common carriers," etc., approved March 22, 1907 (Laws 1907, p. 531). In section 11 of that act there was created a State Railroad Commission, composed of three commissioners. The section provided that the Governor, by and with the consent of the Senate, should appoint three commissioners to serve until the second Tuesday in January, 1909, and that at the general election to be held in November, 1908, there should be elected three commissioners for the terms of two, four, and six years, respectively, and that thereafter, at each biennial general election, one commissioner should be elected to serve for six years, beginning on the second Tuesday in January following his election. At the general election in 1908 three commissioners were elected, to wit, W. L. Seely, for the term of two years, ending on the second Tuesday of January, 1911; D. H. Staley, for the term of four years, ending on the second Tuesday in January, 1913; and A. P. Anderson, for the term of six years, ending on the second Tuesday in January, 1915. After his election, and on the second Tuesday in January, 1911, at the close of Mr. Seely's term, Mr. Kendall duly qualified and entered into the office of Railroad Commissioner for the term of six years. A special session of the General Assembly held in 1910 passed an act (Laws 1910, p. 45) professing to amend, and as amended to re-enact

the act of 1907, and section 11 in the amendatory act, so far as the terms and selection of commissioners are concerned, reads as follows: "That a commission is hereby created and established to be known as the 'State Railroad Commission of Colorado,' which shall be composed of three commissioners, who shall hereafter be appointed by the Governor by and with the consent of the Senate: Provided that the three commissioners who were elected in November, 1908, shall be the commissioners hereunder for the terms for which they were elected, that is to say, Worth L. Seely shall be a commissioner to serve until the second Tuesday in January, 1911; Daniel H. Staley shall be a commissioner to serve until the second Tuesday in January, 1913, and Aaron P. Anderson shall be a commissioner to serve until the second Tuesday in January, 1915; one commissioner shall be appointed by the Governor to serve for six years, beginning on the second Tuesday in January, 1911, and every two years thereafter one commissioner shall be appointed for the term of six (6) years beginning on the second Tuesday in January after each general state election." This amendatory act contained no emergency clause. It was filed in the office of the Secretary of State without the approval or disapproval of the Governor, and under the Constitution went into effect on the 15th day of February, 1911. On the 3d day of May, 1911, the Governor, assuming to act under the provisions of the amendatory statute, appointed Frank S. Hoag, the relator, to the office of Railroad Commissioner for the term of six years, beginning on the second Tuesday of January, 1911. After his appointment on May 3d, Mr. Hoag qualified for the position, and made a demand on Mr. Kendall for the office. On being refused, Mr. Hoag, as relator, caused an action to be brought in the district court in the nature of quo warranto to oust Mr. Kendall. This action resulted in a judgment of ouster against the latter, and he now prosecutes this writ of error to review that judgment.

The relator contends, first, that the act of 1910, by virtue of which he was appointed, became effective on February 15, 1911, and at that time operated to repeal the act of 1907, and particularly section 11 thereof, and to abolish the office then held by the respondent; second, that the act of 1907 was unconstitutional because it exempted from its operation mountain railroads operating less than twenty miles of road, the principal traffic of which is the hauling of mineral from and supplies to mines, in that such exemption rendered the act special or class legislation prohibited by the Constitution of Colorado, and denied the equal protection of the laws contrary to the federal Constitution. The relator has furnished a very elaborate brief on the constitutional questions raised, wherein his counsel with great dili-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

gence have collected many authorities, and have presented and discussed them with great learning. We admit the law as contended for, but we are unable to apply it to the act of 1907 so as to overthrow that statute. The constitutional questions now raised were discussed and determined, contrary to the contention of relator in case No. 7,203, *Consumers' League of Colorado v. Colorado & Southern Railway Co.* et al., 125 Pac. 577. It is therefore unnecessary to discuss them again, and we content ourselves by holding the act of 1907 constitutional for the reasons expressed in that other opinion. The relator contends that the act of 1910, or rather 1911 (as it went into effect in February, 1911), repealed the act of 1907, and abolished the office of Railroad Commissioner, to which the respondent was elected in November, 1910, so that the latter office went out of existence, and that the office and term to which relator was appointed is not the office and term to which respondent was elected and which was abolished.

[1] In order to determine this contention, it is necessary to ascertain, if possible, the intention of the General Assembly that passed the act of 1911, for it is the intention of the legislative body, exercised within constitutional limitations, that is to be enforced. *Stanley v. Little P. M. Co.*, 6 Colo. 415-419; *Arapahoe Co. v. Hall*, 9 Colo. App. 538, 49 Pac. 370.

[2] In order to ascertain this intention, recourse may be had to the title. *Callahan v. Jennings*, 16 Colo. 471, 27 Pac. 1055.

[3] The title of the act of 1911 is: "An act to amend and as amended to re-enact an act, entitled (quoting the title of the act of 1907), and to repeal all acts or parts of acts inconsistent herewith." This title evidences an intention to amend the act of 1907, and only to repeal acts inconsistent with the new act. Section 1 of the new act is as follows: "Section 1. That an act entitled (quoting the title of the act of 1907), approved March 22, 1907, be and the same is hereby amended and as amended re-enacted to read as follows." Here again is an expressed intention to amend the act, and not to repeal it. Section 24, art. 5, of our Constitution provides that statutes shall be amended only by re-enacting and publishing at length the portions affected by amendments, and, as said in *Callahan v. Jennings*, supra: "This constitutional provision settles beyond peradventure the effect of amending a law with the introductory phrase, 'so as to read as follows,' or any other language showing clearly the intent only to amend. When a statute is thus amended, it is not accurate to say that a repeal thereof has taken place." It may not have been necessary to have used the words "and as amended to re-enact." Their only effect, and therefore they must have been used for that purpose, is to give added emphasis to the fact that the Legislature desired the unchanged portions of the law to continue un-

interrupted, for while this court has held that the unchanged portions are not to be considered as repealed and re-enacted, but as the law all along, other courts have said that the unchanged portions are repealed and re-enacted at the same instant of time, and are therefore considered to have been the law all the time. 26 A. & E. Ency. of Law, 706. So that, if to amend an act and at the same time re-enact it as amended effects a repeal, the repeal and re-enactment occur at the same instant of time and the unchanged portions are the law all along. The last section of the act says: "All acts and parts of acts inconsistent herewith are hereby repealed. All parts of the act hereby amended and not re-enacted in this act are hereby repealed." It was the inconsistent parts of the other act, and the parts thereof that were left out of the amendatory act that were repealed. After section 1 and following the words "to read as follows," the amendatory act begins with section 1 and proceeds largely as rescript of the old act, changing here and adding there, leaving out some provisions of the other and resectionalizing toward the close. From all this it seems manifest that it was not the intention of the General Assembly to repeal the act of 1907, but to amend it, carry it along, and continue it in force except in so far as the amended act was inconsistent with and changed from the old act. The act having been thus amended, it is the law of this state that "the original provisions, in so far as they reappear in the amended act, are to be regarded as 'having been the law since they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect.'" *Callahan v. Jennings*, 16 Colo. 471, 27 Pac. 1055, supra. To the same effect is *People v. Board of Equalization*, 20 Colo. 220, 37 Pac. 964.

[4] Section 11 of the act of 1907 creates the Commission in these words: "That a commission is hereby created and established to be known as the State Railroad Commission, which shall be composed of three commissioners." Reference to section 11 of the act of 1911, quoted above, reveals that it is an exact copy of the act of 1907 with reference to the creation of the Commission, except that the words "of Colorado" are added to the name. The entity, the body politic, has not been changed, only its name. The name of a corporation may be changed, but the change in the name does not change the identity of the corporation. True, the qualifications and manner of selection of the commissioners are also changed, but that cannot change the identity of the Commission. The words of creation that brought the Commission into life are changed only in the name, and that life is not taken away by a change of name when the creative words have been the law all along. Thereafter, throughout the act, the Commission is spoken of and its powers and duties prescribed in the same

words as in the original act. If the General Assembly intended to abolish the Commission, surely some disposition would have been made of its books, papers, and records, something would have been done for the continuance of its orders, which the act provided should remain in force for a prescribed period, not exceeding two years, and something would have been said so as to preserve actions arising out of the act of 1907 or the orders of the Commission. Nothing was said in the new act about these matters. We do not think that the General Assembly intended to repeal the act of 1907 and abolish the Commission, and thereby destroy and abate all these things. We must therefore conclude that the State Railroad Commission of Colorado is the same entity as the State Railroad Commission created in 1907, and that the office of Railroad Commissioner has been one and the same office all the time.

The terms of the commissioners prescribed in the act of 1911 are the same terms prescribed in the original act. They begin and end at the same time. Indeed, this is emphasized; for section 11 of the new act specifically says that the commissioners then in office "shall be the commissioners hereunder for the terms for which they were elected"—not for some new term. The terms, therefore, were not changed, and the law of 1907 creating them, and by virtue of which they came into existence as their natal days arrived, has been the law all along.

[5] Now Mr. Kendall was elected under the provisions of an existing law to an existing office for a term to begin in the future. Under that law, he entered into that office on the second Tuesday in January for an existing term. On the 15th day of February, while he was in that office for that term, a law went into effect that did not change the office, nor the term. Now it is sought to put him out by virtue of this law. That is absolutely impossible, for there is no such virtue in the law. Section 11 of the act of 1911 says that the commissioners "shall hereafter be appointed by the Governor by and with the consent of the Senate. * * * One commissioner shall be appointed by the Governor to serve for six years, beginning on the second Tuesday in January 1911, and every two years thereafter one commissioner shall be appointed for the term of six (6) years beginning on the second Tuesday in January after each general state election." From this it is seen that the change made has reference only to the manner of the selection of the commissioners. The new provision is for their appointment, instead of election. This new provision is to be considered as enacted at the time the amended act took effect, to wit, on February 15, 1911 (Callahan v. Jennings, supra), so that the word "hereafter" has reference to a time

subsequent to that date. The first appointment that could have been made after that date was to fill a vacancy should one occur. If no vacancy occurred, the first appointment provided for is one for the term beginning on the second Tuesday in January, 1913. There was no vacancy in Mr. Kendall's office, and he has nothing to do with the term beginning January, 1913. The section provides that the Governor shall appoint one commissioner to serve for the term of six years beginning on the second Tuesday of January, 1911. When the law went into effect, that term was filled, so that it was absolutely impossible for the Governor to fill it. Instead of saying that it was the intention of the act to operate on a previous election, and thus laying the provision for the appointment to Mr. Kendall's term open to an attack as being contrary to section 11 of article 2 of the Constitution against retrospective laws, it is more proper "to say that the portion of the act is inoperative because it commands a thing to be done which in the nature of things cannot be done." *Slip v. People*, 26 Colo. 127, 56 Pac. 571.

Having discussed this case at more length than was perhaps necessary, and being unable to find anything whereby to sustain the judgment of the lower court, that judgment is reversed and the cause remanded, with instructions to dismiss the complaint.

Reversed and remanded, with instructions.

CAMPBELL, C. J., and WHITE, J., not participating.

ATCHISON, T. & S. F. RY. CO. v. GUMAER.

(Court of Appeals of Colorado. July 8, 1912.)

1. RAILROADS (§ 446*)—INJURY TO ANIMALS ON TRACK—NEGLIGENCE—EVIDENCE.

In an action for the killing and maiming of cattle on a railroad track, evidence held sufficient to take the issue of defendant's negligence to the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

2. RAILROADS (§ 441*)—INJURY TO ANIMALS ON TRACK—BURDEN OF PROOF.

In an action for the killing and maiming of cattle on a railroad track, the burden resting on the plaintiff to prove that his damage resulted from the defendant's negligence was not shifted by mere proof that the cattle were killed and injured by the defendant's train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.*]

3. WITNESSES (§ 400*)—CONTRADICTED EVIDENCE—IMPEACHMENT.

While the plaintiff could not impeach the veracity of defendant's employé whom she offered as her own witness, she was not precluded from producing other witnesses whose testimony conflicted with his.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1268, 1269; Dec. Dig. § 400.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. RAILROADS (§ 446*)—INJURY TO ANIMALS ON TRACK—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for the killing and maiming of stock on a railroad track, the evidence is such that fair-minded men might differ as to whether the defendant's employes could have prevented the accident by ordinary care, the question of defendant's negligence is for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

5. WITNESSES (§ 317*)—JURY—DELIBERATIONS.

If the jury believe that any witness has willfully testified falsely as to any material point, they may disregard his entire testimony except in so far as it is corroborated, but to warrant such action the false testimony must be "willfully" given.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1080-1083; Dec. Dig. § 317.*]

6. APPEAL AND ERROR (§ 273*)—PRESENTATION BELOW—EXCEPTION—INSTRUCTION.

A particular statement comprising only a part of the instruction cannot be reviewed upon general exception to the entire instruction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1620-1630, 1764; Dec. Dig. § 273.*]

Appeal from District Court, Fremont County; Lee Champion, Judge.

Action by E. L. Gumaer against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry T. Rogers and Rogers, Ellis & Johnson, all of Denver, for appellant.

WALLING, J. This action was brought by appellee to recover damages by reason of the killing and maiming of a number of appellee's cattle, on the track of appellant's railroad; it being alleged that the cattle were so killed and injured in consequence of the negligent operation of one of appellant's trains. The trial was before the court and a jury, and resulted in a verdict for the plaintiff, upon which the court subsequently gave judgment.

Appellant's counsel, in their brief, insist that the judgment should be reversed by reason of errors alleged to have occurred in the trial of the cause in these particulars: First, because the court denied the defendant's motion for a nonsuit, at the conclusion of plaintiff's evidence in chief, and refused to direct a verdict in favor of the defendant, upon all of the evidence; and, second, because the court did not instruct the jury as requested in defendant's request numbered 7, but did give instruction No. 11, which was a part of the court's charge. The argument of appellant's brief in support of the objections included under the first head is based upon the one proposition, that there was no evidence of negligence on the part of the defendant to charge it with legal responsibility for the accident, which was the basis of the action. No brief has been filed on behalf of appellee. It is not questioned that 22 cattle belonging to the plaintiff were

killed and injured by one of appellant's trains, and there is no controversy as to the extent of the damage sustained.

[1] The trial took place about nine years after the event which gave rise to the action. One of the witnesses called by the plaintiff was the engineer, in the employ of the defendant, who had charge of the locomotive of the train by which the cattle were killed and injured, and he gave the following testimony: The train consisted of either two or three cars, besides the engine, and was running eastward, at a speed of 25 or 27 miles an hour, at the time of the accident, which occurred at about 9 o'clock in the evening of May 24th. Immediately after the engine had rounded a certain curve, the engineer discovered the cattle on the track; those nearest the engine being about 35 to 45 feet distant from the engine, when it was on the straight track immediately east of the curve. He could not see the cattle sooner, because of the curve in the track, which prevented the headlight from illuminating the track, and right of way for any considerable distance. He immediately blew the whistle, and employed every means of stopping the train, and the engine stopped about 70 to 75 yards from its position when the cattle were first in the engineer's view. The first of the animals was struck 35 or 45 feet from the position of the engine when they were first seen by the engineer. After the train was brought to a standstill, the engineer saw a number of the cattle, which had been either killed or injured, lying near the track, along the entire train's length, from about the point at which, as he said, the first was struck. There were also a large number of cattle on the track ahead of the engine, and upon the right of way. That particular train, at the speed at which it was traveling, on a downgrade, could have been stopped ordinarily within a distance of 70 to 75 yards, and it was so stopped, after the engineer first saw the cattle.

From this brief statement of the testimony of the engineer, Williams, it is certain that, so far from sustaining the plaintiff's contention that the cattle were killed and injured through the negligence of the defendant, it indicated care and caution in the operation of the train, under the circumstances detailed by him.

[2] There is no doubt, moreover, that the burden was on the plaintiff to prove that the loss sustained was the result of the defendant's negligence, and, failing in such proof, she was without a cause of action. This burden was not shifted by mere proof that plaintiff's cattle were killed and injured by the defendant's train. *Chicago, etc., Co. v. Church*, 49 Colo. 582, 114 Pac. 299.

[3] But the question whether the issue of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

negligence ought to have been submitted to the jury did not necessarily depend upon the testimony of a single witness and its accompanying inferences. The plaintiff, having offered the engineer as her witness, could not impeach his veracity; nevertheless, she was not precluded from producing other witnesses in support of her case, whose testimony conflicted with his in certain essential particulars. *Pacific, etc., Co. v. Van Fleet*, 47 Colo. 401, 107 Pac. 1087.

[4] It was the just conclusion; from the engineer's testimony, that the train was brought to a stop at practically the earliest possible moment, after the cattle could have been seen by him by the exercise of any reasonable degree of diligence. At the same time, the conclusion was inseparable from the facts, as stated by him, among others, that he first saw the cattle immediately after the engine had passed the curve, and that he stopped the train within approximately 75 yards of the position of the engine when they were so discovered. If there was other testimony before the jury, which tended to establish a different condition of facts, leading to an opposite conclusion, and from which the jury might reasonably have inferred that the accident could have been prevented by ordinary care on the part of defendant's employes, it was proper to leave the determination of the facts, as well as the just inferences from the facts found, to the consideration of the jury. "When the facts, or the inferences to be drawn therefrom, are in any substantial degree doubtful, or fair-minded men might reach different conclusions from the facts, the only proper rule is to submit the question to the jury for determination." *Denver, etc., Co. v. Wright*, 47 Colo. 306, 107 Pac. 1074.

Other witnesses on behalf of the plaintiff, one of whom was the plaintiff's husband, and another an employe in charge of the farm whereon the cattle were pastured, were at the scene of the accident on the morning after it occurred, and they testified to the effect as next hereafter stated. Between 1,100 and 1,500 feet from the most easterly point of the curve mentioned in the engineer's testimony, 22 head of plaintiff's cattle were found on the defendant company's right of way, 4 or 5 of them dead, and 8 or 9 so badly crippled and maimed that they were of necessity forthwith killed by the railway company's employes. Nine others were more or less seriously injured. The 13 cattle killed by the train and the defendant's sectionmen, were found, according to the statements of plaintiff's witnesses last mentioned, strewn along the track, between points 1,100 feet and 1,500 feet east of the most easterly point of the curve. The distance from the curve to the nearest animal was stated to have been about 1,100 feet, by one, and 1,200 feet, by others. They agreed that the one found farthest east was about 1,500 feet from the curve; the distances in all cases being approxima-

tions of the witnesses, not verified by actual measurements. One of these witnesses testified that, where the dead and maimed cattle were found, there was much hair and blood on the track, and other marks on the ground, indicating that the cattle had been there struck and dragged along by the train. He said that these physical indications were upon and near the track, commencing about 1,100 feet, and extending to a point about 1,500 feet east of the east end of the curve. The defendant called as a witness the section foreman, who had arrived at the place where the cattle were found, earlier than plaintiff's witnesses mentioned, and who described the general situation and condition of the dead and maimed animals, without substantial variance from the statements of plaintiff's witnesses, except that the foreman declared that the animals, found dead, or in such condition that they must be killed, were strewn along near the track, between 250 and 500 feet distant from the east point of the curve. The proof showed that the track was perfectly straight for the distance of more than 1,500 feet east of the east point of the curve. There was other evidence, having greater or less materiality to the issue of the alleged negligence of the defendant, which will not be discussed, for the obvious reason that it is not our province to pass upon the weight of the evidence.

It can scarcely be questioned that the circumstances detailed in the testimony of plaintiff's witnesses, who were at the locality of the accident on the morning after it occurred, were inconsistent with the testimony of the engineer, that the first of the cattle was struck at a point approximately 45 feet east of the position of the engine when it completely rounded the curve, and the remainder at intervals of a few feet, until the train was stopped; whether it was stopped within the distance of 75 or 100 yards. There was testimony to the effect that the train could have been brought to a full stop within the distances last mentioned. It may be remarked here that the testimony of the section foreman, as to the places where the cattle were found on the morning after the accident, while far from agreeing with that of the plaintiff's witnesses to the same point, had no tendency whatever to corroborate the engineer's recollection of the locality of the accident with reference to the curve in the track; and that appears to be true generally of the testimony introduced by the defendant bearing on that subject. The conflict in the evidence above referred to involved not only a matter of fact, but also the legitimate inference to be drawn from the circumstances of the accident.

That these cattle were killed and injured by the engineer Williams' train, was sufficiently established by proof, and that fact does not appear to be controverted. Beyond that, there was evidence from which the jury might have found that they were struck

at a place where the track was perfectly straight for many hundred feet east of the approaching train, and in circumstances justifying the inference that they could, by the exercise of ordinary care, have been discovered in time to prevent the accident by stopping the train, and we must presume from the verdict that they so found. Our conclusion is that there was competent evidence before the jury, which required the submission of the issue of negligence to their determination. *Railway Co. v. Charles*, 36 Colo. 221, 84 Pac. 67; *Railway Co. v. Boyd*, 44 Colo. 119, 96 Pac. 781.

[5] The defendant requested the court to give the following instruction: "Instruction No. 7, requested by defendant. The jury are instructed that, if they believe that any witness has willfully testified falsely as to any material point in the case, they are at liberty to disregard his entire testimony, except in so far as it is corroborated by other witnesses, or by facts or circumstances proved in the trial."

This annotation was made upon the written request, and signed by the trial judge, "Amplified and given as amplified." The bill of exceptions recites: "Said instruction was amplified and given as amplified, and to the refusal of the court to give said instruction No. 7 requested by defendant in the form as requested, defendant then and there by its counsel duly objected and excepted." Instruction 11, given by the court to the jury, contained several distinct propositions. The first was that the jury were the sole judges of the credibility of the witnesses. Following that, the jury were told that, in determining the weight to be given to the testimony of any witness, they had a right to consider his interest in the result, his relation to or connection with the party for whom he testified, etc. The last part of the instruction was in this language: "And if you believe that any witness has sworn falsely to any material matter in the case, then you are at liberty to disregard the entire testimony of such witness, except in so far as the same shall be corroborated by the testimony of other credible witness or witnesses."

[6] A general exception was noted by defendant to the giving of instruction 11. It is not claimed that any of the propositions included in that instruction were incorrect, except the sentence last above quoted. Consequently, by the well-settled rule, that particular statement cannot be reviewed upon the general exception to the entire instruction. "Unless, in an appropriate way, an exception to an instruction is made in the court below, so that its attention is directed to the error of law complained of, the instruction will not be considered on review. This court will not review instructions which the trial court was not given an opportunity

to correct." *National Fuel Co. v. Green*, 50 Colo. 307, 324, 115 Pac. 709, 715. Also, *Beals v. Cone*, 27 Colo. 473, 62 Pac. 948, 83 Am. St. Rep. 92; *City of Pueblo v. Timbers*, 31 Colo. 215, 72 Pac. 1059; *Hasse v. Herring*, 36 Colo. 383, 85 Pac. 629. It is true that the last sentence of instruction 11, as given, stated the law incorrectly, and that defendant's requested instruction numbered 7 was right, and should have been given. Of course, the trouble with the instruction given was that the jury were told that, if they believed that a witness had sworn falsely to any material matter of fact, they were at liberty to disregard the entire testimony of the witness, except so far as corroborated, without reference to whether or not the false swearing was intentional or corrupt. *Gottlieb v. Hartman*, 3 Colo. 53; *Last Chance M. & M. Co. v. Ames*, 23 Colo. 167, 172, 47 Pac. 882; *Ward v. Ward*, 25 Colo. 33, 39, 52 Pac. 1105.

The court did not refuse to give the instruction as requested by the defendant, but, on the contrary, evidently intended to make it a part of the general instruction touching the credibility of witnesses. There is no reason to suppose that he deliberately misled the jury, in the face of numerous decisions of the Supreme Court announcing the correct rule, or that he would have declined to insert the omitted word "willfully" in the last sentence of the instruction given, if his attention had been called to the omission. In the circumstances presented, we think that it was the duty of the defendant to specially direct the attention of the court to the error in the form of the instruction given, and, as it does not appear that that was done, the appellant is not in a position to insist upon its exception based on the failure to give its requested instruction, in the language of the request. This conclusion is the more satisfactory, because there is little reason to suppose that the defendant was prejudiced by the failure to give the instruction requested, in addition to instruction 11; no available exception having been taken to the latter.

There are no other matters urged by counsel for the reversal of the judgment, and it is affirmed.

Affirmed.

EMPIRE RANCH & CATTLE CO. v. HOWELL.

(Court of Appeals of Colorado. June 10, 1912.)

1. EJECTMENT (§ 24*)—TITLE OF DEFENDANT—LIMITATIONS—PAYMENT OF TAXES.

A payment of taxes by defendant in ejectment made after the filing of the complaint is not available as a defense, and he cannot invoke the seven-year statute of limitations.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 94-98; Dec. Dig. § 24.*]

2. EJECTMENT (§ 12*)—TITLE OF DEFENDANT.
Where the title of defendant under a tax deed is paramount, it cannot be disturbed or injured by a trustee's deed under which plaintiff in ejectment claims.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 47-55; Dec. Dig. § 12.*]

3. EJECTMENT (§ 12*)—TITLE OF DEFENDANT.
Where in ejectment defendant's claim of title under a tax deed is bad, he is not concerned with defects, if any, in a trustee's deed under which plaintiff claims, or antecedent instruments and proceedings on which it is based.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 47-55; Dec. Dig. § 12.*]

4. MORTGAGES (§ 374*)—FORECLOSURE—TRUST DEEDS—RECITALS—EVIDENCE.

The recitals in a trustee's deed on foreclosure of a trust deed are prima facie evidence of the facts therein stated, though the trust deed does not in terms so provide.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1118-1123; Dec. Dig. § 374.*]

5. EJECTMENT (§ 95*)—TITLE OF PLAINTIFF—TRUST DEED.

The recitals in a trustee's deed on foreclosure under which plaintiff in ejectment claims are prima facie evidence of the facts therein stated, and, in the absence of anything to contradict or impeach the recitals, plaintiff makes sufficient proof of title to put defendant on his proof.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.*]

6. PROCESS (§ 96*)—SUBSTITUTED SERVICE—AFFIDAVIT.

A decree quieting title based on substituted service in which the affidavit for publication fails to state the post office address of defendant, or that the same is unknown to affiant, is void because of the defect in the affidavit.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

7. TAXATION (§ 761*)—TAX DEEDS—INVALIDITY.

A tax deed which recites that the treasurer on October 31st exposed to public sale parcels described, and that he offered and re-offered for sale from day to day until October 31st, and that he bid off the parcel at such sale, is void on its face because showing a sale to the county on the first day of sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509-1513; Dec. Dig. § 761.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Lardner Howell against the Empire Ranch & Cattle Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

PER CURIAM. [1] 1. Appellee, as plaintiff below, brought his action in ejectment. The answer was a general denial. Six months thereafter the defendant company filed what is denominated a supplemental answer, wherein it sets up as a defense the payment of the taxes on the land in question for the year 1907, and on this new fact thus pleaded defendant attempts to invoke the seven-year statute of limitations. The payment of the taxes pleaded in the supple-

mental answer having been made after plaintiff filed his complaint cannot avail the defendant as a defense, and we need not further consider any contention based on the statute of limitations.

[2-5] 2. On the trial, plaintiff, to support his claim of title, introduced a patent from the government, a trust deed from the patentee, and a trustee's deed running to himself and based upon a foreclosure of the aforesaid trust deed. The trustee's deed contained the usual recitations authorizing the trustee, who was a substituted trustee, to act. Defendant strongly objects to the trustee's deed, insisting that the recitations therein are not binding on it, since it, the defendant, claims paramount title by virtue of a tax or treasurer's deed. If the title of defendant be paramount, then it cannot be disturbed or injured by the introduction of the trustee's deed; at most, its introduction would be immaterial. If the defendant's claim of title is bad, then it is not concerned with the defects, if any, in the trustee's deed, or the antecedent instruments and proceedings upon which it is based. *Foster v. Clark*, 121 Pac. 130. Moreover, it has been expressly ruled in this state that the recitations of a trustee's deed are prima facie evidence of the facts therein stated, even where the deed of trust does not in terms so provide. *Carico v. Kling*, 11 Colo. App. 350, 53 Pac. 390, and cases there cited. No evidence having been offered by the defendant tending in any wise to contradict or impeach the recitals in the trustee's deed offered by plaintiff, we must hold that he made sufficient proof of his title to put the defendant on his proof.

[6] 3. The defendant based its title on two tax deeds and a decree of the county court purporting to quiet title to the land in question in defendant. The decree of the county court pleaded was based on substituted service in which the affidavit for publication failed to state the post office address of the defendant, or that same was unknown to the affiant. Under the rule announced in *Empire R. & C. Co. v. Coldren* (Sup.) 117 Pac. 1005, which rule has been later affirmed by the Supreme Court, the decree of the county court pleaded by the defendant was, because of the defect in the affidavit of publication, void and properly excluded by the trial court. There are other fatal defects pertaining to the decree of the county court which we need not consider.

[7] 4. The first tax deed offered by the defendant was offered merely as color of title. Therefore we need not further consider it. Indeed, it does not appear in the bill of exceptions, except by the merest reference. The second tax deed offered by defendant in support of its title is clearly void on its face for several reasons, but one of which we shall consider. According to the

recitals in said deed, the land therein described and involved in this case was sold to the county on the first day it was offered for sale. The recitals supporting this statement are (omitting unnecessary phrases) as follows: "Whereas the treasurer of said county did on the 31st day of October, 1896, * * * severally expose to public sale * * * the several parcels of real property above described; * * * and whereas, thereupon the said treasurer * * * did offer and reoffer for sale from day to day until the 31st day of October, * * * said treasurer did bid it off at such sale," etc. It is true the phrase "from day to day" would indicate that the land was offered for sale on different days, were it not for the fact that it appears clearly from the language preceding this phrase that October 31st (which it is recited was the last day of the tax sale) was the first day that the land in question was reached and offered in the tax sale proceedings. The numerous opinions involving tax titles, and questions pertaining thereto, that have been recently rendered by the Supreme Court, and by this court, make it unnecessary to pass upon all the questions that are presented by the record in this case.

The judgment of the trial court is correct, and should be affirmed.

Affirmed.

ANIMAS CONSOL. DITCH CO. v. SMALLWOOD et al.

(Court of Appeals of Colorado. July 8, 1912.)

1. CONTRACTS (§ 147*) — CONSTRUCTION — INTENT OF PARTIES — CONSTRUCTION AS A WHOLE.

The intention of the parties to a contract should govern, and the contract should be construed as a whole in the light of known physical facts concerning the matters affected by the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

2. WATERS AND WATER COURSES (§ 254*) — EVIDENCE TO AID CONSTRUCTION — PRESUMPTIONS.

A party in the business of supplying water for irrigation, in making a contract to furnish water, must be presumed to have known at the time the physical facts affecting the agreement and to have contracted accordingly.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. § 254.*]

3. CONTRACTS (§ 170*) — CONSTRUCTION OF PARTIES.

The practical interpretation of a contract given to it by the parties while engaged in performance and before any controversy is the best indication of its true intent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

4. CONTRACTS (§ 147*) — CONSTRUCTION — OBJECT OF PARTIES.

In the construction of a contract, the object of the parties at the time of making it should be considered.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

5. WATERS AND WATER COURSES (§ 254*) — IRRIGATION — AGREEMENT TO FURNISH WATER.

An irrigation company, on acquiring a right of way over plaintiff's land, entered into a written contract by which it agreed to furnish him four cubic feet of water per second, to be delivered from boxes to be constructed and maintained by the company at places upon its land designated by plaintiff not exceeding eleven in number, "provided the total capacity of all of said boxes shall not exceed four cubic feet of water per second," and that the grantor should have the right at all times to open and close the boxes as he wished. Held, in an action for an injunction and for damages, that plaintiff, in order to secure the delivery of the agreed amount of water, was not required to use all the boxes at the same time, running at their full capacity to supply the total amount, but was entitled to use such of the boxes as he might wish, the total capacity of which should not exceed four cubic feet of water per second.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. § 254.*]

Appeal from District Court, La Plata County; Charles A. Pike, Judge.

Action by Oscar L. Smallwood and another against the Animas Consolidated Ditch Company. Judgment for plaintiffs, and defendant appeals. Modified and affirmed.

—Ritter & Buchanan, of Durango, for appellant. O. S. Galbreath, of Durango, for appellees.

SCOTT, P. J. The complaint of the plaintiffs in this case, filed in the district court of La Plata county on the 6th day of January, 1908, alleged in substance that their grantor, William Embling, was on the 12th day of March, 1900, and prior thereto, the owner in fee of a tract of land situated in section 36, township 37 N., range 9 W., together with a water right of four cubic feet of water belonging thereto, and a ditch and right of way for said ditch to convey said water from the Animas river, from which said water was taken, to and on the said lands for irrigation and domestic purposes; that the defendant, the Animas Consolidated Ditch Company, at that time, desiring to construct its ditch across said lands, and for the purpose of securing right of way for their ditch over the lands of Embling, entered into a written contract with him for such purpose. In this contract it was agreed that Embling should make, execute, and deliver to the defendant a quitclaim deed to the right of way for defendant's ditch along the line of Embling's ditch then existing, and 12½ feet on each side of the center thereof. It was further agreed that the defendant company should construct and enlarge the said ditch, and maintain and operate the same and keep it in repair at its own expense, in such manner that, at all times during the irrigation season, at least four cubic feet of water will run through the same upon the lands of Embling. That part of the agreement in dis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pute in this case is as follows: "And the party of the second part agrees that it will during all such time deliver to the party of the first part, upon the land above described, four cubic feet of water per second of time, which said water shall be delivered at such places upon said land as the party of the first part shall designate in writing before the completion of said ditch, not exceeding eleven places, said delivery to be made from boxes to be constructed, operated and maintained by the party of the second part, of such capacity as the party of the first part may designate, provided the total capacity of all said boxes shall not exceed four cubic feet of water per second of time, provided further, that said party of the first part shall have the right at all times to open and close the said boxes as he may desire."

The complaint further alleged that it was the intention at the time to secure to the said Embling the convenient and efficient use of four cubic feet of water for irrigation purposes; and that the lands are so situated that it is impossible to successfully or conveniently irrigate the lands of the plaintiff except by the use of the number of boxes named in the agreement; and that the use of the proviso therein contained, that "the total capacity of all of said boxes shall not exceed four cubic feet of water per second of time," if construed as defendant contends, was a mistake and was intended to mean that no more than four cubic feet of water should be used at any one time. The complaint further alleged that the company enlarged said ditch as agreed, and upon its own initiative placed ten boxes on the lands of the plaintiffs, and at the points suggested by the said Embling, and that the same have been operated since 1902 and for six consecutive irrigation seasons; that the defendant company on or about the 1st day of June, 1907, forcibly caused eight of the said boxes to be closed down so that plaintiffs were unable to use the same, and by reason of which action their crops were destroyed in the year 1907, to their damage in the sum of \$500. It was further alleged that, if defendant continues to keep the boxes so closed, plaintiffs will suffer irreparable damage. The prayer of the complaint was for actual damage and for injunctive relief.

The answer of the defendant is an admission of the allegations as to the contract and as to the action of the defendant in closing down the eight boxes referred to. The answer further alleged the right to do this under the terms of the agreement, and denied damage.

The findings of the court appear to be fully justified by the evidence. These findings were in substance as follows: That the plaintiffs are the owners and occupants of the land in question. That irrigation is essential to cultivation and successful raising of crops on the land. That the plaintiffs are

the owners of four cubic feet of water per second of time, which has been applied to domestic and irrigation purposes on said lands for many years past. That plaintiffs planted said lands to crops for the year 1906, as well as for many years last past. That defendant is a corporation and owner of the ditch known as the Animas Consolidated Ditch, which takes its waters from the Animas river from a point on said river above the lands of the plaintiffs. The court further found as a matter of law: That by virtue of a contract made and entered into by and between the defendant and one William Embling, from whom plaintiffs derived their title and rights to said lands and waters for irrigation and domestic purpose, the defendant is bound to carry for plaintiffs four cubic feet of water per second of time through its said ditch from the said Animas river to and upon the lands of the plaintiffs; the same to be delivered upon said lands at such places upon the same as the said William Embling should designate not exceeding eleven places. That said water shall be delivered as aforesaid from boxes as constructed, operated, and maintained by the defendant, of such capacity as should be designated by the said Embling, and that the said Embling shall have the right to continue to open and close said boxes as he may desire. The court further found: That at or about the time of the completion of the defendant's ditch, and at the request of the said Embling, defendant placed ten boxes in its said ditch through which the said Embling and his successors in right have from year to year received and applied said four cubic feet of water per second of time to domestic and irrigation purposes on said lands. That the plaintiffs have a right to the use of any amount of water not exceeding four cubic feet per second of time at any and all times during the irrigation season, through any one or more of said boxes as he may desire, provided that the total amount so used by him through any one or more or all of said ten boxes at any time shall not exceed the total amount of four cubic feet per second of time.

It was further found by the court that it is the duty of this defendant to keep and maintain the said ten boxes as at present located along the line of said ditch, and to deliver on the lands of said plaintiffs through the said boxes the said four cubic feet of water, or any part thereof as plaintiffs may desire at any or all times, without let or hindrance, and for that purpose to allow the plaintiffs to open and close the boxes, or either of them, as they may choose. It was further found that heretofore and during the irrigation season of 1906 (and this seems to be a clerical error because the complaint and the testimony shows this to have occurred in 1907) the defendant wrongfully closed, or caused to be closed, a number of

boxes and refused to allow the plaintiffs to open them or to use water through them, to plaintiffs' great and irreparable damage and injury. The court further found that by reason of this act plaintiffs suffered damage to their crops in the sum of \$100. The defendant was forever enjoined from interfering with or preventing plaintiffs from opening or closing the ten boxes heretofore used by them for receiving and applying four feet of water per second of time to domestic and irrigation purposes on their lands as they may choose, whether they open or close one or more or all of said boxes at the same time. The defendant was further enjoined from nailing up said boxes or in any manner interfering with their use by the plaintiffs. The court also enjoined the plaintiffs from using more than four cubic feet of water at any one time. It is from this judgment and order that the defendant appeals.

Substantially all of the contention of the appellant is based on the proviso in the agreement, "provided the total capacity of all of said boxes shall not exceed four cubic feet of water per second of time," and it is argued that, while the plaintiffs may under the agreement have ten boxes, yet the total measuring capacity of all these shall not exceed four cubic feet, as water is measured, and that therefore the court by its judgment has made a new contract for the parties.

[1] The contract should be construed as a whole and in the light of well-known physical facts concerning the matters affected by the agreement. The intention of the parties should govern. *Fearnley v. Fearnley*, 44 Colo. 422, 98 Pac. 819; *C. B. & Q. Ry. Co. v. Provolt*, 42 Colo. 103, 93 Pac. 1126, 16 L. R. A. (N. S.) 587; *Thilitt v. Mann*, 104 Fed. 421, 43 C. C. A. 617; *San Miguel G. M. Co. v. Stubbs et al.*, 39 Colo. 365, 90 Pac. 842; *True v. Rocky Ford Canal & Land Co.*, 36 Colo. 43, 85 Pac. 842.

Embling, at the time of the agreement, owned a ditch and the right to the use of four cubic feet of water per second of time and was in the actual use of this water for the purpose of irrigation through his own ditch, on the very lands now owned and irrigated through the ditch of defendant. It is clear from the whole agreement that Embling did not intend to release or relinquish to the defendant any right or privilege he then enjoyed. These were to be preserved to him by the defendant, who in consideration was to secure the right of way alone, to carry its waters through an enlarged ditch over Embling's lands.

The testimony shows that, by reason of the unevenness of the land, it is necessary to have the number of boxes which had been used for years, under the agreement, in order to properly and efficiently irrigate his lands. It is true that defendant's engineer testifies that this water could otherwise be used by constructing another ditch below

and parallel with defendant's ditch, involving the use of flumes over the uneven land; but the plaintiffs were under no obligation to do this. The evident purpose and declaration of the agreement was that the water was to be used directly from defendant's ditch, and to accomplish this the large number of boxes to be used was agreed on. It is further made clear by the evidence that the boxes must be of sufficient size to give head so as to permit the water to pass through in order to perform the service intended; and, also, that to use ten boxes so small that the total carrying capacity would be four cubic feet per second of time was not, and could not be, sufficient to make proper use of the water in the irrigation of plaintiffs' lands.

It is common knowledge that force and volume are essential for the purpose of proper delivery of water in such case. It was clearly not contemplated, and is not in evidence, that plaintiffs used all of these boxes at any one time. It is not reasonable to believe that either party to the agreement intended that, in order to secure the delivery of the four feet of water, Embling should use ten boxes at the same time, and that these should be all running at the limit of capacity. That the right to use such of the boxes and at such times as the plaintiffs may require for the sufficient irrigation of their lands, limited to the four cubic feet, seems beyond question, for it is so expressed in the contract, wherein it is said: "Provided further that said party of the first part shall have the right at all times to open and close the said boxes as he may desire."

It is apparent from the testimony that for the court to construe the contract as intended by appellant would be to deny the plaintiffs the very rights possessed before the contract and guaranteed under it; that is to say, the proper and efficient use of four cubic feet of water for the irrigation of his lands.

[2] The defendant was and is in the business of supplying water for irrigation. It must be presumed to have known all these physical facts at the time, and contracted accordingly. But it is apparent that the defendant did not at the time construe the contract as it now contends, for it constructed the ten boxes that were afterward and now used by plaintiffs, and placed them under its own construction of the agreement, and at the places indicated by plaintiffs' grantor, and continued to so maintain them for six consecutive years thereafter.

[3, 4] The best indication of the true intent of the parties to a contract is the practical interpretation given by the parties while engaged in their performance of it and before any controversy had arisen, and the object of the parties at the time should be taken into consideration. *Manhattan L. Ins. Co. v. Wright*, 126 Fed. 82, 61 C. C. A. 138; *Orman v. Potter*, 46 Colo. 57, 102 Pac.

893; Jennings v. Brotherhood, 44 Colo. 77; 96 Pac. 882, 130 Am. St. Rep. 109, 18 L. R. A. (N. S.) 109, 16 Ann. Cas. 787.

[5] But the judgment of the court in so far as it limits the plaintiffs to the use of four cubic feet of water at any one time, was not sufficiently specific as to meet a fair construction of the agreement, which under all the circumstances may reasonably be said to have intended that the total capacity of the boxes used at any one time shall not exceed four cubic feet of water per second of time. It would not seem to be a fair interpretation of the agreement upon its face, nor under the action of the defendant, to say that plaintiffs were to be permitted to use all of the ten boxes so placed and having a total capacity of much more than four cubic feet of water at any one time. Neither can it be fairly said that it was intended to limit the plaintiffs to a fewer number of boxes than stipulated in the agreement, and afterwards placed by the defendant, for the convenient and efficient use of the water to which plaintiffs were entitled for the irrigation of their lands.

The order of the court should have confined the plaintiffs to the use of four cubic feet of water, the amount originally owned by their grantor and reserved in the agreement, and should have also restricted plaintiffs to the use of this water in such manner that they will not be permitted to use a greater number of boxes, of whatever capacity at any one time, the total capacity of which boxes so in use shall not exceed four cubic feet of water per second of time.

With such modification of the order of the court, the judgment is affirmed. All the Judges concurring.

INTERNATIONAL IMPROVEMENT CO. v. WAGNER.

(Court of Appeals of Colorado. July 8, 1912.)

1. BUILDING AND LOAN ASSOCIATIONS (§ 1*) —WHEAT CONSTITUTES—STATUTORY PROVISIONS—CONTRACTS.

Under Mills' Ann. St. § 279, and Mills' Ann. St. Rev. Supp. § 280, providing that building and loan associations shall conduct their business with their members exclusively, and that the words "Loan and Building Association," "Building Association," or "Building and Loan Association," shall form part of the corporate name of every such corporation, where a contract provided for the making of payments to a corporation, whose name did not contain the words in question, and for the lending of money thereafter by the corporation, or the application of the money paid to the purchase of real estate from the company at any time, and also provided that the owner of the contract should not be liable for any obligations of the company, it is not a contract between a building and loan association and one of its members, such as would bind the holder to abide by the by-laws of the com-

pany in the matter of the rescission of the contract and his withdrawal therefrom.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. CONTRACTS (§ 194*)—CONSTRUCTION—GRANTING OF OPTION.

A contract with a corporation, providing that, in consideration of the payment of certain monthly sums, the holder "may borrow," at any time after two years, 75 per cent. of the amount paid in, gave the company no option as to whether it would make the loan, but gave a clear right to its holder to borrow the money without condition.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 828, 903; Dec. Dig. § 194.*]

Appeal from District Court, Denver County; Carlton M. Bliss, Judge.

Action, by John M. Wagner against the International Improvement Company, From a judgment for plaintiff, defendant appeals. Affirmed.

Tolles & Cobbe, of Denver, for appellant; Bartels, Blood & Bancroft, of Denver, for appellee.

SCOTT, P. J. This is an action by the appellee for breach of contract upon what purports to be a bond of appellant, the substantial part of which is as follows: "This is to certify that, in consideration of the payment of five hundred and eighty (580) dollars to be paid upon delivery of this bond, and of the payment of twenty (20) dollars to be paid on the first day of every successive month for a period of 115 months from the date hereof, the International Improvement Company promises and agrees to pay to John M. Wagner, of Ogden, state of Utah, the sum of four thousand (\$4,000) dollars, at its office at Denver, Colorado 97/12 years from the date hereof. This bond is subject to the provisions hereon indorsed, which are hereby referred to and made a part of the same. This bond may be applied to the purchase of real estate for sale by the company, subject to its regular selling conditions. It may be transferred by indorsement and record thereof on the books of the company acknowledged hereon. In witness whereof, the International Improvement Company has caused this bond to be signed by its president and attested by its secretary at its office at Denver, Colorado, this first day of January, A. D. 1906."

The bond contained 12 subject provisions or indorsements, entitled "Privileges and Conditions." Of these, it is necessary to notice two only:

"First. At any time with interest and profits added; to apply in the purchase of real estate for sale by the company, subject to its regular selling conditions."

"Fourth. At any time after two years the legal holder of this bond may borrow 75 per cent. of the amount paid in, with bond to maturity by complying with its conditions."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

The complaint set up two causes of action; but a demurrer was sustained to the second cause, and the trial was had upon the first. This alleged, among other things, a compliance with all the terms and conditions of the bond, and the payment by the plaintiff to defendant of the principal sum of the bond on the day of its date, together with 30 monthly payments of \$20 each; also failure and refusal upon the part of the defendant to comply with provisions 1 and 4, as above set out, in that the defendant had failed and refused to sell the plaintiff real estate and apply the accrued values thereon as agreed; also failure and refusal to loan to the plaintiff 75 per cent. of the value as agreed in provision 4. The prayer was for damage in the sum of \$1,180, being equal to the total amount paid by the plaintiff, including the monthly payments.

The answer admitted the failure to make the agreed loan to the plaintiff, but alleged, as a reason therefor, that there was not, and had not been since plaintiff's application, sufficient funds on hand to make such loan, and that there were other applications for loans antedating that of plaintiff, not yet complied with, and that plaintiff would be made a loan, if he was entitled to one, when his turn is reached on the books of the company. The answer further denied the allegation as to failure and refusal of the defendant to apply the payments he had made upon the purchase of real estate. The evidence offered upon the part of the plaintiff seems to fully support the complaint.

The defendant interposed a motion for nonsuit, presumably, as gathered from the language, upon the ground that the complaint does not state facts sufficient in law to constitute a cause of action against the defendant. This motion was overruled, and, the defendant declining to offer any testimony, the court directed a verdict in the sum of \$1,211.43, which apparently equals the amount paid by the plaintiff on the contract, including interest from the date of the filing of the complaint.

[4] The argument of appellant appears to be based upon the theory that the defendant is a building and loan association, and that this is a case of withdrawal; but, if it is, there is nothing in the contract or the record which so indicates. The defendant is a Colorado corporation. "That all associations organized under the general incorporation laws of this state, for the purpose of the accumulation and loan of funds, the erection of buildings, the acquiring of homes, and the purchase, lease and sale of real estate for the mutual benefit of its members, shall be permitted to conduct such business with its members exclusively." 1 Mills' Stat. § 279. "The words 'Loan and Building Association,' 'Building Association,' or 'Building and Loan Association,' shall form part of the corporate name of every such corporation." 1 Mills' Stat. Supp. § 280. Besides, provision

11 of "Privileges and Conditions" expressly recites: "Eleventh, This bond being the contract between the owner and a corporation, the owner is not liable for any obligations of the company." This would seem to exclude any possibility of mutual rights, benefits, and obligations applicable to the members of a building and loan association, made necessary under the statute, although both parties on the trial seem to have treated the defendant as such.

The proof, then, having sustained the complaint, we have before us only the legal question as to the sufficiency of these, involved in the refusal of the court to grant a nonsuit.

It is urged by appellant that, before plaintiff can recover, he must show that there are funds in the hands of the defendant which can lawfully be applied to the making of a loan. Many cases are cited in support of this contention; but these are all cases between members of building associations themselves, in which there were mutual agreements between the members, and where all alike are bound by the by-laws of the societies.

This is not a case involving the question of withdrawal as a member of such an association, but, on the contrary, involves the question of the surrender of a contract with the company, in which the holder is not shown to have any other interest.

As before recited, in the case at bar, it is expressly agreed in the bond that the same is a contract between the holder and the corporation. There is nothing to indicate, either in the bond or the record, that the plaintiff was a member of the association, or had any interest in it, except as the purchaser and holder of its bond. Hence the cases cited can have no application.

This is clearly an action for breach of contract, in which the plaintiff seeks to recover upon a contract with it to the effect that, if plaintiff shall make the agreed payments as therein provided, he may surrender such contract at any time, and have the money paid on it, together with interest and profits, applied in the purchase of real estate for sale by the company, subject to its regular selling conditions; and, further, that at any time after two years the legal holder of the bond may borrow 75 per cent. of the money paid in by complying with the conditions of the contract.

The evidence shows that the defendant refused to sell the plaintiff real estate, but based such refusal on the statement that it had no real estate that it was in a position to dispose of.

[2] It is not necessary to discuss this alleged breach; for there was a clear breach of that provision of the agreement providing for a loan to plaintiff of 75 per cent. of the money he had paid in. It is contended that the words "may borrow" made this optional with the defendant as to whether or not it should make plaintiff the loan. We do

not think so. We regard it as the clear right of the plaintiff, under the contract, to borrow this sum of money, and the clear obligation of the company to make the loan without any condition. It was plainly one of the inducements and considerations of the contract; and the failure of the defendant to meet its obligation in this respect was such a breach of the agreement as is actionable.

The judgment is affirmed. All the Judges concurring.

COORS v. BROCK.

(Court of Appeals of Colorado. July 8, 1912.)

1. EVIDENCE (§ 32*)—JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

The court does not take judicial notice of municipal ordinances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. § 32.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Where, in an action for injuries to a bicycle rider in a collision with a team of defendant, the evidence showed that plaintiff traveled alongside of defendant's wagon about three feet from the curb and directly opposite the driver on the wagon, that the team turned toward the curbing and knocked plaintiff down, a charge that it was plaintiff's duty to keep out of the way of the team, if it suddenly turned in stopping or in meeting another vehicle, was properly refused as invading the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—STREETS—COLLISIONS—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a bicycle rider in a collision with a team caused by the team suddenly turning to the right toward the curb while plaintiff was riding between the curb and the team, the question of defendant's freedom from negligence, on the theory that the swerving of the team was justifiable, held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.*]

4. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

In an action for injuries to a bicycle rider in a collision with a team swerving toward the curb while plaintiff was riding between the team and the curb, an instruction that, if the driver of the team did not know of plaintiff's situation in time to avoid a collision, there could be no recovery, was properly refused because omitting the qualification that the driver might, by ordinary care, have known of plaintiff's situation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

5. TRIAL (§ 295*)—INSTRUCTIONS—SUFFICIENCY.

Where the court correctly charged on contributory negligence and declared that all the instructions must be taken as a whole, an instruction omitting all reference to contributory negligence, was not erroneous on that ground.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

6. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence and supported by evidence, if believed, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3987; Dec. Dig. § 1002.*]

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Albert W. Brock against Adolph Coors. From a judgment for plaintiff, defendant appeals. Affirmed.

Ezra Keeler, of Denver, for appellant. Bicksler, Bennett & Nye, of Denver, for appellee.

KING, J. This case was before the Supreme Court upon a former appeal in which a judgment for the plaintiff was reversed, because of error in certain instructions given by the court to the jury. Coors v. Brock, 44 Colo. 80, 96 Pac. 963. The cause was again tried, and upon verdict of the jury judgment was rendered, from which the defendant again appealed.

The complaint alleged that, while plaintiff was riding a bicycle near the intersection of Lawrence street in the city of Denver, defendant's servant so negligently and carelessly drove a two-horse team and wagon that, without fault or negligence on the part of plaintiff, the horses of defendant struck plaintiff and threw him off his bicycle upon the ground, thereby inflicting injuries to his person and bicycle, for which he seeks compensation.

The answer admitted defendant's ownership of the team and wagon, and that the same was being driven by defendant's servant, that while plaintiff was riding his bicycle he came into collision with defendant's horses and was thereby thrown from the bicycle to the ground, but avers that plaintiff's alleged injuries were caused through the negligence of plaintiff, directly contributing thereto in consequence of his riding into and against one of defendant's horses, without fault or negligence on the part of defendant or his servant. All other averments of the complaint were denied by the answer, and all averments of new matter in the answer were denied by reply.

A rather full statement of the evidence as it appeared upon the first trial is given in the opinion delivered by Mr. Justice Maxwell in Coors v. Brock, supra, which differs to some extent from the evidence upon the second trial.

Plaintiff's testimony shows that he overtook defendant's team and wagon at the intersection of Curtis street with Nineteenth street, from which point he traveled alongside of defendant's wagon for about 2 blocks, to the corner at Nineteenth and Lawrence streets; that they were traveling upon the

right side of Nineteenth street, plaintiff on his bicycle about 3 feet from the curb and directly opposite the driver upon the front end of his wagon which was nearer the middle of the street than, and about 7 feet from, the plaintiff; that both were going about 8 miles per hour; that while approaching Lawrence street and about 25 feet therefrom, plaintiff saw a street car coming down Lawrence street from Twentieth street, running at a high rate of speed; that he was unable to see the car sooner because of a building upon the corner of the block; that upon seeing the car he suddenly checked the speed of his wheel, intending to run behind the car and down on the right-hand side of Nineteenth street to his place of business; that defendant's team turned suddenly to the right toward plaintiff; that to save himself plaintiff turned into the curbing as closely as he could, but the horses caught him at the corner of the curb, knocked him down, and trampled upon him and his wheel after he struck the ground; that there was nothing to prevent the driver from seeing plaintiff and no obstructions to the left of the driver. Plaintiff was severely and permanently injured. His testimony was supported by a witness to the accident who stated that she saw the driver whirl his horses to the right, throwing plaintiff under the team to the ground.

The driver testified that he did not see plaintiff until plaintiff came into collision with one of the horses; that he first saw plaintiff as he brought his horses to a stop, at which time his horses' heads were near the first rail of the car track crossing Nineteenth street (the car being upon the opposite track); that in stopping his team he pulled it a little to the right, when the wheelman passed from behind the wagon and ran into the off horse. The driver's testimony was strongly supported by some of defendant's witnesses, but in some respects it was not supported. Some of such witnesses testified that plaintiff was riding rapidly with his head down upon the handle bars, and that while so riding he ran into defendant's team. It will thus appear that the testimony was materially and sharply conflicting. There was sufficient competent evidence to justify the jury in finding either for the plaintiff or for the defendant in accordance with their views of the credibility of the witnesses and the weight to be given to their testimony in connection with the conditions and circumstances surrounding the occurrence.

Defendant's assignments of errors raise a number of objections; those relied upon in argument being the refusal of the court to give certain instructions requested by him, and the giving of the second instruction over the objection of the defendant, and refusal to set aside the verdict.

[1] The first instruction requested and

refused related to the law governing the use of vehicles on the street, by which the defendant asked the court to instruct the jury, among other things, that the rider or driver of a vehicle must "keep within 15 feet of the corner of the curb when turning to the right into another street, and it must necessarily follow that, in passing another vehicle going in the same direction, it must pass such vehicle on the left." Certain ordinances of the city of Denver were offered and received in evidence, but there is no such provision in the ordinances introduced. This court cannot take judicial notice of the provisions of ordinances of municipal corporations. *Garland et al. v. City of Denver*, 11 Colo. 534, 19 Pac. 460.

[2] By defendant's instruction No. 2 the court was asked to instruct the jury that, while riding along the street, as shown by the testimony, it was "plaintiff's duty at his peril to keep out of the way of defendant's team in case they should be suddenly turned to the right, either in stopping or meeting another vehicle, or in turning to the right into another street." Such an instruction would have been a clear usurpation of the functions and province of the jury. The evidence did not show acts of plaintiff constituting negligence per se.

[3] By defendant's instruction No. 3 the court was requested to instruct the jury that, under the evidence, if the team was caused to swerve to the right, "such swerving of the team to the right in stopping would be justifiable on the part of the driver, although the plaintiff were riding along by his side." The determination of that question also was one of fact for the jury, and not of law for the court.

[4] By instruction No. 9 the court was requested to instruct the jury that, if the driver of defendant's team did not know of plaintiff's situation in time to have avoided the collision, the verdict should be for the defendant. This instruction, as requested, omitted the very important qualification that the defendant's driver might, by ordinary care, have known the plaintiff's situation.

From the foregoing observations upon the instructions requested and refused, it will appear that the court did not err in refusing to give them in the form requested. Such portions of the instructions requested as state the law, together with other instructions requested and refused, were substantially incorporated into the instructions given by the court.

[5] Error is assigned to instructions numbered 2 as given by the court because it omitted all reference to contributory negligence on the part of the plaintiff. A full and correct statement of the law as to contributory negligence was given in other instructions, and the jury was further admonished that all of the instructions must be taken and considered as a whole.

[8] We think the court did not err in refusing to set aside the verdict, for, while it was manifestly contrary to the evidence of defendant's witnesses, it was in consonance with that of the witnesses for plaintiff, and the mere fact that the jury chose to believe one set of witnesses rather than another is not evidence that the jury acted under the influence of passion or prejudice. The evidence does not warrant the court in holding, as a matter of law, that the injury to plaintiff was caused by his contributory negligence. There is no condition conclusively appearing from the evidence which required defendant's team to be turned or permitted to turn abruptly to the right in stopping for the car to pass, in view of the distance between the team and such passing car; nor reason why, with the exercise of ordinary care, the horses should not have been kept from trampling upon plaintiff after he was down.

Finding no material error in the record, the judgment of the trial court will be affirmed.

(17 N.M. 270)

STATE ex rel. HOLLAMAN v. LEIB.
(Supreme Court of New Mexico, June 17, 1912.)

(Syllabus by the Court.)

1. QUO WARRANTO (§ 1*)—PROCEDURE—TITLE TO OFFICE.

A proceeding by information in the nature of quo warranto to try title to a public office is not a proceeding against the officer as such, but is confined in its scope to an inquiry as to whether the person is lawfully holding the office.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 1, 3, 23, 28; Dec. Dig. § 1.*]

2. JUDGES (§ 14*)—POWERS IN DIFFERENT COURTS—APPOINTMENT BY SUPREME COURT.

Under the provisions of section 15 of article 6 of the Constitution, the Chief Justice of this court has power to designate any district judge in the state to hold court in any district whenever the public business may require, whether the requirement arises out of an undue accumulation of business, or by reason of the disqualification of the district judge to sit in any one or more cases.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 47; Dec. Dig. § 14.*]

3. JUDGES (§ 14*)—JUDGES PRO TEMPORE.

The provision of the section for trials before a member of the bar as judge pro tempore is permissive merely, and does not control the other provisions of the section.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 47; Dec. Dig. § 14.*]

Quo Warranto by the State, on the relation of Reed Holloman, against Thomas D. Leib. Petition dismissed.

The Attorney General, for the State. Renchan & Wright, of Santa Fé, for relator. Jesse G. Northcutt, of Trinidad, Colo., A. A. Jones, of East Las Vegas, and John Morrow, of Raton, for respondent.

PARKER, J. This is an original petition in this court for leave to file information in the nature of quo warranto. The relator was a candidate for the office of district judge of the Eighth judicial district against the respondent at the recent first state election. The respondent received the certificate of election from the canvassing board, and has entered upon the discharge of his duties. Relator alleges in his affidavit accompanying the petition that, while respondent on the face of the returns received the larger number of votes, in fact relator received the larger number of legal votes; the discrepancy occurring by reason of certain alleged irregularities or misconduct in conducting the election in precincts 1, 3, and 16 in Union county. A rule to show cause why leave should not be had to file the information was issued and served, and upon the return day respondent moved to discharge the rule. Several considerations are presented by counsel, some of which will be considered.

1. Counsel for respondent rely upon State ex rel. Owen v. Van Stone, 121 Pac. 611, decided January 20, 1912. In that case, after pointing out that this court, as well as the district courts, has original jurisdiction in these cases in all instances, we said: "This court, in the absence of some controlling necessity therefor, of the existence of which this court is the sole judge in each instance, should decline such jurisdiction, and will do so in all cases brought at the instance of a private suitor. What will be considered by this court as a controlling necessity, it will be impossible, and indeed improper, to attempt to define in advance."

It is urged by relator that a "controlling necessity" exists for this court to assume jurisdiction, for the reason that respondent is in the possession of and exercising the functions of the office of district judge, and, consequently, no other district judge or court has jurisdiction to entertain the proceeding. The proposition is based upon the proviso contained in section 13 of article 6 of our Constitution, which is as follows: "The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and all other writs, remedial or otherwise, in the exercise of their jurisdiction, provided that no such writs shall issue directed to judges or courts of equal or superior jurisdiction."

[1] The argument proceeds upon the theory that a proceeding of this kind against a man holding the office of district judge is a proceeding against him in his official character, and that this is expressly forbidden by the proviso, supra. At first view it would seem that the argument is sound. While the proceeding is not intended to control judicial action in any particular matter, it may seem to be designed to control judicial ac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion by forbidding any such action at all in any case. But this view is superficial and erroneous. The real nature of the proceeding is to inquire into the right of the individual to assume to hold and exercise the functions of a public office, and has no reference, except incidentally, at least, to any official action. Hence the proceeding is purely personal against the individual and not against the officer.

Thus in High's Extr. Legal Rem. § 604, it is said: "Nor does it command the performance of his official functions by any officer to whom it may run, since it is not directed to the officer as such, but always to the person holding the office or exercising the franchise, and then not for the purpose of dictating or prescribing his official duties, but only to ascertain whether he is rightfully entitled to exercise the functions claimed."

So in Attorney General v. Barstow, 4 Wis. 773, it is said: "It is foreign to the objects and functions of the writ of quo warranto to direct any officer what to do. It is never directed to an officer as such, but always to the person—not to dictate to him what he shall do in his office, but to ascertain whether he is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim." See, also, State v. Broatch, 68 Neb. 687, 94 N. W. 1016, 110 Am. St. Rep. 477.

It follows that the argument based on the proviso in section 13 of article 6 of the Constitution fails.

[2] 2. The argument for relator further proceeds to the effect that a controlling necessity exists for this court to assume jurisdiction, because no provision of law exists whereby relator can compel a hearing in the district court. The argument is based upon section 15 of article 6 of the Constitution, which is as follows: "Any district judge may hold district court in any county at the request of the judge of such district. Whenever the public business may require, the Chief Justice of the Supreme Court shall designate any district judge of the state to hold court in any district, and two or more district judges may sit in any district or county separately at the same time. If any judge shall be disqualified from hearing any cause in the district, the parties to such cause, or their attorneys of record, may select some member of the bar to hear and determine said cause, and act as judge pro tempore therein."

It is urged that a proper interpretation of the section limits the procedure, where a district judge is disqualified, to the selection, by agreement of the parties, of some member of the bar to act as judge pro tempore, and it is urged that this might, and, in case the incumbent refused to agree, would, amount to a denial of justice. We think the in-

terpretation too narrow and the argument faulty.

In the first place, power is conferred by the section upon district judges to call in another district judge in any case. We assume, however, that a due sense of the proprieties would cause any district judge to refrain from selecting another judge to try a case involving the very title to the former's office, except upon consent of the opposite party. Under the territorial form of government it was not infrequent, to avoid the expense to litigants on change of venue, to call in another judge to try a case in which the presiding judge was disqualified. But the parties were uniformly consulted as to the judge to be selected.

Again, the Chief Justice has power under this section to designate any district judge to hold court in any district whenever the public business may require. It is not only when the public business may be too heavy for one judge to attend to, but whenever, for any reason, the public business may require, that the Chief Justice has the power to designate another district judge to hold court in any district. If for any reason, therefore, the circumstances arise so that one case or many cases cannot be disposed of in any district, the power of the Chief Justice may be invoked and the remedy applied.

[3] The provision for the selection of a member of the bar to try a given case is merely permissive and does not control the other provisions of the section.

So it appears that no controlling necessity exists for this court to entertain jurisdiction; a speedy and adequate remedy in the district court being available.

The conclusion of the court, in accordance with our former decision in the Owen-Van Stone Case, *supra*, being that it should not entertain jurisdiction of a proceeding of this kind under the circumstances mentioned, it becomes unnecessary, and we deem it improper, to decide in advance the question presented as to the right of trial by jury in quo warranto proceedings; no district court having as yet awarded or denied such right.

For the reasons stated, the rule to show cause will be discharged, and the petition of relator will be dismissed, without prejudice to a renewal of the same in the proper district court.

ROBERTS, C. J., and HANNA, J., concur.

LUND v. GILBERT. (17 N. M. 265)

(Supreme Court of New Mexico. June 14, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 744*)—DISMISSAL—FAILURE TO FILE ASSIGNMENTS OF ERROR.

Where appellant has failed to file assignments of error, within the time required by

section 21, c. 57, S. L. 1907, as amended by section 2, c. 120, S. L. 1909, and advantage is taken of such failure by motion to dismiss before such default has been cured, in the absence of a satisfactory showing, excusing the default, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8043-8048; Dec. Dig. § 744.*]

Appeal from District Court, Chaves County; before Chief Justice Pope.

Action by R. E. Lund against J. C. Gilbert. Judgment for plaintiff, and defendant appeals. Dismissed.

O. O. Askren, of Roswell, for appellant. R. E. Lund, of Roswell, for appellee.

ROBERTS, C. J. The appellant, by an order extending the time to file his transcript, made by the district judge of Chaves county, was given until the 17th day of February, 1912, to file such transcript. The transcript was filed with the clerk of this court on the 3d day of February, 1912, and within the time allowed; but no assignment of errors was filed, and on the 12th day of March thereafter, and after the expiration of the return day, appellee filed a motion to dismiss the appeal, because of the failure to file assignment of errors. Thereafter, on March 21st, appellant filed assignment of errors, but has made no showing as to why the assignment of errors were not filed prior to the return day or the date of the filing of the motion to dismiss the appeal.

By section 21, c. 57, S. L. 1907, as amended by section 2, c. 120, S. L. 1909, the appellant is required to file a copy of his assignment of errors with the clerk of the Supreme Court on or before the return day to which the cause is returnable, and in default of such assignment of errors and filing the same, the appeal or writ of error may be dismissed and the judgment affirmed, unless good cause for failure be shown. In the case of Gause-Langenberg Hat Co. v. Raton National Bank, 124 Pac. 794, decided at the present term of this court, the court in discussing this statute said: "That statute provides that, if the plaintiff in error fails to file an assignment of error on or before the return day, the writ of error may be dismissed and the judgment of the lower court affirmed, upon motion of the defendant in error, unless the plaintiff in error shall show good cause for his default. It has been held in this court that where the motion of defendant in error is filed before the plaintiff in error has cured his default, in the absence of a satisfactory showing excusing the default, the writ of error will be dismissed"—citing Price et al. v. Toti et al., 16 N. M. 1, 113 Pac. 624; Sacramento Irrigation Co. v. Lee, 15 N. M. 567, 113 Pac. 834; Martin v. Territory, 6 N. M. 491, 30 Pac. 951; Lamy v. Lamy, 4 N. M. (Gild.) 29, 12 Pac. 650.

The appellee, having filed his motion to

dismiss, after default of appellant in filing a copy of his assignment of errors, and before such default has been cured by filing such assignment of errors, and no good cause having been shown for the failure to comply with the provisions of the statute, the motion to dismiss the appeal was well taken, and must be sustained, and it is so ordered.

HANNA and PARKER, JJ., concur.

(17 N. M. 367)

TERRITORY v. TURNER.

(Supreme Court of New Mexico. June 14, 1912.)

(Syllabus by the Court.)

HAWKERS AND PEDDLERS (§ 7*)—FAILURE TO TAKE OUT LICENSE—INDICTMENT.

Section 4149, C. L. 1897, as amended by section 4, c. 108, S. L. 1901, makes it a penal offense to refuse or neglect to take out a license and pay the penalty prescribed, within 30 days after receiving a notice from the assessor, as provided in the act, and it is necessary, in an indictment based upon this section, to charge that such notice was received by the defendant, and that he failed, within the time limited, to pay the tax or license.

[Ed. Note.—For other cases, see Hawkers and Peddlers, Cent. Dig. §§ 16-19; Dec. Dig. § 7.*]

Appeal from District Court, Santa Fé County; before Justice John R. McFie.

Pattie M. Turner was convicted of peddling without a license, and appeals. Reversed and remanded.

Marron & Wood, of Albuquerque, for appellant. Frank W. Clancy, Atty. Gen., for the Territory.

ROBERTS, C. J. The appellant was convicted in the district court of Santa Fé county of engaging "in itinerant trade without first having obtained a license as a peddler." A demurrer was filed to the indictment, which was overruled, and the cause was submitted to the court upon an agreed statement of facts, a jury having been waived, and the court, upon such statement of facts, found the defendant guilty. Motion was filed in arrest of judgment, upon the same grounds specified in the demurrer to the indictment. The motion was overruled, and defendant was sentenced to pay a fine of \$10 and costs, from which judgment this appeal is prosecuted. The only question urged upon this appeal is the insufficiency of the indictment to charge an offense against any penal statute of the (then) territory of New Mexico.

The material part of the indictment charges that the defendant "did unlawfully engage in itinerant trade without first having obtained a license as a peddler, and without having any license as a peddler she, the said Pattie M. Turner, then and there selling dry

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

goods and merchandise at retail to individual purchasers, which said purchasers were not dealers in the articles sold, and the same not being maps, books, newspapers, fuel, fruits, and domestic machinery, she, the said Pattie M. Turner, not then and there having a merchandise license." The indictment was apparently drawn under section 16, c. 128, of the Laws of 1905, the material portion of which reads as follows: "Every itinerant vendor who sells or exposes for sale, either at public or private sale, in any county of this territory any manufactured goods, wares, jewelry or merchandise without having first procured a territorial license, and the license from the county in which he sells or exposes for sale such manufactured goods, jewelry, wares or merchandise, as provided for in this act, * * * shall be punished by a fine of not less than \$10, etc."

The Attorney General admits that the indictment is not good, under this section of the statute, because it fails to charge that the defendant was an itinerant vendor, or to charge the acts included under the definition of an itinerant vendor in the first section of the act. The indictment goes no further than to charge that the defendant "did unlawfully engage in itinerant trade." As it is admitted by the state that the indictment fails to charge a violation of this section of the statute, we need not devote further time to a discussion of this issue.

The Attorney General, however, contends that the indictment does charge an offense under sections 4141 and 4149, C. L. 1897. Section 4141 imposes a license tax upon certain vocations and business, among which are peddlers. Section 4149 originally made it a penal offense for any person to carry on any business without a license, for the carrying on of which a license was required by the act of which said section formed a part. But this act was amended by section 4 of chapter 108 of the Laws of 1901, so that it now reads as follows: "Any person, firm or corporation who shall engage in or carry on any business or avocation, for which a license is required without having paid such tax, shall be required to pay double the amount of such tax for the time which expired from the beginning of such business or avocation until a legal application for a license shall have been made; and if such person, firm or corporation shall refuse or neglect to take out a license, and pay the penalty above mentioned, for thirty days after receiving a notice from the assessor, a notice such as is required by section 4155 as amended by section 5 of this act, shall be deemed guilty of a misdemeanor, and, upon conviction, be fined any sum not less than fifty nor more than one hundred dollars, or be imprisoned in the county jail not more than six months."

By this section it will be observed that a person who engages in any business or avocation, for which a license is required, without having paid such tax, shall be required to pay double the amount of such tax for the time which expired from the time he began such business until such tax is paid. It is not made a misdemeanor to engage in business without having paid a license tax, but the party doing so is required to pay a double license or tax. It is, however, made a misdemeanor to refuse or neglect to take out a license, and to pay the penalty, viz., double the ordinary tax or license, within 30 days after receiving a notice from the assessor, as provided in the act. Under this act, if it is still in force, the penal offense is the failure to pay the tax within 30 days after receiving the notice from the assessor. This being true, it would be necessary, in order to charge an offense under this section, to allege that the notice was received by the offending party and that he failed to pay the tax within the time limited. "In those cases, in which the violation of a duty based upon notice is the gist of offense, the giving of the notice must be averred." 22 Cyc. 329.

The indictment failing to allege that such notice was received by the defendant, and the failure thereafter by the defendant for 30 days to pay such tax or license fee, it follows that the indictment was not good under section 4149, supra; and, the indictment failing to charge an offense under either section of the statute, the judgment of the lower court will be reversed, and the cause remanded, with instructions to the lower court to sustain the demurrer to the indictment and the motion in arrest of judgment and discharge the defendant.

HANNA and PARKER, JJ., concur.

(17 N. M. 241)

TERRITORY v. GRAVES.
(Supreme Court of New Mexico. June 14,
1912.)

(Syllabus by the Court.)

1. RECEIVING STOLEN GOODS (§§ 3, 2*)—ELEMENTS OF OFFENSE.

To sustain the prosecution of a prisoner for receiving goods, knowing them to be stolen, four things must be proved:

- (1) That the goods or other things were previously stolen by some other person.
- (2) That the accused bought or received them from another person, or aided in the concealing of them.
- (3) That, at the time he so bought or received them, or aided in concealing them, he knew they had been stolen.
- (4) That he so bought or received them, or aided in concealing them, *mallo animo*, or with a dishonest intent.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. §§ 5, 4; Dec. Dig. §§ 3, 2.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 5993.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. RECEIVING STOLEN GOODS (§ 1*) — SUBSTANTIVE OFFENSE.

The felonious receiving of stolen property, knowing the same to have been stolen, is a substantive offense, and distinct from larceny.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

3. RECEIVING STOLEN GOODS (§ 1*) — EVIDENCE.

One cannot at the same time be a principal in a larceny, and in a legal sense a receiver of the stolen property.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

Appeal from District Court, Chaves County; before Chief Justice William H. Pope.

Richard C. Graves was convicted of receiving stolen goods, and appeals. Reversed and remanded.

Appellant, Richard C. Graves, was indicted at the May term, 1911, of the district court of Chaves county, for the larceny of a cow and for feloniously receiving and aiding in the concealment of said cow, knowing the same to have been stolen. The indictment is in two counts; the first charging larceny, and the second charging receiving and aiding in concealment. Appellant was arraigned May 8, 1911, and pleaded generally to the indictment "not guilty." Trial was had at the then May term, and the jury returned a verdict of "guilty as charged" in the second count of the indictment. The court overruled motions for a new trial and in arrest of judgment, and rendered judgment upon the verdict, and defendant prayed this appeal.

The record discloses that the cow in question was missed by the owner on January 10, 1911, who tracked her until he lost the trail. It was shown that the cow was seen, with other cattle, for several days at a place known as the Berrendo farm; that one of the prosecuting witnesses asked appellant if he knew of any one who had lost the cow; and that appellant replied that she belonged to the section foreman, that he would get the cow and send the owner word or take her to him. It does not appear that the appellant got the cow, but two or three days later, this witness testified, the cow disappeared, and several days later the owner brought the cow back by the place. The owner testified that he recovered the cow about March 5, 1911; that he found her in appellant's pasture.

W. W. Gatewood and R. L. Graves, both of Roswell, for appellant. Frank W. Clancy, Atty. Gen., for the Territory.

HANNA, J. (after stating the facts as above). In the presentation of this case a number of errors are assigned with respect to giving and refusing instructions, and admission of testimony; but, as we have concluded to base our opinion upon the merits

of the case, it will not be necessary to pass upon these assignments of error.

[1] The question of larceny having been eliminated from the case by the verdict of the jury, we will turn our attention to the second count of the indictment upon which the verdict of the jury in this case rests. This count is based upon section 1117 of the Compiled Laws of 1897, which is as follows: "Every person who shall buy, receive or aid in the concealment of stolen money, goods or property, knowing the same to have been stolen, shall be punished by imprisonment in the territorial prison or county jail not more than four years nor less than three months, or by fine not exceeding five hundred dollars."

Our attention has been called to similarity of this statute and the Virginia statute, and the further fact that the Supreme Court of Appeals of Virginia, in the case of *Hey v. Commonwealth*, 73 Va. 946-951 (34 Am. Rep. 799), held that to convict an offender against this statute four things must be proved, viz.: (1) That the goods or other things were previously stolen by some other person. (2) That the accused bought or received them from another person, or aided in the concealing of them. (3) That, at the time he so bought or received them, or aided in concealing them, he knew they had been stolen. (4) That he so bought or received them or aided in concealing them, *mallo animo*, or with a dishonest intent."

It has been said that the general rule, subject to a few exceptions, is that to sustain a conviction on this charge the burden rests upon the prosecution to prove the four distinct elements enumerated above, 10 Ency. of Evd. 665.

[2] Under section 1117 the felonious receiving of stolen property, knowing the same to have been stolen, is a substantive offense, and distinct from larceny. *Huggins v. People*, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357.

[3] We are also of the opinion that, where the evidence shows that the defendant was himself guilty of the theft, there can be no conviction of feloniously receiving the property in question knowing it to have been stolen. *State v. Honig*, 78 Mo. 249.

Among the numerous assignments of error, we deem it necessary to consider but one, viz., the alleged lack of evidence to support the verdict. We are reluctant to base our opinion, in any case, upon insufficiency of evidence; but in this case there is clearly a total failure of proof as to the essential elements, pointed out in this opinion, necessary to constitute the offense charged in the second count of the indictment in this case.

It would appear from the record that the jury mistook the evidence as establishing that appellant was guilty of receiving, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

aiding in the concealment of, stolen property, or both; while, if any criminal offense is proven by the evidence, it is that of larceny.

When the appellant took possession of the cow, at the Berrendo place, he was guilty of the crime of larceny, if he committed any crime at all.

For the reasons assigned, the judgment is reversed, and the cause remanded.

ROBERTS, C. J., and PARKER, J., concur.

(17 N. M. 222)

DEARBORN v. NIAGARA FIRE INS. CO. OF CITY OF NEW YORK.

(Supreme Court of New Mexico. May 15, 1912.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 32*)—AUTHORITY TO SETTLE—SIGNING BY SUCCESSOR.

A bill of exceptions, under the provisions of section 26, c. 57, S. L. 1907, may be settled and signed by the judge who tried the cause or his successor.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 37-41, 194; Dec. Dig. § 32.*]

2. INSURANCE (§ 665*)—FIRE INSURANCE—ACTION ON POLICY.

Evidence examined, and held to justify the action of the court in directing a verdict for the plaintiff, where motion for a directed verdict was made by both parties at the close of the testimony.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.*]

3. INSURANCE (§ 143*)—MISTAKE IN POLICY—REFORMATION.

If the contracting parties to a policy of fire insurance make a mistake in the name of the insured, a court of equity, upon proper proof, has jurisdiction to reform the contract and correct the mistake.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 479; Dec. Dig. § 143.*]

4. REFORMATION OF INSTRUMENTS (§ 19*)—MUTUAL MISTAKE—REFORMATION OF POLICY.

If a party applying for insurance states the facts to the agent, and relies upon the agent to write a policy of insurance that will protect his interests, and the agent so understands, but fails by inadvertence or mistake to so write the contract, the mistake is mutual.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74-78; Dec. Dig. § 19.*]

Appeal from District Court, Curry County; before Justice W. H. Pope.

Action by J. T. Dearborn against the Niagara Fire Insurance Company of the City of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was instituted by the appellee in the court below to recover the sum of \$2,320.77 on account of a policy of insurance issued by the appellant on the 8th day of March, 1909, insuring for a period of 60 days the property described in the policy, which property was destroyed by fire on the 29th day of April, 1909. The policy was issued in

the name of M. Bryant in the sum of \$4,000. The facts, so far as material, are as follows: Appellee was the owner of the lots described in the policy and was having a building erected thereon by M. Bryant, the contractor. The appellee had furnished a large portion of the materials to be used in the building, and had paid to the contractor a portion of the contract price. He applied to the agent of the appellant for a policy of insurance, and stated to him: "I told him that I wanted to take out a builder's risk on this building, and that I was furnishing some of the material. Bryant was the contractor." Appellee testified that that was all the conversation had with the agent at the time he applied for the policy. The agent of appellant, who wrote the policy, testified that appellee came to his office, and asked him to write \$4,000 of builder's risk insurance. He said: "I asked him if I had to write it in his name, and he said, 'Yes,' and then he said, 'Well, Bryant was the contractor,' and I said, 'Well, perhaps I had better write it in Bryant's name,' and that is about all the conversation we had." The same witness, upon cross-examination, was asked the following questions, and made the following answers: "Q. As a matter of fact, Mr. Feagan, at the time of this loss by this fire, you thought that Mr. Dearborn's interest was protected under that policy, didn't you? A. I thought it was by being insured in the policy; yes, sir. Q. And you thought that all along until the adjuster refused to pay it, didn't you? A. Yes, sir; I thought it was in that way. Q. Then, if you thought all along up to the time the adjuster disclaimed the liability, you must have intended that at the time you wrote the policy, didn't you? A. Well, yes; I thought Mr. Bryant was the responsible party by writing the policy that way. Q. You thought Mr. Bryant was the responsible party, yet you thought Mr. Dearborn's interest was protected under the policy? A. Yes, sir; in an indirect way." The agent, after writing the policy, retained it in his office until after the loss. The appellee by his complaint sought to have the policy of insurance reformed, so that the appellee's name appear therein as one of the insured, and to recover judgment for the amount hereinbefore set out. The appellant admitted the issuance of the policy, but denied that, by inadvertence or mistake of its agent, the name of Bryant was inserted, and appellee's name omitted from the policy, alleged that it had paid to Bryant the loss by him sustained, amounting to the sum of \$1,679, and that it held his receipt therefor. At the close of the testimony the defendant moved the court for an instructed verdict, for the reason that the evidence failed to sustain the allegations of the complaint; that through inadvertence or mistake of its agent the name of M. Bryant only was inserted in the policy. At the same time the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff moved the court to instruct the jury to return a verdict in his favor. The court instructed the jury to return a verdict in favor of the plaintiff in the sum of \$2,320.77. The verdict was returned, and judgment was entered thereon in plaintiff's favor, from which judgment this appeal is taken.

E. W. Dobson, of Albuquerque, for appellant. Harry L. Patton and M. O. Spicer, both of Clovis, for appellee.

ROBERTS, C. J. (after stating the facts as above): The appellee having filed a motion to strike the bill of exceptions from the files, we will first discuss this motion before considering the merits of the case. The motion was based upon the ground that the bill of exceptions was not signed and settled before the judge who tried the case. The cause was tried before Hon. Wm. H. Pope, as judge of the Fifth judicial district, under the territorial form of government. Upon the admission of New Mexico as a state, Judge Pope was succeeded by Hon. John T. McClure as judge of the Fifth judicial district. The bill of exceptions was not presented to Judge Pope, and, the time not having expired within which the same could be settled and signed, the same was presented to and signed by Judge McClure. The appellee claims that the territorial Supreme Court, in the case of *Ross v. Berry*, 120 Pac. 306, held that the bill of exceptions should be settled before the judge who tried the case. The facts, however, in the case of *Ross v. Berry*, supra, were altogether different from the facts in the case now before the court. In that case the bill of exceptions was not signed by the judge who tried the case, or his successor, but was presented to and signed by the judge of another district. The matter of making up a bill of exceptions and settling the same, and the signing thereof, is regulated by statute.

[1] Section 26 of chapter 57, Session Laws of 1907, provides for the settling and signing of a bill of exceptions by "the judge or his successor." Judge McClure being the successor of Judge Pope, as judge of said district, properly signed the bill of exceptions. Therefore the motion to strike the bill of exceptions will be overruled.

[2] This brings us to a consideration of the merits of the controversy. The appellant has assigned numerous grounds of error, but we shall consider only the points discussed by the appellant in its brief. It insists that the evidence did not justify a reformation of the policy, and this requires an examination of the evidence to enable us to determine whether or not there was substantial evidence supporting the judgment in this regard. We have set out in the statement of facts practically all the evidence submitted upon the question of what occurred at the time the application for the insurance policy was made, except the fact that the premium on the policy was paid by the appellee,

or, rather, was charged to the account of the appellee by the agent, who it appears was indebted to the appellee, and the agent remitted to the company the amount of the premium. The court found, and so stated in an opinion rendered at the time of directing the verdict, that the evidence showed that there was a mutual mistake between the plaintiff and the defendant acting through its agent in writing said policy contract.

The appellant relies largely upon the case of the Trustees of St. Clara Female Academy, etc., v. Delaware Insurance Co., 93 Wis. 57, 66 N. W. 1140, for reversal, but, as we read the case, the facts in that case and the one now before the court are not parallel. There a building was in process of erection by a contractor under a contract by which the trustees agreed to procure insurance to protect the interest of the contractor. The agent to whom application was made for the insurance knew nothing whatever about the contract. The application for the insurance policy was made by Sister Mary Edmond, and she described the transaction in respect to the insurance, in substance as follows: "I told Mr. Hobbins I did not understand how insurance was taken out on a building in course of erection, and that I left entirely into his hands to attend to it." On being asked what was said during the interview with the agent in relation to the contractor, and his interest in the building, she answered: "I have no recollection of Mr. McAlpine's [the contractor] name being mentioned." The agent stated, upon being asked if it was his intention when he wrote the policies to protect the interests of all the parties: "I could not say that, as I supposed I insured the sisters." The court in its statement of the facts said: "And the evidence is clear and decisive that the agent, Hobbins, had not been requested by any one to insure McAlpine, or to make him a party to the policies for any purpose whatever. The insurance was made to the plaintiff as owner, and for a period of three years." The court says, in discussing the law: "When it is said that a written agreement may be corrected or reformed so as to express and carry out the intention of the parties, this must be understood as applying to the intention of the parties by reason of some mutual agreement made between them, and upon which their minds have actually mutually met, and not to some real or conjectural intention they may have separately entertained, but which never acquired the character of real contractual intention. As applied to the present case, it was not enough that McAlpine or the plaintiff, or both of them, intended to have the property insured for them as their interest might appear. It was necessary for them, in order to have the relief demanded, that the defendant companies, or their agent, so understood the matter, and undertook or agreed to write the insurance accordingly. While it is not material what language the

parties used to express their mutual intent, the court will carry it into effect and reform the instrument accordingly."

[3] As we view the facts and the doctrine announced in the case just considered, we think it supports the action of the lower court in the present case. It will be noticed that the court holds in that case that it is not material what language the parties use to express their mutual intent, but the question is whether their minds actually met upon a common understanding or mutual intent. In the case now before the court, the appellee applied to the agent of the appellant for the policy of insurance. He stated that he was the owner of the property and was furnishing some of the material, and desired insurance, and that Mr. Bryant was the contractor. It must be understood that no question as to the rights of Mr. Bryant under the policy was before the court for consideration, but the sole question was as to the rights of the appellee thereunder. The agent who wrote the policy admits that the application was made by appellee as stated by him, but says, further, that he asked appellee if the policy should be written in his name, and he said, "Yes," but that thereafter the agent suggested that, as Bryant was the contractor, it should be written in his name, to which appellee made no response. But the agent for the appellant says that he thought he was protecting Mr. Dearborn's interest under the policy, and that he thought Dearborn's interest was protected all along until the adjuster refused to pay it. Another strong circumstance tending to show that it must have been the mutual intention of the parties that the insurance should protect the interest of the appellee was the fact that he paid the premium upon the policy in question. From the facts we believe there was substantial evidence which justified the lower court in arriving at the conclusion that the name of the appellee was omitted from the policy, and that his interests were not protected thereunder by the mutual mistake of the parties. The law in respect to the effect of such a mistake is well settled by the courts. In the case of *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52, Mr. Justice Harlan, speaking for the court, says: "We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. A definite concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, is established by the legal and exact evidence, which removes all doubt as to the understanding of the parties. In the attempt to reduce the contract to writing, there has been a mutual mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property, less than that agreed to be insured. The written agreement did not effect that which the

parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities. In *Simpson v. Vaughn*, 2 Atk. 33, Lord Hardwicke said that a mistake was 'a head of equity on which the court always relieves.' In *Henkle v. Royal Exchange*, 1 Ves. Sen. 318, the bill sought to reform a written policy after loss had actually happened upon the ground that it did not express the intent of the contracting parties. The same eminent judge said: 'No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against fraud in contracts, so that if reduced to writing contrary to the intent of the parties, on proper proof, would be rectified.' In *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559, Chancellor Kent examined the question both upon principle and authority, and said: 'I have looked into most, if not all, of the cases in this branch of equity jurisdiction, and it appears to me established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake, affirmatively by bill, or as a defense.' In the same case he said: 'It appears to be the steady language of the English chancery for the last 70 years, and of all the compilers of the doctrines of that court, that a party may be admitted to show, by parol proof, a mistake, as well as fraud, in the execution of a deed or other writing.' And such is the settled law of this court. *Graves v. Boston Marine Insurance Co.*, 2 Cranch, 419, 2 L. Ed. 324; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Bradford v. Union Bank of Tennessee*, 13 How. 57, 14 L. Ed. 49; *Hearne v. Marine Insurance Co.*, 20 Wall. 488, 22 L. Ed. 395; *Equitable Insurance Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398. It would be a serious defect in the jurisdiction of courts of equity if they were without the power to grant relief against fraud or mutual mistakes in the execution of written instruments. Of course, parol proof in all such cases is to be received with great caution, and, where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character."

If the contracting parties to the policy of insurance made a mistake in the description of the premises, or in the names of the insured, a court of equity, upon proper proof, has jurisdiction to reform the contract and correct the mistake, as held by the Supreme Court of the state of Illinois in the case of *German Insurance Co. v. Gueck*, in a case reported and annotated in 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835. See, also, 19 Cyc. p. 651, and cases cited. From the facts, detailed by the agent of the insurance com-

pany, there is no doubt but that the company, through its agent, undertook to write an insurance policy that would protect Dearborn's interest in the property. Dearborn trusted to the agent to write such a policy, and the minds of the agent and of Dearborn met upon the proposition. It is true Dearborn did not direct how the policy should be written, but he acquiesced in the statement of the agent that it should be written in Bryant's name, but there was a mutual agreement and understanding that a policy of fire insurance should be written that would protect Dearborn's interest in the property. The agent so understood and testified that he thought Dearborn's interest was protected until the adjuster came and refused to pay the loss to Dearborn. Why should not a court of equity reform the contract of insurance as written to conform to the understanding of the parties which it was intended to express, but which it failed to express by reason of the mistake of the parties, as to the law or the facts? If the mistake be treated as a mistake of law, still a court of equity would have the power to reform the contract so as to express and fulfill the manifest intention of the parties to the agreement. *Hunt v. Rousmaniere*, 1 Peters, 1, 7 L. Ed. 27; 19 Cyc. 653. And this is sound in principle.

[4] An insurance agent, not versed in law, and the owner of property desiring insurance, enter into an agreement for insurance. The agent and the party to be insured agree that a certain result shall be accomplished, viz., that a policy shall be written by the agent which will protect the interest of the party applying for the insurance in the property. The premium is paid. A loss occurs, and it develops that through a mistake of fact or law, which is mutual, the agreement as reduced to writing fails to carry out the real contract which the parties sought to enter into. Why should not a court of equity reform the contract, so that it will conform to the real agreement of the parties, and enforce it, where the proof is clear, and there is no doubt of the mistake? We think every principle of justice and right demands the correction of the mistake and the enforcement of the contract. In this case the insurance company, through its agent, attempted to write the policy according to the understanding of both parties and to effectuate insurance that would protect Dearborn. Its agent and Dearborn thought this had been accomplished, but it develops that through a mistake either of fact or law the written contract did not express the real agreement of the parties. Under the facts, we think the lower court did not err in reforming the contract of insurance and rendering judgment for the appellee.

The cause is therefore affirmed.

HANNA and PARKER, JJ., concur.

(17 N.M. 188)

MAYS et al. v. BASSETT et al.

(Supreme Court of New Mexico. May 7, 1912.)

(Syllabus by the Court.)

1. JUDGES (§ 29*)—JURISDICTION—TERRITORIAL SUPREME COURT.

Congress and the Legislature intended that the district courts of the territory should be open at all times and that any Associate Justice of the Supreme Court might preside over such court to effectuate such purpose.

Held, that an order signed by an Associate Justice of the territorial Supreme Court, in a district other than his own, reciting that such judge was acting in the absence of the presiding judge, sufficiently discloses the authority of such judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 140-142, 144-152; Dec. Dig. § 29.*]

2. STATUTES (§ 225¼*)—CONSTRUCTION.

All laws enacted at the same session of the Legislature relating to the same subject-matter are in *pari materia*, and are to be considered and construed together as if they were different sections of one act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 804; Dec. Dig. § 225¼.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 91*)—EXPENDITURES—BOARDS OF SCHOOL DIRECTORS.

The provisions of section 1581, Comp. Laws of 1897, are applicable to and binding upon boards of school directors as well as boards of education.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 210; Dec. Dig. § 91.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 80*)—PUBLIC BUILDINGS—SEALED PROPOSALS.

Where a statute requires sealed proposals and letting of contract for public buildings to lowest, responsible bidder, a reasonable public notice is implied from the requirements of the statute.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 191, 192-194; Dec. Dig. § 80.*]

(Additional Syllabus by Editorial Staff.)

5. OFFICERS (§ 55*)—"VACANT."

An office is "vacant" whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-84; Dec. Dig. § 55.*]

Error to District Court, Union County; before Justice Parker.

Action by W. G. Bassett and others against James M. Mays and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

The defendants in error, who were plaintiffs below, filed their petition in the district court of Union county within the Fourth judicial district of the territory of New Mexico, on March 26, 1910, for the purpose of restraining James M. Mays, Rafael Savedra, and Albert W. Farr, who were school directors of school district No. 22, from building a schoolhouse in said district, pursuant to a contract made with C. M.

Williams, and to restrain Joseph Gill, school superintendent, from approving any school warrant issued by said directors in payment for said building, and to restrain Robert Q. Palmer, county treasurer of said county, from paying any such warrant. Upon the filing of said petition, an injunction was issued by Hon. John R. McFie, Associate Justice of the Supreme Court of the territory of New Mexico, and judge of the First judicial district court thereof, restraining said Mays, Savedra, and Farr, as such school directors, from carrying out said contract, and restraining said Williams, the contractor, from continuing the building, and restraining said Gill and Palmer from approving or paying any warrants issued in payment to such builder. The restraining order was signed by "John R. McFie, Associate Justice," without designating what court, or the location of the court, of which he was said associate justice. Said restraining order cited said defendants below, now plaintiffs in error, to appear before the district court of Union county, at Raton, on the 7th day of April, 1910, then and there to show cause why the temporary writ of injunction should not be made permanent. The summons was signed by the clerk of the Fourth judicial district of New Mexico, but was blank as to the authority given by the judge; the reason being that there was no presiding judge at that time in and for the Fourth judicial district of New Mexico, wherein Union county was situate. To this petition and order to show cause the defendants below, now plaintiffs in error, filed their motion to dissolve the injunction, the same being now a part of the record, for the reasons therein disclosed.

Upon the petition and this motion to dissolve a hearing was had before said Hon. John R. McFie, at Raton, on April 7, 1910, and the plaintiffs below asked leave to file an amended petition which was then and there granted, and defendants below again cited to appear and show cause April 19, 1910, to which ruling, order, and judgment of the court defendants below duly excepted. Defendants in error filed an amended petition, and to this plaintiffs in error filed a supplementary motion to dissolve the injunction, and also filed an answer to the amended petition, which answer was made a part of the supplementary motion, the answer denying every material allegation of the amended petition, and was duly verified, and prayed that the injunction be dissolved, the action dismissed, and for damages, with costs of suit. Upon these new issues a hearing was had at Las Vegas, N. M., before Hon. Frank W. Parker, Associate Justice of the Supreme Court of New Mexico, and judge of the Third judicial district court, whilst he was holding court at Las Vegas, in said Fourth judicial district; there being no presiding judge of said Fourth judicial district at the time. A final decree

was rendered herein by Judge Parker, and from this decree plaintiffs in error sued out a writ of error before the clerk of the Supreme Court, bringing the case to this court on error.

H. L. Bickley and J. Leachy, both of Raton, for plaintiffs in error.

HANNA, J. (after stating the facts as above). The defendant in error has filed no brief in this court, and we have been under the necessity of engaging in an unusual amount of research work to arrive at a correct conclusion with respect to the several important questions raised in this case.

The first assignment of error, relied upon by plaintiff in error, is that the injunction should have been dissolved at the first hearing, because the petition was wholly insufficient to give the court jurisdiction to issue the temporary writ; because the judge issuing the temporary writ had no jurisdiction of the subject-matter, or of the parties to the action at the time the order was made; because the jurisdiction of the court nowhere appeared of record in the case.

I. Considering the several grounds of this assignment of error, in their order, we are of the opinion the trial court did have jurisdiction to issue the temporary writ. The court found that the petitioners were resident citizens and taxpayers of school district No. 22, of Union county, and an examination of the record discloses the pleading of all other necessary jurisdictional facts.

II. The alleged lack of jurisdiction in the judge, issuing the temporary writ, over the subject-matter and the parties, raises a question with respect to the jurisdiction of territorial district judges in districts other than those to which they were assigned while acting in such districts after the expiration of the term of the presiding judge of such district, and prior to the assignment of a new judge to said district.

Section 882 of the Compiled Laws of 1897 provides as follows: "When any judge of any district court shall be absent from his district, or shall be in any manner incapacitated from performing any of his duties as such judge, any other district judge in the territory may perform any and all such duties for him the same as he might do if present or able to act. Provided, that nothing herein contained shall be held to require that such other district judge must come within the district of the judge for whom he is acting before he can properly perform such duties as aforesaid." It is apparently urged that this provision of our statutes will not apply to a case arising through vacancy in the office of presiding judge.

[5] It has been said that "vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the Constitution, or law, with an incumbent who is legally qualified to exercise the powers and

perform the duties which pertain to it; and, conversely, it is vacant, in the eyes of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event. *Collins v. State*, 8 Ind. 344-350; *People v. Tilton*, 37 Cal. 614-617; *Pruitt v. Squires*, 64 Kan. 353, 68 Pac. 643.

We find in section 2901 of the Compiled Laws of 1897 further provision in this connection. Section 2901: "When any justice of the Supreme Court shall be absent from his district, or shall be in any manner incapacitated from acting or performing any of his duties of judge or chancellor in his district, or from holding court therein, any other justice of the Supreme Court may perform all such duties, hear and determine all petitions, motions, demurrers, grant all rules and interlocutory orders and decrees, as also all extraordinary writs in said district."

[1] From these two statutory provisions we are clearly of the opinion that it was the intention of the Legislature to cover all circumstances that might prevent, or disqualify, any presiding judge from exercising the duties of his office.

In the case of *Francisco Gonzales y Borrego et al. v. Territory of New Mexico*, 8 N. M. 446-495, 46 Pac. 349, 363, the territorial Supreme Court, referring to the provisions of the Act of Congress of Sept. 9, 1850, c. 49, § 9 Stat. 446, used the following language: "It will be noted that the judicial power which is thus vested in plenary terms in the district courts is to be exercised in each district by one of the justices of the Supreme Court." It does not require that it shall be exercised by any particular one of the justices; and while, for the convenience of the public, a judge is to be assigned to each district, who is required to reside therein, there is no express or implied prohibition upon any judge against exercising power in any district not the one to which he has been assigned. There is nothing in the language of that clause requiring such a construction as will confine the exercise of the power to the particular justice assigned to the district, when that person is otherwise incapacitated."

We are constrained to believe that Congress and the Legislature, in the necessary purpose of providing for the prompt administration of justice, intended that the district courts of the territory should be open at all times and that any associate justice of the Supreme Court might preside over such court to effectuate such purpose.

The Supreme Court of the United States, in the case of *Francisco Gonzales y Borrego et al. v. William P. Cunningham, Sheriff of Santa Fe County*, 164 U. S. 612, 17 Sup. Ct. 182, 41 L. Ed. 572, considered the sources and history of the legislation pertaining to this question of jurisdiction of associate justices of the territorial Supreme Court. The importance of this question and its effect

upon recent litigation in the Fourth district will justify our lengthy quotation from this case. The Honorable Chief Justice Fuller in his opinion in this case said: "The contention here is that the proceedings before Judge Hamilton were coram non iudice and void because, being the member of the Supreme Court assigned to the Fifth district, he could not exercise judicial power in the First district. By U. S. Rev. Stat. § 1851, it was provided that 'the legislative powers of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.' By U. S. Rev. Stat. § 1865, that 'every territory shall be divided into three judicial districts; and a district court shall be held in each district of a territory by one of the justices of the Supreme Court at such time and place as may be prescribed by law, and each judge, after assignment, shall reside in the district to which he is assigned.' By U. S. Rev. Stat. § 1874, that 'the judges of the Supreme Court of each territory are authorized to hold court within their respective districts, in the counties wherein, by the laws of the territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes except those in which the United States is a party.' Section 1907 provided that 'the judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, Montana and Wyoming shall be vested in a Supreme Court, district courts, probate courts, and in justices of the peace.' These provisions, mutatis mutandis, were contained in the organic law of New Mexico. The number of judges of that territory having been raised to five, it was provided by an act of July 10, 1890 (26 Stat. at L. 226, c. 665): 'Sec. 3. That the said territory shall be divided into five judicial districts, and a district court shall be held in each district by one of the justices of the Supreme Court, at such time and place as is or may be prescribed by law. Each judge, after assignment, shall reside in the district to which he is assigned. Sec. 4. That the present chief justice and his associates are hereby vested with power and authority, and they are hereby directed to divide said territory into five judicial districts, and make such assignment of the judges provided for in the first section of this act as shall in their judgment be meet and proper.' Section 1852 of the Compiled Laws of New Mexico of 1884 is as follows: 'When any justice of the Supreme Court shall be absent from his district, or shall be in any manner incapacitated from acting or performing any of his duties of judge or chancellor, in his district, or from holding court therein, any other justice of the Supreme Court may perform all such duties, hear and determine all petitions, motions, demurrers, grant all rules and interlocutory orders and decrees, as also all extraordinary writs in said district.' It appears to us that

this enactment was within the power of the legislative assembly under the Revised Statutes, and that it is not inconsistent with the provision for the assignment of the judges to particular districts and their residence therein. By the organic act and the Revised Statutes, the whole of the judicial power of the territory was vested in the Supreme Court, district and probate courts, and justices of the peace; and the Supreme Court and district courts possessed common-law and chancery jurisdiction. The Supreme Court of the territory held that the judicial power, which was thus vested in plenary terms in the district courts, was to be exercised in each district by one of the justices of the Supreme Court, and that the organic law did not require that it should be exercised by any particular one of the justices; that, while for the convenience of the public it was provided that a justice should be assigned to each district and reside therein, there was no express or implied prohibition upon any judge against exercising the power in any district other than the one to which he has been assigned; and that there was nothing in the language of the provision requiring such a construction as would confine the exercise of the power to the particular justice assigned to a district when he might be otherwise incapacitated."

It should be borne in mind that section 1852 of the Compiled Laws of New Mexico of 1884 appears in the compilation of 1897 as section 2901.

In considering the effect and purpose of this legislation, we are of the opinion that the Honorable Associate Justice John R. McFie had jurisdiction over both the subject-matter and parties at the time he made the order granting the temporary writ of injunction.

III. This leaves but the final objection urged in connection with the first assignment of error, i. e., that the jurisdiction nowhere appeared of record in the case. The order granting the temporary writ was signed "John R. McFie, Associate Justice, acting in the absence of the judge of the Fourth judicial district." The authorities are not in harmony as to the necessity for the record showing the authority of a judge's act in a district other than his own. It has been said that, in the absence of any showing to the contrary, it will be presumed that he acted under proper authority. We are fully of the opinion, however, that the authority of Judge McFie, in this instance, sufficiently appeared, and that further inquiry into the merit of this assignment of error is unnecessary.

IV. The next assignment of error relied upon is based upon the fifth finding of fact and the conclusion of law drawn therefrom as the same appears in the final decree. The fifth finding of fact is as follows: "Fifth. That the said alleged contract made and en-

tered into by the defendants, C. M. Williams, James M. Mays, Rafael Savedra, and Albert W. Farr, as trustees of school district No. 22, of Union county, N. M., was made without any advertisements or public notices, and that said proposed expenditure amounted to \$5,820, but that eight requests for bids and sealed proposals were made by writing letters to eight different contractors, and three sealed bids were received."

The alleged erroneous conclusion of law, also found in the final decree, is as follows: "In view of the foregoing findings of fact, the court is of the opinion that, under section 1581 of the Compiled Laws of the Territory of New Mexico, the said alleged contract made and entered into by and between the defendant C. M. Williams and the defendants James M. Mays, Rafael Savedra, and Albert W. Farr, acting as the board of trustees of school district No. 22 of Union county, N. M., is null and void in that no advertisement or public notices of any kind or character requesting the submission of sealed proposals for the erection of said school building according to the plans and specifications adopted by said school board was made."

Section 1581 referred to is section 26 of chapter 77 of the Session Laws of 1891. It is urged by plaintiffs in error that said chapter 77 of the Session Laws of 1891 was enacted for the sole purpose of creating a board of education in municipalities, and specifying the duties and powers thereof, and that the defendants below, plaintiffs in error here, are not bound by the provisions of said section 1581 with respect to the requirement for letting of a contract for the erection of a public building involving the expenditure of more than \$500, upon sealed proposals, and to the lowest responsible bidder.

It is also contended that section 1584 of the Compiled Laws of 1897, which appears as section 21 of chapter 25 of the Session Laws of 1891, as amended by chapter 97 of the Laws of 1907, and section 7 of chapter 119 of the Session Laws of 1903, contains all the provisions empowering school directors to provide schoolhouses and sites therefor, and also all provisions for the making of contracts in relation thereto, and that nowhere is there any requirement that a board of school directors shall advertise for bids, before letting a contract for the building of a schoolhouse, involving an expenditure of more than \$500.

Chapter 25 of the Session Laws of 1891, is entitled "An act establishing common schools in the territory of New Mexico, and creating the office of superintendent of public instruction." This act was approved February 12, 1891, and provides for the creation of the territorial board of education and the office of superintendent of public instruction, and the duties of such superin-

tendent of public instruction. Said act further provides for the election of a superintendent of schools for each county, defining his duties, and provides for the formation of school districts and for regulation thereof, prescribing the qualifications of school directors, and defining the duties of such directors; further providing as to general matters in connection with taxation and school funds. This act is plainly limited in its scope to the purpose indicated, and the 45 sections of the act appear in the compilation of 1897 as sections 1514 to 1557, both inclusive.

At the same session of the Legislature an act designated as an amendatory act of said chapter 25 was passed, and appears in the Session Laws of 1891 as chapter 77. This last-mentioned act is entitled: "An act to amend an act entitled 'An act to establish common schools in the territory of New Mexico and creating the office of superintendent of public instruction,' approved February 11, 1891." This last-mentioned act of the Legislature was approved February 26, 1891, and appears in the Compiled Laws of 1897 as sections 1558 to 1591, both inclusive. It provides for salaries of county superintendents, requirements as to qualification of voters at school elections, exemption of certain classes of property from taxation for school purposes, and for the establishment and maintenance of a system of schools in each city or town; all cities and towns then organized, or thereafter organized under any law of the territory, to be governed by the provisions of this act. The authorities having charge of such schools are designated as boards of education.

It appears that the second act of the Legislature, referred to, amends the first act in the matter of a general tax levy, and that it supplements other provisions of the first act, particularly with regard to provision for necessary expenses of members of the board of education and pay for the services of the county superintendent.

A careful examination of both acts further discloses that those sections which are general in their scope or application were apparently intended by the Legislature to apply to all common schools; reference to the provisions as to poll tax and compulsory attendance verifying this statement.

[2] In the case of *Blackwell v. Bank of Albuquerque*, 10 N. M. 566, 63 Pac. 47, our territorial Supreme Court held: "It is a well-settled principle that all laws enacted at the same session of the Legislature relating to the same subject are in pari materia, and are to be considered and construed together as if they were different sections of one act, and as if enacted on the same day."

[3] We are therefore of the opinion that

section 1581 (section 26 of chapter 77 of the Session Laws of 1891) of the Compiled Laws of 1897 is applicable to, and binding upon, boards of school directors as well as boards of education.

[4] This leaves for our determination but one question, viz.: In the absence of a provision in the statute requiring publication of notice, or call for bids, in matters of contracts for public work, where competitive bidding is required, is publication of notice necessary or required? The statute in question is as follows: "No expenditure involving an amount greater than two hundred dollars, shall be made except in accordance with the provisions of a written contract, and no contract involving an expenditure of more than five hundred dollars, for the purpose of erecting any public buildings or making any improvements, shall be made except upon sealed proposals, and to the lowest responsible bidder." It is urged that this statute does not in language require any advertisement for bids, but we cannot agree with this contention.

It has been held, in a similar case where sealed proposals were required and the work was to be let to the lowest responsible bidder, that the requirements referred to plainly implied that there should be notice. *Galbreath v. Newton*, 30 Mo. App. 394. In the same case, subsequently before the same court, the doctrine that notice was implied where sealed proposals and a letting to the lowest responsible bidder were required was reaffirmed, and the implied notice was defined as reasonable public notice. *Galbreath v. Newton*, 45 Mo. App. 322.

We are clearly of the opinion that this statute (section 1581) required competitive bidding, based upon plans and specifications, and to attain that end some form of reasonable public notice was required and is to be implied from the nature of the statute. *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 99 N. W. 607, 106 Am. St. Rep. 931.

It has also been held that a requirement for public work to be let to the lowest bidder necessarily implies a common standard by which to measure the respective bids, which should be prepared and upon which the bids must be based. *Mazet v. Pitts-burgh*, 137 Pa. 548, 20 Atl. 693; *Kneeland v. Furlong et al.*, 20 Wis. 437.

It not appearing in this case that any form of public notice was given, we are of the opinion that the court below did not err in its findings of fact and conclusions of law based thereupon, and the decree is therefore affirmed.

ROBERTS, C. J., and RAYNOLDS, District Judge, concur.

(17 N. M. 112)

**DEPARTMENT STORE CO. v. GAUS-LANG-
ENBERG HAT CO.**(Supreme Court of New Mexico. May 5,
1912.)**1. PLEADING (§ 121*)—DENIAL—EFFECT.**

The denial of knowledge or information sufficient to form a belief as to the indebtedness and plaintiff's demand for payment is no denial at all; the facts being those which defendant must necessarily know.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 245-248; Dec. Dig. § 121.*]

**2. PLEADING (§ 127*)—ADMISSIONS BY
PLEADINGS—INSOLVENCY.**

Where the pleadings admitted that defendant corporation was unable to meet its obligations as they matured, its insolvency was admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 264-268; Dec. Dig. § 127.*]

**3. CORPORATIONS (§ 553*)—RECEIVERS—AP-
POINTMENT.**

Under Laws 1905, c. 79, § 72, providing that whenever a corporation shall become insolvent, or suspend its ordinary business from want of funds, any creditor or stockholder may apply for an injunction and a receiver, and a receiver shall be appointed unless it shall appear that the corporation is about to resume its business with safety to the public and advantage to the stockholders, while mere inability to meet pecuniary obligations as they mature will not warrant a receivership, it must appear that the insolvency is of such a character that the corporation will not be able to resume its business with safety to the public and advantage to its stockholders, but where a corporation is hopelessly insolvent, and is unable to procure insurance on its property, and there have been two fires in its stock of merchandise, the appointment of a receiver is justified.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.*]

**4. CORPORATIONS (§ 557*)—RECEIVERS—AN-
SWER—IMMATERIAL ANSWER.**

In a proceeding for the appointment of a receiver and issuance of an injunction to restrain an insolvent corporation from doing business, where the defendant's answer admitted its insolvency and inability to pay a large amount of debts, allegations that part of the indebtedness mentioned in the complaint was illegal were immaterial, constituting no defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230; Dec. Dig. § 557.*]

**5. CORPORATIONS (§ 557*)—RECEIVERS—AP-
POINTMENT.**

In a proceeding for the appointment of a receiver of and issuance of an injunction to restrain an insolvent corporation from continuing its business, where the corporation admitted its insolvency, allegations that the suit was maliciously instigated by one of the creditors of the corporation were immaterial, constituting no defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230; Dec. Dig. § 557.*]

**6. CORPORATIONS (§ 558*)—RECEIVERS—NA-
TURE OF PROCEEDINGS.**

Under Laws 1905, c. 79, § 72, providing that a receiver may be appointed of an insolvent corporation upon petition of a creditor or stockholder where it is shown by affidavits

that the corporation is hopelessly insolvent and cannot resume business, the judgment appointing a receiver is a final judgment which cannot be vacated, so as to allow the defendant to further plead.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2237-2240; Dec. Dig. § 558.*]

Error to District Court, Colfax County; before Justice C. J. Roberts.

Action by the Gaus-Langenberg Hat Company, a corporation, against the Department Store Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Argued before HANNA and PARKER, JJ., and E. C. ABBOTT, District Judge.

J. Leahy, H. L. Bickley, and L. S. Wilson, all of Raton, for plaintiff in error. E. A. Mann, of Albuquerque, and John D. Morrow, of Raton, for defendant in error.

PARKER, J. This was an action brought in the district court for Colfax county, under the provisions of sections 72 and 73 of chapter 79 of the Laws of 1905, relating to insolvent corporations. An injunction was granted and a receiver appointed, ex parte. Thereafter the plaintiff in error filed an answer, whereupon defendant in error filed a motion to strike out portions of the answer and a motion for judgment on the pleadings. These two motions came on for hearing and were argued, submitted, and sustained by the court. A decree was then entered continuing the injunction theretofore granted, and again appointing the same receiver and clothing him with all of the statutory powers as specified in section 73 of the act above mentioned. Thereupon plaintiff in error filed a motion to vacate said decree, which was overruled, and it sued out this writ of error for the purpose, as stated in the praecipe for record, of presenting four questions, as follows: (1) Whether or not the trial judge erred in rendering his decision giving the plaintiff judgment upon the pleadings in this cause upon the motion of the plaintiff therefor, and appointing a permanent receiver and granting a permanent injunction herein. (2) Whether or not it was error on the part of the judge assuming to try said cause to strike out of the answer of defendant paragraphs 8, 9, 10, 11, and 12, and all that portion of paragraph 7 of defendant's answer after the first line thereof, or to strike out any of said paragraphs or any part thereof. (3) Whether or not such judge erred in not sustaining defendant's motion to vacate said order and decree and allow the defendant to defend said action either with amended answer or otherwise. (4) Whether or not Hon. Ira A. Abbott, who assumed to try said cause, had any jurisdiction to try the same in chambers when not in attendance upon the Supreme Court and when not assigned to the Fourth judicial district of said territory, and when

there was a vacancy in the office of the judge of said Fourth judicial district.

1. The first question is the most important, and lies at the foundation of the whole case. The defendant in error, plaintiff below, after alleging the indebtedness to it, alleged: "That said defendant corporation is insolvent; that defendant has no credit; is unable to settle its current bills as they become due; has permitted notes executed by it to go to protest; has permitted numerous suits to be filed against it by its creditors; has permitted its stock of goods and assets to become depleted; has no credit among trading concerns and supply houses with which to replenish its depleted stock." It further alleged that plaintiff in error was indebted to various other creditors in the sum of \$29,500, and, if certain outstanding notes were valid, a further sum of \$13,000; that a portion of the stock of merchandise of plaintiff in error was destroyed by fire, and on the succeeding night a second fire occurred in the same portion of the building; that thereafter the insurance companies canceled all insurance on the stock of goods, and no insurance could be obtained.

Plaintiff in error, in its answer, denied knowledge or information sufficient to form a belief as to its indebtedness to the defendant in error, and alleged that, if it did owe the amount claimed, a "substantial portion of said amount is not yet due". Denied knowledge or information as to whether demand had been made upon it for the amount due defendant in error; denied specifically the allegations of the complaint in regard to its insolvency, but admitted that its indebtedness exceeded \$12,000; admitted that it had applied for insurance, and alleged that, before the appointment of the receiver, it "had a reasonably good prospect" of securing insurance; alleged that it was establishing its credit with merchandise houses, and that, if allowed to control its own affairs, it would be able to resume its active business in a short time, and conduct the same for the benefit and advantage of its stockholders and others interested. Other allegations appear in the complaint and answer, which will be noticed later.

[1] The denial of knowledge or information sufficient to form a belief as to the indebtedness and demand for payment is no denial. These are facts of which the plaintiff in error was necessarily informed, and a denial in this form, under such circumstances, is unavailing. *Railroad Co. v. Wertheim*, 15 N. M. 506, 119 Pac. 573; 30 L. R. A. (N. S.) 771.

We have, then, a case alleged and undenied of past-due indebtedness of a corporation; payment duly demanded and refused, and admitted indebtedness of over \$12,000 to diverse creditors; stock of merchandise and fixtures upon which no insurance could be obtained and in which two successive fires had occurred; and alleged lack of credit,

which is denied, but which, later in the answer, is practically admitted by the allegation that plaintiff in error was establishing its credit; pending actions for the collection of current indebtedness admitted in the answer.

It is to be remembered that a preliminary injunction had been granted and a receiver appointed, ex parte, and upon the filing of the answer the cause was argued and submitted without objection as upon order to show cause. The only showing made by plaintiff in error was the answer. Certain affidavits appear to have been filed with the complaint, but they are not in the record. Upon this state of the case, the court found the issues for the defendant in error, continued the injunction, and reappointed the receiver as above stated.

The argument against the action of the court in awarding judgment on the pleadings proceeds upon the theory that it is necessary to allege and show, not only that plaintiff in error was insolvent in the sense that it was unable to meet its current obligations as they matured, but also that it was "not about to resume its business in a short time thereafter with safety to the public and advantage to its stockholders". It is argued that no allegation of the latter requirement appears in the complaint, and in the answer it is alleged that, out of its resources, in a short time it would liquidate all of its liabilities and be in a prosperous condition, and be able to resume its active business with advantage to its stockholders and all others concerned. How this desirable condition of affairs is to be brought about is not shown by the answer. The allegation amounts simply to the expression of an opinion, and presents no facts to the court for consideration.

[2] It is apparent, from the foregoing, that there was no question upon the pleadings as to the insolvency of the plaintiff in error; it being admitted that it was unable to meet its pecuniary obligations as they matured. *Empire State Trust Co. v. Trustees of Fisher*, 67 N. J. Eq. 602, 60 Atl. 940, 3 Ann. Cas. 393; *Catlin v. Vichachi Mining Co.*, 73 N. J. Eq. 286, 67 Atl. 194; *Reinhardt v. Interstate Telephone Co.*, 71 N. J. Eq. 76, 63 Atl. 1097.

[3] But it is correctly urged by plaintiff in error that mere inability to meet pecuniary obligations as they mature is not enough to authorize an injunction and receiver. It has been so held under the New Jersey statute, from which ours is taken. The insolvency must be found to be of such a character and quality that the corporation will not be able to resume its business with safety to the public and advantage to its stockholders. *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402, 23 Atl. 934; *Cook v. East Trenton Pottery Co.*, 53 N. J. Eq. 29, 30 Atl. 534.

No specific allegation of inability to resume business appears in the complaint. It is argued by counsel for plaintiff in error

that in this particular the complaint fails to state a cause of action. We do not so understand the complaint. The facts relied upon to show the character of the insolvency are set out in the complaint. To make the further allegation of inability to resume business with safety to the public and advantage to the stockholders in the terms of the statute would be to add merely a conclusion from the facts already stated, and would add nothing to the complaint. This holding in no way conflicts with the holding in *Irrigation Co. v. Lee et al.*, 15 N. M. 597, 113 Pac. 834. In that case the allegation was "that the said corporation is insolvent and has suspended its ordinary business for want of funds to carry on the same." No facts showing the character of the insolvency or inability to resume business are stated, and the court, following the New Jersey decisions, properly held the complaint insufficient.

It is further urged by counsel that the facts alleged in the complaint and not denied in the answer are wholly insufficient to warrant the action of the court in awarding the drastic remedy of injunction and receiver.

Much confusion arises from the fact that counsel in their brief found much of their argument on the allegations of a proposed amended answer which they offered to file, and which contains many allegations of fact not mentioned in the original answer. But, as will be hereafter shown, these allegations cannot be considered in determining the correctness or incorrectness of the action of the trial court. We have carefully considered the pleadings, and taking into consideration the insolvency of the corporation, the pendency of suits for the collection of current indebtedness, the impaired credit, the inability to secure insurance and all the facts appearing, we cannot say that the trial court erred in awarding the injunction and appointing the receiver.

It is to be realized, of course, that such far-reaching power, fraught with such tremendous consequences to the corporation and its stockholders, should be exercised with the greatest care and caution. But where it appears, as we think in this case it does, that the only safety to its creditors and stockholders lies in the assumption of control of the corporate property by the court, it is the latter's duty to act and enforce the statute.

Counsel for defendant in error seek in their brief to broaden the scope of the motion for judgment on the pleadings, by arguing that such a motion in a proceeding of this kind necessarily includes the "affidavits, proofs, and allegations" of the parties mentioned in section 72 of the act. There is much force in the arguments, for the reason that the hearing is a final hearing upon such showing as the parties may elect to make, of which all litigants must be aware. However, it is unnecessary for us to determine this point

in view of our conclusion upon the facts as shown by the pleadings proper, viz., complaint and answer.

[4] II. The plaintiff in error complains of the action of the court in striking out part of paragraph 7 and all of paragraphs 8 to 12, inclusive, of its answer. Paragraphs 7 to 10, inclusive, relate to the alleged illegal character of certain notes issued by the officers of the corporation, and charge that it is not liable thereon. A sufficient answer to the objection is to say that this indebtedness forms no part of the \$12,000 or more of indebtedness admitted to be due. It was therefore immaterial whether the notes were valid or not.

[5] Paragraph 11 of the answer charges that the defendant in error was induced to bring the action by one Mendelson, whose purpose was to harass, annoy, and injure the plaintiff in error to subserve his own interests. Paragraph 12 of the answer charged this same Mendelson with having further injured the plaintiff in error by filing an action in which he charged the negligence of the corporate officers in regard to the two fires, with circulating statements derogatory to its officers, and thus preventing it from obtaining insurance.

Both of these paragraphs are devoted to the question of motive on the part of one Mendelson in causing the action to be brought and in preventing the obtaining of insurance. It is to be remarked that Mendelson was not a party to the proceedings, except as he might be interested as a creditor. But, if he were a party, the question of motive is not material. The question was whether the corporation was insolvent to the extent that it could not resume business with safety to the public and advantage to its stockholders. If it was, it was immaterial what motive prompted the bringing of the action. *McMullin v. Electric Mfg. Co.*, 73 N. J. Eq. 527, 68 Atl. 97; *Catlin v. Vichachi Mining Co.*, 73 N. J. Eq. 286, 67 Atl. 196. The court was right in striking the paragraph from the answer.

[6] III. Counsel for plaintiff in error complain of the action of the court in refusing to vacate the decree and allow it to defend by amended answer, or otherwise. They overlook, it seems to us, a controlling principle which governs in these cases. This principle is that the hearing, in this class of cases, is a summary one at which the parties are at liberty to make such showing by way of affidavits, proofs, and allegations as they see fit. The hearing is necessarily a final hearing, and the judgment is final, and can only be reviewed upon appeal of error. *Irrigation Co. v. Lee et al.*, 15 N. M. 597, 113 Pac. 834. No right to plead over exists. *Pierce v. Old Dominion Mining & Smelting Co.*, 67 N. J. Eq. 399, 58 Atl. 819.

IV. The fourth question presented is disposed of by the case of *Mays v. Bassett et al.*, 125 Pac. 609, decided at this sitting.

We find no error in the record, and, for the reasons stated, the judgment of the lower court will be affirmed, and it is so ordered.

HANNA, J., and ABBOTT, District Judge, concur. ROBERTS, C. J., having been of counsel in the court below, did not participate in this proceeding.

(17 N.M. 88)

STATE ex rel. WARD v. ROMERO, County Treasurer.

(Supreme Court of New Mexico. March 23, 1912.)

(Syllabus by the Court.)

1. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—COMPENSATION—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The office of district attorney, created by section 24 of article 6 of the Constitution of New Mexico, is a state office, and the incumbent is precluded by section 9 of article 20 from receiving to his own use any compensation, fees, allowance, or emoluments other than the salary provided by law.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

2. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—NATURE OF OFFICE—"DISTRICT OFFICER."

The words "district officer" used in section 3 of article 20 of the Constitution refer to the district attorney and district judge, but the words were used to designate the geographical limits within which such officer performed the duties of his office, and did not refer to the nature and grade of the office.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 3, p. 2139.]

3. DISTRICT AND PROSECUTING ATTORNEYS (§ 1*)—NATURE OF OFFICE.

Prior to the adoption of the Constitution by statute, the district attorney was made the law officer of the territory, and was required to represent the territory within his district in all cases, civil and criminal, and to give advice, when requested, to territorial officials. The fact that he may have performed his duties within a designated district did not make him a district officer.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. DISTRICT AND PROSECUTING ATTORNEYS (§ 1*)—NATURE OF OFFICE.

Under the Constitution, the district attorney is a part of the judicial system of the state and is a quasi judicial officer.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. OFFICERS (§ 1*)—"STATE OFFICER"—NATURE OF OFFICE.

An officer appointed or elected for a particular locality, whose duties are of a public or general nature, in the discharge of which the whole state is interested, is a state officer in an enlarged sense, and, where it appears that such officer has not been dealt with by the Legislature or the constitutional convention as a local officer, but as a state officer, the court

should give effect to the intention and understanding of the framers of the Constitution.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 1, 4; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6635-6638; vol. 8, p. 7804.]

6. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—COMPENSATION—DETERMINATION.

A district attorney is an officer provided by the Constitution, whose salary is to be fixed by the Legislature, and who serves without compensation until a salary has been provided by law.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

7. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—COMPENSATION—CONSTITUTIONAL PROVISIONS.

Section 4 of article 22 continues in force all laws of the territory, not inconsistent with the Constitution, as laws of the state. Held, that chapter 22, S. L. 1909, providing that the district attorney shall receive a stated sum of \$500 per annum from the territory, and providing fees for the major part of his compensation, is inconsistent with the Constitution. Having prohibited such officer from receiving any fees or other emoluments of office, it was clearly not the intention that he should be confined to an annual salary of \$500 per annum.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

8. CONSTITUTIONAL LAW (§ 15*)—CONSTRUCTION AND OPERATION—GENERAL RULES.

It is the duty of the court to interpret the various provisions of the Constitution in such a manner as will carry out and give effect to the spirit of the whole instrument.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 15.*]

9. CONSTITUTIONAL LAW (§ 12*)—CONSTRUCTION AND OPERATION—GENERAL RULES.

Where the spirit and intent of the Constitution can be clearly ascertained, effect should be given to it, and the strict letter should not control, if the "letter" leads to incongruous results clearly not intended.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 12.*]

10. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—COMPENSATION—STATUTORY PROVISIONS—RELATION BACK.

The salary of the district attorney, when fixed by the Legislature, may relate back to the time of his induction into office.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

Appeal from District Court, San Miguel County; David J. Leahy, Judge.

Mandamus by the State on the relation of G. W. G. Ward against Eugenio Romero, treasurer of San Miguel County. From a judgment granting a peremptory writ, defendant appeals. Reversed, with instructions.

Charles W. G. Ward was and is the district attorney of the Fourth judicial district of the state of New Mexico. For the purpose of procuring a judicial determination of the question as to whether section 7, c. 22, of the Laws of New Mexico of 1909, providing for the payment to the district attorney of fees in certain cases, was abrogated by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Constitution of the state of New Mexico, the relator and appellee procured the allowance by the board of county commissioners of San Miguel County of a fee for services rendered. Payment of the warrant issued therefor was refused by the county treasurer, and proceedings in mandamus were instituted to compel said official to pay the same. The lower court found for the relator and ordered that a peremptory writ of mandamus issue, commanding said treasurer to pay said warrant. From such judgment, respondent prosecutes this appeal. The additional facts appear in the opinion.

Chas. W. G. Ward, of East Las Vegas, and A. B. McMillen, of Albuquerque, for appellant, Frank W. Clancy, Atty. Gen., for appellee.

ROBERTS, C. J. (after stating the facts as above). The question involved in this appeal arises as the result of the transition of our form of government from territorial to state. Under chapter 22, S. L. 1909, provision is made for the payment to the various district attorneys of the territory of fees as compensation for their services in addition to an annual salary of \$500 per annum paid by the territory. Section 24 of article 6 of the Constitution of the state is as follows: "There shall be a district attorney for each judicial district who shall be learned in the law and who shall have been a resident of New Mexico for three years next prior to his election, shall be the law officer of the state and of the counties within his district, shall be elected for a term of four years, and shall perform such duties and receive such salary as may be prescribed by law." And section 9 of article 20 provides: "No officer of the state who receives a salary shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office in any form whatever, except the salary provided by law." And section 1, article 10, reads: "The Legislature shall at its first session classify the counties and fix salaries for all county officers which shall apply to those elected at the first election under this Constitution. And no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county."

A reading of the two sections last quoted will clearly demonstrate that, if a district attorney is either a state or a county official, he is not entitled to collect and retain to his own use any fees or emoluments of office. In the case of Territory ex rel. Delgado v. Romero, Treasurer, etc., 124 Pac. 649, decided at the present term of this court, we held that a county officer, under the section last quoted, was not entitled to collect and retain to his own use fees, under the statutes of the territory providing therefor. But no

argument is necessary to demonstrate that a district attorney, under our Constitution, is not a county officer. He is elected by the voters of each judicial district, comprising from two to four counties, and there is no language used in the Constitution evincing any intention on the part of the constitutional convention to classify or designate a district attorney as a county official.

[1] What, then, is the nature of his office? That he is either a district or a state official is apparent. If the former, then he does not come within the prohibition of the Constitution, and there is no inhibition against his receiving fees as compensation instead of a salary. If the latter, then he is precluded from collecting and retaining fees or other emoluments of office, save the salary provided by law. The Supreme Court of Colorado in the case of Merwin v. Board of Commissioners, 29 Colo. 169, 67 Pac. 285, speaking through Mr. Justice Campbell, says: "A district attorney is not a county or precinct but a district officer." But no reason is given whatever for the conclusion.

Counsel for appellee relies upon two provisions of the Constitution to support his contention that a district attorney is a district officer and not a state officer, viz.: Section 13 of article 5: "All district, county, precinct and municipal officers shall be residents of the political subdivisions for which they were elected or appointed." And section 3 of article 20: "The terms of office of every state, county, or district officer, except those elected at the first election held under this Constitution, and those elected to fill vacancies, shall commence on the first day of January, next after his election"—asserting that by the sections just quoted the constitutional convention clearly intended to classify district attorneys and district judges as "district officers." If the framers of the Constitution intended to create a separate class of officials to be known as district officers, and to relieve this class from the injunction against receiving fees for their services, we are bound to give effect to their intention.

[2] The Attorney General classifies judges of the district courts as "district officials," and, if district attorneys are "district officers," he is correct. It must be conceded that the Constitution, by the last section quoted, clearly refers to district attorneys and district judges when it uses the words "district officer" in speaking of the term of office. But did the constitutional convention, by the use of the words, intend thereby to designate a separate and distinct class of officials, or to bring clearly within the purview of said section officers which it had theretofore called "district attorney" and "district judge"? Was the language used intended merely as descriptive of the territorial limits of the official duty of the officer, or to place him in a separate and distinct class?

A warden of the penitentiary is a state officer unquestionably. Suppose that New Mexico were divided into two districts by a law which provided for the erection of a penitentiary in each district, and the commitment therein of all convicts convicted within the named district, would the warden be any less a state official, even though he might be designated by law as "superintendent of the first district"? We think not.

The constitutional convention divided the state into eight judicial districts, and provided for a district judge and a district attorney for each judicial district. By the designation "district," does it make them any less state officials, if in fact their duties and functions concern the state at large and are not limited to the particular district for which they have been elected? If a district judge is not a state official, he does not come within the provisions of section 9 of article 20, *supra*, and there is no restriction upon the power of the Legislature to provide "compensation, fees, allowance or emoluments" for him at its pleasure. We cannot conceive that the convention, by the use of the language employed in section 3 of article 20, *supra*, intended to produce such a result or to create a class of officers theretofore unknown in New Mexico, and to relieve such officials from inhibitions imposed upon all other designated officers of the state.

Judge Cooley in his work on Constitutional Limitations (7th Ed.) p. 91, says: "Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a very proper rule of construction that the whole is to be examined with a view to arriving at the true intention of each part."

In what sense did the framers of the Constitution use the word "district" when they provided for the office of district attorney? Did they call into existence an officer theretofore unknown in New Mexico, with whose functions, powers, and duties the people were not familiar?

[3] Let us consider the recent provisions of our territorial statutes relative to this office and we shall find a satisfactory answer to the question. Section 3, c. 78, S. L. 1891, in defining the duties of the district attorney, says: "It shall be the duty of each of the district attorneys in this territory to prosecute and defend for the territory in all courts of record of the county or counties in their respective districts, all causes, criminal and civil, in which the territory * * * may be a party or interested or concerned."

In an act of the legislative assembly of 1906 (section 2, c. 22), the above duties are again enjoined upon him, and in addition it is made his duty to advise all territorial officials whenever his advice is requested. He was made the law officer of the territory,

and the fact that he may have performed his duty in prosecuting and defending suits within defined limits did not make him any less the representative of the territory. He was an agent provided for by the Legislature and appointed by the Governor to perform the high function of the state in the preservation of the public peace and the protection of life and property; he prosecuted in the name of the people of the territory, not of any county or district; he was the advocate of all the people of the territory in the enforcement of law, and did not represent one county or one district. He was not required to reside at the time of appointment within the district for which he was appointed. While it is true he was the law officer of the various counties within his district, yet this duty was but an incident of the office, or the employment of a state agent for a purely local purpose, and did not change the nature of his office. He was the known legal representative of the territory, and the constitutional convention simply intended to provide for a similar office when they adopted section 24, art. 6, *supra*.

[4] The Constitution makes him the law officer of the state and of the various counties within his district, and we are clearly of the opinion that he is a state officer and is precluded from receiving to his own use any compensation, fees, allowances, or emoluments other than the salary to be provided for him by the Legislature. The position of the court is amply supported by the adjudication of the courts to which we will now advert.

The Supreme Court of Arkansas, in the case of Griffin v. Rhodon, 85 Ark. 89, 107 S. W. 380, in considering the question as to whether the district attorney was a state officer within the meaning of a constitutional provision which provided that no officer of the state should receive for salary fees amounting to more than \$5,000 net profits per annum, says: "This court is of the opinion that the constitutional provision applies to the office of prosecuting attorney. It is a state office within the meaning of this provision. A prosecuting attorney is, according to the requirements of the Constitution, elected by the qualified electors of the circuit for which he is to serve, and must be a resident of that circuit. Nevertheless he is elected as an officer of the state. He draws a salary from the state as one of its officers, which is provided for in a section of the Constitution, grouping together the other state officers, and he is the representative of the state in all criminal prosecutions in his circuit. It is true that he is by statute made the representative of each county in his circuit in all litigation in which the counties are concerned. Some of the emoluments of his office come from the counties; the statute providing that in certain contingencies the counties shall pay the cost of

criminal prosecutions. Still he is an officer of the state and represents the several counties in his district only as political subdivisions of the state."

[5] Chief Justice Campbell in the case of *Douvielle v. Maristee Supervisors*, 40 Mich. 585, in discussing the question as to whether probate judges were county officers, within the terms of a statute allowing a board of supervisors to fix the salary of county officers, says: "It is very clear to us that the duties performed by probate judges are in no sense services performed for their respective counties, and they are in no sense county officers. They exercise a portion of the judicial and prerogative power of the state."

Judge Copley, in the case of *People v. Harbut*, 24 Mich. 44, 9 Am. Rep. 103, says: "For those classes of officers whose duties are general, such as the judges, the officer of militia, the superintendent of police, of quarantine, and of ports, by whatever name called, provision has, to a greater or less extent, been made by state appointment. But these are more properly state than local officers; they perform duties for the state in localities, as collectors for the general government, and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general."

In the case of *Leib v. Commonwealth*, 9 Watts (Pa.) 200, it was urged that as the Constitution, in speaking of the court of common pleas, used the expressions "in each county," "of each county," and "within each county," that the office was a county office and the judge of said court a county officer. The court says: "We think the court of common pleas of each county is to be considered as a state court, and the office of an associate judge of that court a state office. It is true the office is exercised in a county, but that circumstance does not make it a county office. The officers of the heads of departments, such as the secretary of the land office, surveyor general, auditor general, and state treasurer, are exercised at Harrisburg, within the county of Dauphin, yet they are clearly state, not county, officers. It is also true that the Constitution and laws in speaking of the courts of common pleas term them at different times the courts of common pleas "in each county," "of each county," and "within each county." But the phraseology seems to refer to the geographical limit within which the duties of each are to be exercised, and not the nature and grade of the office."

It seems to us that the reasoning of this case is a complete answer to the contention that, because the district attorney is referred to as a district officer, it was the intention of the constitutional convention that he should be classified as such, and not as a state officer. While so designated, the phraseology simply designates the geographi-

cal limits within which the duties of his office are to be exercised, and does not refer to the "nature and grade of the office."

In the case of *Landon v. Mayor, etc.*, of New York, 39 N. Y. Super. Ct. 467, in speaking of the judge of the court of common pleas, Chief Justice Monell, says: "The judicial department is a part of the general government of the state. It forms no exclusive part of any of the political subdivisions of the state. It administers its functions for the people at large and, except in some cases, is unlimited in its jurisdiction. The court of common pleas is a part of this judicial system and, although there is a territorial limitation to its organization, it nevertheless is not dis severed from the general judicial department of the state. It administers the law for all the people, and is not confined to the constituency of a particular district. * * * The judges of this court are among the class of judicial officers who are denominated public officers of the state. 1 Rev. St., (1st Ed.) p. 95, pt. 1, c. 5, tit. 1, § 1. If such officers are with functions, which, at least for some purposes, extend over the state, then they are not necessarily county or city officers, but officers of the state, and a part of the state judiciary."

Under our Constitution, the district attorney is a part of the judicial system of the state. His duties, powers, and functions are dealt with under the head of "judicial department." He is a quasi judicial officer. In the well-considered case of *Burch v. Hardwicke*, 71 Va. 24, 32 Am. Rep. 640, the Supreme Court of Virginia, in discussing the distinction between state and county officers, reviews the authorities and concludes: "The distinction recognized in all of them is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character, they are state officers, whether the Legislature itself makes the appointment or delegates its authority to the municipality. The state, as a political society, is interested in the suppression of crime and in the preservation of peace and good order and in protecting the rights of persons and property. No duty is more general and all pervading than this. It extends alike to towns and cities as to the country. It looks to the preservation of order and security in the state, * * * and, in fine, the suppression of all those disorders which affect the peace and dignity of the state and the security of the citizens. The instrumentalities by which these objects are effected, however appointed, by whatever name called, are agencies of the state, and not of the municipalities for which they are appointed or elected."

We do not desire to be understood as holding that the constitutional convention in-

tended to include within the designation of "state officers" all the peace officers of the state, or even judges of probate courts and justices of the peace, because by common understanding of the people, and in a popular sense, and by reason of prior legislative enactments and classification, many of these officials were evidently considered and dealt with as purely local officers, and, where it is evident that the Constitution, in dealing with these officials, did so in the popular sense, we should give effect to the intention.

The Supreme Court of Tennessee in "Judges Salary Cases," 110 Tenn. 370, 75 S. W. 1061, says: "The several judges of the chancery, circuit, and criminal courts, which may from time to time be created by the General Assembly, are unquestionably state officers elected and commissioned for state purposes."

The Constitution of the state of Washington, art. 4, § 5, provides for a superior court in each county and the election of at least one judge by the electors of each county for such court. Article 6, § 8, provides for the election of state officers every fourth year, and fixes the time of election. The question arose as to whether judges of the superior courts were state officers required to be elected as other state officers were elected. The court says in the case of *State v. Twipheil*, 4 Wash. 715, 31 Pac. 19: "That they are more accurately described as state officers than as county or district officers is evident, not only from the character and extent of their jurisdiction and the locality in which they may be called upon to discharge their duties as such officers, but also from the fact that they are paid, at least in part, by the state, and vacancies occurring in the office are to be filled by the Governor. In other states, having similar provisions in their Constitution as to superior court judges, they have uniformly been held to be state officers. We think the reasonable construction of the whole of the Constitution will show that superior court judges are included within the designation of 'state officers' as used in said section 8." We might remark that our Constitution likewise provides that vacancies in the office of district attorney are to be filled by the Governor by appointment.

The case of *Burch v. Hardwicke*, supra, is approved in the case "In re Police Commissioners," 22 R. I. 654, 49 Atl. 36, by the Supreme Court of Rhode Island. We are aware of the fact that several states have held prosecuting officials, whose territorial limits were confined to a single county, to be county, and not state, officers, but these decisions were probably upon the theory that the Constitution or legislative enactments had dealt with these officers in the popular sense, and not in the more enlarged sense.

[6] It is argued that a holding that the district attorney is a state officer, within the

inhibition of section 9, art. 20, of the Constitution, will leave the district attorney with a salary of but \$500 per annum, which could not be increased or diminished by the Legislature, and that this is evidence of the intention that he was not considered as a state official. But is this contention sound? Is he not rather an officer provided by the Constitution, whose salary is to be fixed by the Legislature, and who serves, if he chooses to continue in office, without compensation until a salary has been provided by law?

[7] Section 4 of article 22 (schedule) continues in force all laws of the territory not inconsistent with the "provisions of this Constitution" as laws of the state. Chapter 22, S. L. 1909, provides for the appointment of district attorneys and prescribes their compensation. An annual salary of \$500 is to be paid them by territory quarterly, and they receive fees for all services rendered by them in criminal and civil cases. It clearly appears from the act in question that their compensation was to be paid largely by fees payable by the various counties. It cannot be that the framers of the Constitution intended that this old fee and salary law should remain in force, or that the portion of it which provided for a payment by the territory of a salary of \$500 only, which sum would not even compensate the district attorney for his traveling expenses, should remain.

The Supreme Court of Indiana in the case of *State ex rel. Collett v. Gorbey*, 122 Ind. 17, 23 N. E. 678, says: "If a proposed construction of a statute, or of a constitutional provision, when carried to its legal and logical consequences, leads to results which could not have been within the contemplation of the makers of the law, or the framers of the constitutional provision; then such proposed construction must be erroneous, for it is a fundamental principle of construction that the intention of the lawmakers must prevail."

[8] It was clearly the intent of the constitutional convention that all officers therein provided for should be upon a salary basis. Not a line of the instrument indicates a different purpose. It is the duty of this court to interpret the various provisions of the Constitution to carry out the spirit of that instrument. We should not permit legal technicalities and subtle niceties to control and thereby destroy what the framers of the Constitution intended.

[9] Where the spirit and intent of the instrument can be clearly ascertained, effect should be given to it, and the strict letter should not control if the letter leads to incongruous results clearly not intended.

It is apparent that the constitutional convention did not intend that the old fee and salary law should remain in force and effect, or that a part of it should be effective. We think it is in conflict with section 9.

art. 20, *supra*, and that no salary is provided by law for the district attorney.

[10] From what we have said it follows that the district attorney under the Constitution is a state officer; that he is not entitled to accept or receive to his own use any compensation, fees, allowance, or emoluments for or on account of his office; that he is an officer serving without salary, and that it remains for the Legislature to determine the amount of salary he shall receive; that the salary when fixed and determined may relate back to the time of his induction into office.

It follows that the lower court erred in entering judgment for the relator, and the cause is therefore reversed, with instructions to the lower court to enter judgment for the respondent.

HANNA and PARKER, JJ., concur.

(17 N. M. 123)

TERRITORY v. MONTOYA.

(Supreme Court of New Mexico. May 5, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 10*) — COMMON LAW — PROCEDURE.

The common law of crimes is in force in New Mexico except where it may have been repealed or modified by statute, and common-law procedure is in force except where special provision is made by statute to the exclusion of the common-law procedure.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8; Dec. Dig. § 10.*]

2. HOMICIDE (§ 128*) — MURDER — INDICTMENT.

Where the statutes have adopted the common-law definition of murder, an indictment may very properly omit a direct charge of a purpose or intent to kill as a part of the overt act alleged as a crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 195, 196; Dec. Dig. § 128.*]

3. HOMICIDE (§ 22*) — MURDER IN THE FIRST DEGREE.

The statutes of New Mexico do not attempt to change the common-law definition of murder, and does not limit murder in the first degree to those homicides committed purposely or with intent to kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35-38; Dec. Dig. § 22.*]

4. INDICTMENT AND INFORMATION (§ 79*) — CLERICAL ERRORS.

Defendant cannot take advantage of an obvious clerical error corrected by necessary indictment from other parts of the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 209-214; Dec. Dig. § 79.*]

5. HOMICIDE (§ 137*) — INDICTMENT — MANSLAUGHTER.

An indictment which fails to allege in conclusion that the defendant killed and murdered the deceased is sufficient to charge manslaughter, and, where the defendant was convicted of manslaughter, he cannot take advantage of the defect, as he was not injured thereby.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 228-230; Dec. Dig. § 137.*]

6. HOMICIDE (§ 269*) — MOTIVE — QUESTION FOR JURY.

The jury in a homicide case are the sole judges of the fact of the existence of a motive on the part of the accused, and the jury may infer a motive from the commission of the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563; Dec. Dig. § 269.*]

7. HOMICIDE (§ 255*) — EVIDENCE — MANSLAUGHTER.

Evidence examined and held sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539-541; Dec. Dig. § 255.*]

Appeal from District Court, Colfax County, before Justice Roberts.

Jose Casimiro Montoya was convicted of voluntary manslaughter and moved for a new trial and for arrest of judgment, and, on denial of the motions, defendant appeals. Affirmed.

M. C. Pacheco, and J. Leahy, both of Raton, for appellant. Frank W. Clancy, Atty. Gen., for the Territory.

HANNA, J. Numerous errors are assigned, and we will consider those relied upon by appellant, as far as possible, in the order presented.

1. The first assignment of error is that "the indictment charges no offense or violation of any law of the territory of New Mexico, because it does not allege or charge that the mortal wounds were inflicted with felonious intent." In this connection it was urged (a) that the indictment does not charge that defendant discharged the pistol; and (b) that the indictment does not allege an intention to take the life of deceased.

(a) We cannot give serious weight to the contention that this indictment fails to charge that defendant "discharged the pistol." The indictment is as follows: "That Jose Casimiro Montoya, late of the county of Colfax, territory of New Mexico, on the eighteenth day of March, in the year of our Lord one thousand nine hundred and eleven, at the county of Colfax aforesaid, with force and arms in and upon one Jacobo Casados, then and there being, unlawfully, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, did then and there make an assault with a certain pistol, then and there charged with gunpowder and loaded with divers leaden bullets, which said pistol said Jose Casimiro Montoya then and there had and held in his hands, and said Jose Casimiro Montoya then and there unlawfully, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, did point and aim said pistol at and to the body of said Jacobo Casados, and by force of said gunpowder in said pistol contained as aforesaid, did then and there unlawfully, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, discharge, and shoot two of said bullets from

out of said pistol so had and held by him, said José Casimiro Montoya, as aforesaid, at, against, and into the body of said Jacobo Casados, which said bullets by force of said gunpowder contained in said pistol so held and discharged by said José Casimiro Montoya as aforesaid, did then and there upon and in the body of said Jacobo Casados strike and enter, and said bullets did thereby, then and there inflict two mortal wounds upon said body of said Jacobo Casados, of which said wounds so caused and inflicted as aforesaid, said Jacobo Casados did then and there die; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of New Mexico." It appears that the defendant was charged with discharging and shooting, "two of said bullets from out of said pistol," and by all reasonable intendment he must have discharged the pistol. This is clearly sufficient in the opinion of the court.

(b) The second ground urged in support of this assignment of error presents a more serious aspect and one that numerous courts have differed with respect to. This ground presents the alleged necessity of this indictment charging an intent to kill.

The indictment is based upon section 1, c. 36, of the Session Laws of 1907, which is as follows: "All murder which shall be perpetrated by means of poison or lying in wait, torture, or by any kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate any felony, or perpetrated from a deliberate and premeditated design unlawfully and maliciously to affect the death of any human being, or perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree."

[1] The common law of crimes is in force in New Mexico except where it may have been repealed or modified by statute. Likewise common-law procedure continues in force here except where special provision is made by statute to the exclusion of the common-law procedure. At common law there were no degrees of murder, and there were but two degrees of felonious homicide, murder, and manslaughter. By our statute we have two degrees of murder, first and second, and likewise two degrees of manslaughter, voluntary and involuntary. At the common law, murder is defined to be the unlawful killing of any reasonable creature in being and under the King's peace, with malice aforethought, either express or implied. 4 Bla. Com. 198. Section 1060 of Comp. Laws of 1897 defined murder in substantially the foregoing language.

In *Schaffer v. State*, 22 Neb. 557, 35 N. W. 394 & Am. St. Rep. 274, cited by appel-

lant, it is correctly stated that at common law a purpose or design to kill is not an essential ingredient, but it is also there stated that the rule of the common law has been changed, and the purpose, design, or intent to kill must now be alleged. The statute construed by this court contains the word "purposely" in defining the crime of murder in the first degree. In this case the court followed the rule laid down by the Supreme Court of Ohio in the case of *Fouts v. State*, 8 Ohio St. 98, construing the statute of Ohio, likewise containing the word "purposely" in its definition of the crime of murder in the first degree.

In the case of *Hamilton v. United States*, 26 App. D. C. 386, it is clearly pointed out that, in those states in which the statutes have simply adopted the common-law definition of murder, an indictment may very properly omit a direct charge of a purpose or intent to kill as a part of the overt act alleged as a crime. *Davis v. Utah Territory*, 151 U. S. 270, 14 Sup. Ct. 328, 38 L. Ed. 153.

[2] It should be borne in mind that our statute does not attempt to change the definition of the crime of murder as known to the common law. It provides that "all murder which shall be perpetrated by means of poison, or lying in wait," etc., shall be denominated as murder in the first degree, "and all other kinds of murder shall be deemed murder in the second degree." It has been said that the legal scope of murder as a generic term is unchanged by this class of statutes. 1 Wharton's Crim. Law, § 393.

[3] Our statute does not limit murder in the first degree to those homicides committed purposely or within intent to kill. In our opinion the essential elements of our statute, so far as challenged by this assignment, have been charged in the indictment in this case. The first assignment of error is therefore not well taken.

2. The second assignment of error relied upon by appellants is that a variance appears upon the face of the indictment because it alleged the assault was made upon "Jacobo Casados," and the proof disclosed that the assault was made on "Jacobo Casados." In this connection it is urged that it was not within the province of the court to declare the name "Casados" appearing in the indictment, to have been a typographical error.

Referring to the indictment we find that it charged as follows: "That José Casimiro Montoya, late of the county of Colfax, territory of New Mexico, on the eighteenth day of March, in the year of our Lord one thousand nine hundred and eleven, at the county of Colfax aforesaid, with force and arms in and upon one Jacobo Casados, then and there being, unlawfully feloniously, wilfully, deliberately, premeditatedly, and with malice aforethought, did then and there make an assault with a certain pistol, then and

there charged with gunpowder and loaded with divers leaden bullets, which said pistol said Jose Casimiro Montoya then and there had and held in his hands, and said Jose Casimiro Montoya then and there unlawfully, feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, did point and aim said pistol at and to the body of said Jacobo Casados, etc."

[4] In four other essential charging parts of this indictment the name of deceased appears as Jacobo Casados, from which it clearly appears that the writing of the name "Casadoa" is purely a clerical or typographical error.

The object of an indictment is definitely to apprise the person accused of the offense with which he is charged, so that he may properly prepare his defense, and it should be so drawn that, in case any other proceedings should be taken against him for the same offense, he could plead a former acquittal or conviction. *Ball v. United States*, 140 U. S. 136, 11 Sup. Ct. 761, 35 L. Ed. 377. It is quite apparent that appellant was notified that he was accused of having killed Jacobo Casados. In our opinion this was an obvious clerical error corrected by necessary intentment of other parts of the indictment. 22 Cyc. 291; *State v. Morgan*, 35 La. Ann. 293; *State v. Ford*, 38 La. Ann. 797; *Greeson v. State*, 6 Miss. (5 How.) 33.

[5] 3. The third assignment of error urged by appellant is that there was no allegation in the indictment that the defendant killed or murdered deceased. This was the principal ground relief upon in support of the motion for a directed verdict, and was also set forth as one of the grounds in support of the motions for new trial and arrest of judgment. It is here urged as one of the alleged errors of the court below in failing to direct the jury to find a verdict of not guilty.

The motion in this respect is as follows: "Whilst the indictment attempts to charge and allege acts amounting to murder, it does not charge murder nor any other offense, because there is no allegation in the indictment that the defendant murdered the deceased, Jacobo Casados." This charge is sufficient as a charge of manslaughter, and therefore the indictment did charge an offense. 2 Bishop's Crim. Pro. (4th Ed.) § 548.

The conviction here was for manslaughter. We are of the opinion that this assignment of error must be overruled.

[6] 4. The next error assigned is that the court should have directed a verdict because the territory failed to establish a motive for the murder, and that there was no sufficient evidence to prove an intent to take the life of the deceased.

We have carefully examined the record and find that Reymundo Leyba, a witness for the prosecution, testified that the accused had stated to him a few weeks prior to

the homicide that he had three enemies, naming deceased as one of them. This testimony, as well as the reason assigned by defendant for the pre-existing enmity, were proper subjects of consideration by the jury as judges of the fact of existence or nonexistence of a motive. We are of the opinion that the jury in homicide cases not only are sole judges of the fact of the existence of a motive on the part of the accused, but the jury may infer a motive from the commission of the crime or the actions of the slayer. *Wharton on Homicide* (8d Ed.) § 596. The question of intent urged in connection with this assignment we have considered in connection with the first assignment of error.

For the reasons stated, we cannot give favorable consideration to this assignment of error.

[7] 5. The appellant further urges as a ground for reversible error that the court erred in overruling the defendant's motion to take from the jury a portion of the testimony of Luciana Rivera and Eusebia Rivera. It appears that these witnesses testified that defendant fired two shots, but on cross-examination Luciana Rivera qualified her testimony by stating that she believed it was Casimiro who fired the shots, and Eusebia Rivera, a daughter of Luciana Rivera, testified that her mother told her that Don Jose Casimiro fired the shots. Because this testimony is asserted to be conclusions of these two witnesses and was not withdrawn from the jury, error is alleged. In our opinion it was necessary to consider the testimony of these witnesses as a whole; there was conflicting testimony by each witness, due possibly to the confusion of the witness while under cross-examination. The conflict of testimony was such that the court properly permitted the jury to consider it as a whole in order that it might determine the weight of the evidence, as well as the true meaning and intent thereof.

It is asserted in this connection that, at the time the prosecution rested, there was no proof that defendant had fired the shots except the alleged conclusions of these two witnesses referred to, and therefore that the court should have directed a verdict. The record discloses that this is not the case; it appearing that the witness Donaciana Mares, for the prosecution, testified that the defendant, immediately after the shooting, admitted to those present that he had shot the deceased.

6. The next assignment of error was that the indictment was defective because it did not allege that deceased died of a mortal wound. In this respect we find that the indictment charged as follows: "And said bullets did thereby, then and there inflict two mortal wounds upon and in the body of said Jacobo Casados, of which said wounds so caused and inflicted as aforesaid, said Jaco-

bo Casados did then and there die." We are clearly of the opinion this indictment is not subject to the criticism advanced by this assignment of error.

7. It is also contended by appellant that the evidence is insufficient to sustain the verdict of the jury. The argument in support of this contention is addressed primarily to the weight to be given to the testimony of the several witnesses, and this court cannot now disturb the verdict of the jury in this case. There was substantial evidence offered in the case, and it was for the jury to weigh the same. We are of opinion that the evidence is sufficient to sustain the verdict.

A number of additional assignments of error are dealt with in appellant's brief, some apparently waived, but all have been considered, and we are of the opinion that no reversible error has been found, therefore the judgment of the lower court is affirmed.

PARKER, J., and ABBOTT, District Judge, concur.

(17 N. M. 137.)

DAILY et al. v. FITZGERALD et al.
(Supreme Court of New Mexico. May 5, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS.

Every inference not contrary to the evidence or otherwise appearing to be unreasonable will be drawn from the facts found by the court, and in case of doubt that presumption will be presumed correct which supports the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

2. APPEAL AND ERROR (§ 1011*)—REVIEW—QUESTIONS OF FACT—CONFLICTING EVIDENCE.

The court will not disturb findings of fact where there is any substantial dispute upon the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

3. MINES AND MINERALS (§ 97*)—MINING PARTNERSHIPS—PRESUMPTIONS.

Every agreement for the working of a mine is a mining partnership except where there has been an express agreement to constitute a full trading partnership, but such latter agreement need not be proven by some express words of the parties, describing in exact language the relations intended to be assumed, or negating in express words their intent to become mining partners.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 222; Dec. Dig. § 97.*]

4. MINES AND MINERALS (§§ 97, 100*)—MINING PARTNERSHIPS—DISTINCTION FROM GENERAL PARTNERSHIP.

The chief fact which distinguishes mining from general partnerships is the absence of the *delectus personæ* in the former and the resultant rules, that the shares of mining partners may be transferred to others, who become partners in turn by acquiring such interests,

without working a dissolution of the partnership.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 222, 225; Dec. Dig. §§ 97, 100.*]

5. MINES AND MINERALS (§ 99*)—MINING PARTNERSHIPS—NATURE AND LIABILITIES.

Where there is an express agreement between the parties, and it appears therefrom that they contracted with the object and purpose of relying upon the *delectus personæ* in their relation, the fact that their business was the working of a mine does not affect their relation or liability as general partners.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 223, 224; Dec. Dig. § 99.*]

6. APPEAL AND ERROR (§ 193*)—PRESENTING QUESTIONS IN LOWER COURT—PLEADING—STATEMENT OF CAUSE OF ACTION.

Where the findings and judgment are supported by the evidence, and it appears that the case was decided correctly upon the merits, the objection that the complaint does not state facts sufficient to constitute a cause of action, not urged in the court below, and which might have been obviated by an amendment of the complaint, is waived and cannot be urged upon appeal for the first time.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 193.*]

7. PLEADING (§ 418*)—WAIVER OF OBJECTIONS—RULING ON DEMURRER—PLEADING OVER.

Where, upon demurrer being sustained to the complaint, the plaintiffs plead over, they thereby waive the error, if any, in sustaining the demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.*]

Appeal from District Court, Bernalillo County; before Justice Abbott.

Action by J. G. Daily and another, doing business under the firm name and style of the Zack Metal Company, against George E. Fitzgerald and others, individually and as copartners under the firm name and style of the Torpedo Copper Company, and others. From the judgment, defendants appeal, and plaintiffs file a cross-appeal. Affirmed.

Prior to August 3, 1906, the Torpedo Mining Company, owning the copper property known as the Torpedo Mine at Organ, N. M., had gone into the hands of Nicholas Galles, as receiver, appointed by the court, and the defendant Geo. E. Fitzgerald, being a practical mine operator, had some negotiations looking to a purchase of the mine, but, being himself without sufficient means, was seeking to associate with himself persons who could supply the necessary money. Through the defendant Frank A. Helmer, a lawyer in Chicago, he became acquainted with the defendant Foster and succeeded in interesting him in the enterprise, and on the 3d day of August, 1906, Fitzgerald, Foster, and Helmer entered into the following written agreement:

"This memorandum of agreement made and entered into this third day of August, 1906, by and between N. C. Foster of Fair-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
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child, Wisconsin, and George E. Fitzgerald of El Paso, Texas, and Frank A. Helmer of Chicago, Illinois, witnesseth:

"That whereas said George E. Fitzgerald, second party, has made a proposition to Nicholas Galles as receiver of the Torpedo Mining Co. at Las Cruces, New Mexico, for the purchase from him, as such receiver of the Torpedo Mining property so called, more specifically described in said proposition, at and for a price of three hundred thousand dollars (\$300,000) upon terms in said proposition, specified covering a period of two years for the payment thereof in partial payments, and it is understood by the parties hereto that the court at Las Cruces has authorized the receiver to accept said proposition upon said Fitzgerald filing a good and sufficient bond in the penal sum of twenty-five thousand dollars (\$25,000) conditioned upon the payment of twenty-five thousand dollars (\$25,000) first payment on said purchase price within six months, and further conditioned that said mining property shall be kept free from liens and incumbrances occasioned by said Fitzgerald during his operation under said contract with said receiver, and whereas the said Foster, first party, is about to furnish, or procure said bond, and advance to the enterprise a sufficient amount of money, not exceeding the sum of fifteen thousand dollars (\$15,000) as shall be required in the procuring possession, opening and operating of said mine under the terms of said contract with said receiver, for which services and money to be required said Foster is to receive a compensation in the way of a conveyance hereafter of a proportionate share of said mining property.

"Now therefore, it is agreed between the parties hereto as follows: That said Foster will provide or furnish the security, or indemnity required for the procuring of the bond in question in the penal sum of twenty-five thousand dollars (\$25,000) conditioned as aforesaid from a surety company, pursuant to the order of said court, and that he will advance such sums as shall be required for procuring possession and prosecution of operations under said contract upon said mining property not to exceed the sum of fifteen thousand dollars (\$15,000), as the same may be required by the needs of said operations and called for from time to time, any and all such sums to be construed as an advance to the enterprise and to be returned and repaid to the said Foster from the net profits, or proceeds of said enterprise, and mining operations hereafter, and within a period of six months herefrom.

"It is further agreed that said Fitzgerald shall give his whole time and personal energies and attention to the management, control, and development of said mining property and enterprise, have entire charge of, and responsibility therefor, he being allowed to draw the sum of two hundred and

fifty dollars (\$250) per month to be charged as expenses against said enterprise, until such time as the twenty-five thousand dollars (\$25,000), first payment, under said contract called for has been made, and without further compensation as salary.

"It is further agreed that in furtherance of the enterprise a corporation shall be organized under the laws of some of the states or territory to be agreed upon by said three parties hereto with such amount of capital stock as may be mutually agreed upon, and that the proportion of stock of said corporation or interest in the enterprise shall be divided as follows: 25% thereof to N. C. Foster, 8 1/2% thereof to Frank A. Helmer, and the remainder 66 1/2% to said George E. Fitzgerald.

"It is further agreed that all advances, as heretofore specified, made by said Foster to said enterprise in the way of money advanced for the obtaining possession, prosecution of operations thereunder, and the conduct of the business connected with said enterprise shall be treated as an advance and repaid as hereinbefore specified, but that said Fitzgerald shall not be personally liable for the return or payment of any of said money individually, and that said Helmer shall be responsible to the said Foster for the return only of one-fourth thereof.

"It is further agreed that any and all amounts, if any, paid by said Foster under his obligations upon said bond, shall be chargeable to the enterprise, and repaid to him from the mining properties in question, or their proceeds as in case of any debt of the enterprise paid by him.

"It is understood and agreed that upon the organization of such corporation, said N. C. Foster shall be elected president, Frank A. Helmer secretary and treasurer, and said George E. Fitzgerald shall be made the general manager, and that all three shall be directors.

"[Signed] N. C. Foster.

George E. Fitzgerald.

Frank A. Helmer.

"After the execution of the above contract Fitzgerald made a written proposition to the receiver, on behalf of himself and his associates, to purchase the mine. The receiver was duly authorized by the court to enter into the proposed contract with Fitzgerald and his associates, which he did on the 13th day of August, 1906. Under the contract, the purchasers bound themselves to take possession of the said premises and property and proceed to free the same from water, and thereafter prosecute the operation of said property in a minerlike manner; conduct, operate, and develop said mine and mining property diligently and in a manner consistent and in accordance with the usual minerlike methods of mining, and drain and keep drained and care for said mine and property in a good and workmanlike manner, and specifying certain other things to be

done in connection with said mine which need not be set out. The proposed purchasers agreed to expend \$25,000 during the first year in developing said mine, and executed a bond in the sum of \$25,000 for the payment of all debts and obligations, etc. The bond was furnished by the defendant Foster.

After the execution of the contract between the three defendants in Chicago, L. G. Tucker was hired as auditor to go to the mines and look after the accounting, and being unacquainted with Fitzgerald, and doubtful of his responsibility, saw Helmer, whom he knew, and was assured by Helmer that the enterprise was backed by all three, and that it was safe for him to go. Helmer then went with Fitzgerald from Chicago to Las Cruces to complete the deal and to superintend the details of its execution. After the execution of the contract for the purchase of the mine, Helmer and Fitzgerald went out to Organ to the mine and spent two or three days looking over the proposition, after which Helmer returned to Chicago and Fitzgerald took possession of the mine. From that time Helmer was in constant communication by letters and telegrams with Fitzgerald, Tucker, and Foster, and received reports frequently from Fitzgerald and Tucker as to what was being done at the mine, and communicated to Foster uniformly everything of importance or of interest. Mr. Foster was in Chicago frequently and visited Helmer at his office, and there received from Helmer all the information concerning the mine and the workings thereof known to Helmer. While Helmer was in Las Cruces on the first visit, arrangements were made for the incorporation of the company, but for various reasons the matter of incorporating the company was delayed until the latter part of October, 1907; a portion of the delay being due to the fact that negotiations were pending with various parties for a sale of the property by the defendants. It appears that the defendants decided not to await the incorporation of the company before proceeding with the working of the mine, and, while no agreement in express terms between the defendants to operate as a partnership until the corporation should be organized and completed was testified to, yet that such an agreement existed and was so understood by the parties themselves is abundantly established by the evidence. Foster continued to advance money for the operation of the mine far beyond the \$15,000 specified in the original contract, and down to the time of the organization of the corporation had advanced about \$75,000.

The defendant Foster evidently understood that the three defendants were partners, and that he was liable as such for the debts and obligations of the company. In a letter to the defendant Fitzgerald on January 4, 1907, he says: "What has become of the incorporation papers for the Torpedo Copper Company? It seems to me these papers

ought to be executed and things put in shape, as I believe it is somewhat dangerous to run that business the way it is run at the present time unincorporated." And in another letter to Fitzgerald on March 11, 1907, he says: "I am quite anxious to have the incorporation of the Copper Company completed and the transfer of the mine to the company, on account of danger of accidents, etc., which might occur and embarrass us more in a partnership business than as an incorporation." And in another letter on July 20, 1907, he says: "I have been urging Mr. Helmer for some little time to have the incorporation put through, as I do not like the responsibility of the thing as it now stands, and, if we get that perfected in good shape, I shall not be quite so anxious to sell the property, but you know how it is and the liability might be too great under the present conditions." Other evidence was introduced showing that the three defendants also had in contemplation the matter of a town site adjoining the mine, the erection of a smelter, the contract for which was apparently let by the defendant Foster himself, and the construction of a railroad from the mine to connect with some other railroad. The business of operating the mine was carried on by Fitzgerald under the name of the "Torpedo Copper Company." Tucker, the auditor and bookkeeper opened up a set of books for the company, and at the head of the books he stated the relationship between the parties as follows: "Partnership existing between N. C. Foster of Fairchild, Wisconsin, F. A. Helmer of Chicago, Ill., and George E. Fitzgerald of Organ, N. M., being the individuals composing the partnership and in interest as follows." Both Foster and Helmer were at the mine a number of times after the books were opened, and both examined the books, but there was no direct testimony showing that either of them saw the statement entered by Tucker.

Numerous letters from Helmer to Fitzgerald were introduced in evidence for the purpose of showing the relations of the parties defendant to each other. In a letter of October 23, 1906, from Helmer to Fitzgerald, he says: "You are not connected with people who are covertly looking for a chance to get your scalp. We shall not need Langworthy. We three are enough and we will be practically one." Again he says, in a letter of November 13, 1906, in speaking of a proposition of Fitzgerald's, apparently to sell or take in some other parties in the venture: "I have rather come to count on the Torpedo as an enterprise in which I intuitively associate only yourself, Mr. Foster and myself to all substantial purposes—we have a good thing on a conservative ownership basis, and there is enough in it on this same conservative basis to make it a perfectly safe and thoroughly profitable enterprise for us all." And in a letter of the

24th of November of the same year, Helmer says to Fitzgerald: "Mr. Foster was in today. He says you needn't worry a minute about falling down." In a letter of November 28, 1906, Helmer says to Fitzgerald: "Neither Mr. Foster nor I would want to stay in the mine if you went out. I have depended on you, and Mr. Foster is depending on you through me. Neither of us are foolish enough to want anything to do with a mine except in the hands of a friendly, honest, and capable associate. When you go out, we go out too undoubtedly, for we are simply in here through you." Unfortunately the letters from Fitzgerald to Helmer and Foster were not produced upon the trial of the case.

In October, 1907, when the incorporation of the company was completed, all three of the defendants signed a written statement transferring the property to the corporation in exchange for its stock, a portion of which statement read as follows: "All the accounts and bills receivable and assets connected with or belonging to the mining enterprise now and heretofore conducted by us upon said premises and under said contract, you to take the same subject to and you to assume and agree to pay all our outstanding liabilities and obligations connected with or arising from the business now and heretofore conducted by us under the name of the Torpedo Copper Company under said contract."

Fitzgerald had, from the time he began operations, delivered all the ore mined to the El Paso Smelter, from whom he had been accustomed to receive advances. In June, 1907, Fitzgerald began negotiations with the Torreón Smelter through the plaintiff Dally for the smelting of the ores of the company. His desire to change was prompted by the fact that the El Paso Smelter would not advance to him a sufficient amount on the ore to be delivered in the future, and he desired to make arrangements whereby more liberal advances could be secured. After several interviews and much correspondence, an arrangement was finally perfected between Fitzgerald and the plaintiffs by which the Torreón Smelter was to reduce the ore, and plaintiffs were to advance to Fitzgerald or the Torpedo Copper Company the value of the ore on board the cars at Las Cruces, N. M., less freight and treatment charges, and under this agreement the plaintiffs advanced to the defendant Fitzgerald the amount for the recovery of which this action was instituted.

It is evident that the substance of the communications between the plaintiffs and the defendant Fitzgerald, and probably the contract itself, was sent by Fitzgerald to Foster, as Foster in his letter of August 26th to Fitzgerald says: "You speak of getting all settled up with the El Paso Smelter people. I hope you will see that

everything and all contracts are settled up to their satisfaction before leaving them, as I imagine we do not want any trouble with them in any way, shape or manner. Therefore there should be a perfect understanding with them before making the change. Neither do I think we should enter into any very extensive contracts with the Torreón people. Better see how things pan out first. I am under the impression that if any contracts are made, it should be done by the Torpedo Copper Company as a corporation. If you are pensive as you expect, tonnage and value, I can see no reason at the present time for getting advances from them; as likely by the time you need more money you will have it coming. Possibly you might need some advances on shipments of ore until you get fixed with them." On October 3, 1907, Helmer wrote Fitzgerald with reference to Fitzgerald's failure to come to Chicago as had been arranged: "On finding that you had not left, I showed him (Foster) that you could not leave under the circumstances if Dally was coming with the pay roll approaching. I think Foster will indorse the Torreón Smelter contract proposition; as he now seems to thoroughly approve it." From the evidence it appears beyond question that the defendant Foster knew that the El Paso Smelter had been making advances to Fitzgerald on ore shipped, and that, at the time of the change from the El Paso Smelter to the Torreón Smelter, Foster himself paid to the El Paso Smelter \$4,000 in settlement of all advances made by that smelter not covered by ore shipments.

The plaintiffs advanced to the defendant Fitzgerald, under the contract of August 31, 1907, \$16,500 in money on ore prior to the incorporation of the company. This ore was not tested or sampled at Las Cruces, N. M., as provided by the contract; this provision having been waived by both parties. The price of copper had materially depreciated between the period of the shipment of the ore and the time for settlement under the contract, and the quality of the ore shipped was found, when assayed, to be such that its total net value was less than the freight, treatment, and extraction charges provided for in the contract by some \$1,483, and including the excess freight paid on moistures. The total loss was \$2,146.95. This action was instituted to recover from the three defendants the advances made and the loss sustained on freight and treatment charges and moistures; the plaintiffs alleging that the defendants were copartners and that each was liable individually for the amount claimed. The defendants were all nonresidents of the territory of New Mexico, and service was had only upon the defendant Foster, who appeared and filed an answer, setting up the contract executed between the three defendants and denying the liability.

The cause was by stipulation transferred to the district court of Bernalillo county and was heard by the court, a jury having been waived.

The court made findings of fact in substance as follows: "1. The copartnership of the plaintiffs. 3. That Fitzgerald entered into the agreement with the receiver on behalf of himself and his associates, Foster and Helmer, and took possession of the mine in the joint behalf until it was turned over to the corporation on October 16th. 4. That during all this time the three defendants were partners doing business under the firm name and style of the Torpedo Copper Company. 5. That as such they were engaged in the operation of the mines and in plans, preparations, work, and expenditures for the erection of a smelting and reducing plant for the purpose of extracting and smelting ores and the acquiring and exploiting of a town site which they propose to use in connection with the development and operation of said mines. 6. That the said George B. Fitzgerald, on the evidence, had authority from the defendants Nathaniel C. Foster and Frank A. Helmer to market all ores extracted from the said mines, and to procure advances from the plaintiffs on account of ores thereafter to be extracted and mined in the conduct of the copartnership business, and the defendant Foster knew that such advances were being made by the plaintiffs, and made no objection to them. 7. to 9. That, while so acting, the copartnership entered into the written contract for the sale of the ores to the plaintiff and providing that the plaintiffs would advance sums of money from time to time on account of the ores thereafter to be mined which was to be repaid with such ore with interest at 1 per cent. a month. 10. The tenth finding sets forth in detail the charges or deductions to be made for treatment, freight, etc. 11. That a considerable quantity of ore was shipped by the defendant company to the plaintiff prior to the organization of the corporation, but the quality and price was such that (18th) the freight, treatment, and extraction charges, 'provided for in the aforesaid contract,' exceeded the net value by \$1,483.82. 14. That the plaintiff advanced \$15,500 prior to October 16th on account of ore thereafter to be shipped, and paid \$1,000 to May Bros. for hauling the ore which was likewise to be considered as an advance. 19. That the defendants, on or prior to the month of December, 1907, ceased to operate the aforesaid mine or to extract ores therefrom, and disposed of the mine to other parties, and have failed and refused to repay to the plaintiffs the aforesaid sums or any part thereof."

Upon these findings the court stated the following conclusions of law: "1. That the said George B. Fitzgerald was without authority given in express terms to pledge the

personal credit of his associates in the said enterprise or to borrow money or contract debts in the operation of the same mining claims, and personally bind them or either of them, but had implied authority as set forth in findings of fact 2 and 6 as hereabove set forth. 2. That the sums of money advanced by the plaintiffs to or for the said Torpedo Copper Company, in the operation of the said mine, were to be paid back in ores to be thereafter shipped by said Copper Company. 3. That the plaintiffs are not entitled to recover anything on account of freight, treatment, or reduction charges paid on the ores shipped by or through them to the Torreon Smelter. 4. That plaintiffs are entitled to recover from the defendant Nathaniel C. Foster the several sums advanced by the plaintiffs to the Torpedo Copper Company, and the sum paid May Bros. with interest from the date of each advance or payment at the rate of 12 per cent. per annum, amounting at this date to the sum of \$23,841.81; to all of which findings and conclusions the defendants excepted."

Judgment was entered in accordance with the findings, from which judgment the appellant prosecutes this appeal, and the appellees also prosecute a cross-appeal from the action of the court in holding that the plaintiffs were not entitled to recover on account of freight, treatment, or reduction charges paid on ore shipped by or through them to the Torreon Smelter.

Argued before ROBERTS, C. J., HANNA, J., and RAYNOLDS, District Judge.

Wade & Wade, of Las Cruces, for appellant Foster. Marron & Wood, of Albuquerque, for appellees.

ROBERTS, C. J. (after stating the facts as above). [1] The appellant contends that the findings of the trial court are not sufficient to support the judgment. The findings are set out in the statement of facts, and it is not necessary to repeat them here. The appellant evidently proceeds upon the theory that, if any doubt exists as to the meaning of the findings, that doubt is to be resolved in his favor. He endeavors to create such doubt by combining and confusing the language of the sixth finding of fact that Fitzgerald had authority to make the contract with the first conclusion of law that this authority was not given in express terms. The rule as to the construction of findings is exactly the opposite from that contended for by appellant. The general rule is "that every reasonable intendment and presumption will be resolved against the appellant and in favor of the correctness of the proceedings below." 8 Cyc. 275. Applying this rule to the construction of findings, every inference not contrary to the evidence or otherwise appearing to be unreasonable will be drawn from the facts found, and in case of doubt that presumption will be pre-

sumed correct which supports the judgment. 3 Cyc. 810. In *Kuschel v. Hunter*, 50 Pac. 397,¹ the court says: "The presumptions we are permitted to indulge must be in support of the judgment. If there are doubts as to the meaning of any finding, they must be resolved in support of the judgment." Tested by this rule, we think the findings are sufficient to support the judgment.

[2] Appellant argues that the findings are not supported by the evidence. This court has held, by an unbroken line of decisions, that it will not disturb findings of fact, where there is any substantial dispute upon the evidence. A great many of the disputed facts in the case were established by circumstantial evidence, and we cannot say that the lower court was not justified in arriving at the conclusion it did.

The principal contention urged by appellant is that the defendants were mining partners, and therefore that Fitzgerald did not have the power to bind Foster by his engagements with the plaintiffs; that a mining partnership has special features, differing from other partnerships, among which are: a want of the *delectus personarum* and a consequent want of that authority, in the individual members to pledge the personal credit of their associates except for the employment of labor and similar essential purposes. There is, of course, no dispute as to the existence of these special associations, known as mining partnerships, and as to the lack of power of any member thereof to bind his associates to the extent of the implied powers of a commercial partner. But under the findings of the court it is apparent that the principle does not apply to the case at bar.

Under the sixth finding, the court found that Fitzgerald, on the evidence, had authority from the defendants Foster and Helmer to market all ores extracted from the mine and to procure advances from the plaintiffs on account of ores thereafter mined, and that the defendant Foster knew that such advances were being made; and by its fourth finding the court found that the parties were "partners doing business under the firm name and style of the Torpedo Copper Company, and as such partners were engaged in the development and operation of the mining property." It is evident that the court found that the parties did not sustain the relation to each other of mining partners, but that they were partners, subject to the rules relating to an ordinary partnership in trade. This conclusion is strengthened by the fact that the appellant, at the conclusion of the testimony, requested the court to find facts showing the existence of a mining partnership, and to state the conclusion of law therefrom that the rela-

tionship existing between the said parties constituted a mining partnership. This the court refused to do, but made the findings set out in the statement of facts.

The appellant contends that the agreement of August 8, 1908, set out in the statement of facts, was the measure of the power of the partners and limited their rights, and that the liability of the defendant Foster must be determined under the provisions of said contract. If this proposition is correct, there could be no doubt as to the non-liability of the defendant Foster. The lower court, however, evidently did not determine his liability upon such contract. A reading of the contract will evidence the fact that it did not provide for the working of the mine. It was simply a preliminary arrangement between the three parties, providing for the purchase by Fitzgerald of the property, the furnishing of the indemnity bond by Foster, the organization of a corporation, and the distribution of the shares of stock. It was evidently never the intention of the parties to carry on, under this written agreement, the extensive mining operations which they did. Immediately after the purchase by Fitzgerald of the property, or the signing of the contract for the purchase, steps were taken to complete the formation and organization of a corporation to take over the property. This was delayed from time to time, and Fitzgerald continued working the mine and Foster to advance money far beyond the amount specified in the preliminary written agreement. Other undertakings were begun by the parties, and, from all the circumstances shown on the trial, we believe the court was justified in concluding that a partnership existed between the parties, and that it was subject to the rules relating to an ordinary partnership in trade. We have set forth in the statement of facts many of these facts and circumstances.

[3] The appellant contends that every agreement for the working of a mine is a mining partnership, except where there has been an *express agreement* to constitute a full trading partnership, but we do not understand that appellant contends that by "express agreement" he means one proven by some *express words* of the parties describing in exact language the relation intended to be assumed or negating in express words their intent to become mining partners. In the leading case in this country on mining partnerships (*Skillman v. Lachman*, 23 Cal. 204, 83 Am. Dec. 96), the court says: "Still there may be a partnership in the working of a mine subject to the rules relating to an ordinary partnership in trade. Story, Part. § 82. And this relation of partnership may be constituted either by express stipulation or by implication deduced from the acts of the parties." The court evidently found that the relation of the defendant

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 118 Cal. 274.

Foster to the enterprise was not that of a mining partner.

(4) The chief fact which distinguishes mining from general partnerships is the absence of the *delectus personæ* in the former and the resultant rules, that the shares of mining partners may be transferred to others, who become partners in turn by acquiring such interests; and, as the partners therefore have not the right to choose their associates, it necessarily follows that such associates have no power to personally bind their fellow members. *Skillman v. Lachman*, 23 Cal. 198, 83 Am. Dec. 96; *Duryea v. Bart*, 28 Cal. 569; *Meagher v. Reed*, 14 Colo. 235, 24 Pac. 681; 9 L. R. A. 455.

(5) Where there is an express agreement between the parties, and it appears therefrom that they contracted with the object and purpose of relying on the *delectus personæ* in their relations, the fact that their business was the working of a mine does not affect their relation or liability as general partners. This proposition was decided by the Supreme Court of California in the case of *Decker v. Howell*, 42 Cal. 637. The court says: "The main question in this case is whether Howell had authority, either express or implied, to make the note in suit. It is equally well settled by the decisions of this court that no such authority exists in the case of an ordinary mining partnership. The decisions in *Skillman v. Lachman*, 23 Cal. 206 [83 Am. Dec. 96], and the subsequent cases, place this exception to the recognized rule as applicable to trading partnerships, upon the ground that in mining partnerships the *delectus personæ* does not exist, and the membership is continuously subject to changes beyond the control of the partners. But it is no disparagement to the salutary doctrine of these cases to hold that a strict partnership may exist in the working of a mine which shall be subject to the incidents of a trading partnership. There is nothing in the nature of the business of mining which forbids such a contract. If by the terms of a contract of mining partnership it appears that the confidential relations of an ordinary partnership are established, and that the firm is not subject to the intrusion of other partners at will, the reason of the rule that restricts the powers of a single partner falls. The parties are strictly partners, not by reason of their common ownership of the mine, but as the result of their own agreement. * * * In *Bainbridge on Mines*, 439, the author says: 'But there are mining concerns which are carried on by partners, few in number, subject to mutual selection, and therefore more closely connected by mutual confidence.' * * * There may be no difference between firms of this kind and those engaged in any other distinct business as general partners, and those who are not working partners may not be less liable to the general consequences of such a partnership." Certainly it must

be the intention of the parties operating a mine which must control. If they intend that their relations to each other shall be that of partners, with the confidential relations of an ordinary partnership existing, and the firm not subject to the intrusion of other members at will, no reason exists for the application to such business relations of the rules of an ordinary mining partnership.

(6) The facts and circumstances established and proven on the trial of this case in the lower court justified the court in concluding that the parties themselves intended to establish the confidential relations of an ordinary partnership. Foster, the appellant, in several of his letters, speaks of his liability for the obligations of the partnership. If a mining partnership existed, and if the partners regarded each other merely as mining partners, no liability on his part would have existed, save as he had authorized. Fitzgerald, the managing partner at the mine, contracted debts and incurred obligations, procured advances from the El Paso Smelter, all of which were taken care of by Foster, and that without objection or complaint. The correspondence shows that the parties did not intend that other partners should intrude into the partnership. Helmer says to Fitzgerald, in speaking of a proposition which had been made to Fitzgerald to buy his interest, "If you go out, we go out"; again he tells Fitzgerald, "we, three are one." If either of the three partners had conveyed his interest in the mine to a stranger, the purchaser and the remaining partners would have become tenants in common of the mine and in its workings, subject to the rules applicable to an ordinary mining partnership (*Decker v. Howell*, supra), but such sale would have worked a dissolution of the general partnership theretofore existing between the three partners. The court found that the partners had in contemplation other enterprises, viz., the erection of a smelter, the exploiting of a town site, and the building of a railroad. These enterprises were not mentioned in the written contract of August 3d, but were taken up by the parties later.

Where in a partnership the *delectus personæ* exists, and the parties intend that the confidential relations of partners shall exist, and so treat the business relation, the mere fact that the business engaged in is the operation of a mine should not alter the liability of the individual partners. To so hold would be to lose sight of the principle which distinguishes a mining partnership from an ordinary commercial partnership. The mere fact that parties make a contract, associating themselves together for the purpose of mining, falls far short of fixing their relations as mining partners. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. The real relations of the partners must be determined, not on the agreement of August 3d, as appellant assumes, but on

their acts, intentions, and agreements thereafter, as disclosed by the evidence; the contract being merely a piece of evidence serving to throw light on these intentions.

The lower court found that an ordinary commercial partnership existed between the parties; while such finding was not made in express terms, yet it was plainly made by implication, and, finding no error in this holding upon the evidence, numerous points argued by appellant are disposed of.

Appellant contends that Daily had notice of the limited liability of Foster, basing such contention upon a remark made by Galles, the receiver, to Daily that "Foster had associated with him as mining partners Fitzgerald and Helmer," but there were other facts and circumstances appearing in evidence, of which Daily had notice, which justified the court in holding otherwise.

Appellant, in this court, for the first time challenges the sufficiency of the complaint to state a cause of action. No demurrer to the complaint was filed in the lower court, and no objection was interposed to the admission of evidence. This contention can be disposed of by a quotation from the case of *Cushing v. Pires*, 124 Cal. 663, 57 Pac. 572. "While the complaint is not to be recommended as a precedent to be hereafter followed, yet in view of the fact that no objection, either as to its form or substance, was made in the court below, we think it sufficient to support the judgment based upon it. It is true that the objection that the complaint does not state a cause of action may be successfully made for the first time on appeal, but the appellate court will not be overzealous to find a defect in the complaint that the appellant himself failed to discover until the case had been decided against him on its merits. We think the defects in the complaint, as well as the variance complained of, are of a nature to be waived by failure to call them to the attention of the trial court by proper objections, and that the defendant should not be heard to urge those objections for the first time after judgment." See, also, *Western Union Telegraph Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *Chavez v. Myers*, 11 N. M. 333, 68 Pac. 917.

Appellant claims that the judgment was excessive in that the court included in the judgment the sum of \$3,000 and interest thereon. In a statement rendered by Daily to Foster on May 6, 1906, this \$3,000 was shown to have been advanced on October 23, 1907, which it develops was after the date of the organization of the corporation. But Daily in his testimony says that the sum was advanced on the date of the organization of the corporation, so we cannot say that the court was in error in including the item.

The plaintiffs have brought a cross-appeal,

assigning as error the action of the court in finding that the plaintiffs waived their right to recover freight and treatment charges, claiming that such finding is without any evidence to support it. We have examined the transcript and find that there is evidence upon which the court might have based such a finding.

[7] Appellees, in their cross-appeal, also assign as error the action of the court in sustaining the demurrer to the amended complaint, and thereby striking out the additional defendants. It is a sufficient answer to this alleged error to say that the plaintiffs did not stand on their demurrer, but filed an amended complaint, and that the parties defendant who were stricken out by the action of the court in sustaining the demurrer are not parties to this appeal.

Finding no error in the record, the cause is affirmed.

HANNA, J., and RAYNOLDS, District Judge, concur.

PARKER, J., having passed upon one feature of the case in the court below, presented here by cross-appeal, did not participate.

(17 N.M. 166)

THIRD NAT. EXCH. BANK OF SANDUSKY, OHIO, et al. v. SMITH et ux.

(Supreme Court of New Mexico. May 5, 1912.)

(Syllabus by the Court.)

1. PUBLIC LANDS (§ 19*) — GOVERNMENT OWNERSHIP — OFFENSES INCIDENT TO DISPOSAL.

Act Cong. Feb. 25, 1885, c. 149, 23 Stat. L. 321 (U. S. Comp. St. 1901, p. 1524), makes it a penal offense for any person to inclose public lands of the United States, or to assert the right to the exclusive use and occupancy of any part of the public domain, without claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith, with a view to entry thereof at the proper land office, under the general laws of the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

2. MORTGAGES (§ 81*) — ACTIONS TO FORECLOSE — DEFENSES.

A paragraph of answer, interposed in a suit on notes, and to foreclose a trust deed, given for the purchase price of the land included in the trust deed, which sets up as a defense that the contract by which the land was acquired and the consideration for the notes secured by the trust deed was in violation of the penal provisions of Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), states a good defense.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 188-190; Dec. Dig. § 81.*]

3. CONTRACTS (§ 105*) — VALIDITY — LEGALITY OF CONSIDERATION.

An act done in violation of a statutory prohibition is void, and confers no right upon the wrongdoer.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 478, 480-497; Dec. Dig. § 105.*]

4. CONTRACTS (§ 105*)—VALIDITY—LEGALITY OF CONSIDERATION.

A contract founded upon an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party in violating a statute, or doing an illegal act, is void.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 478, 480-497; Dec. Dig. § 105.*]

5. MORTGAGES (§ 454*)—ACTIONS TO, FORECLOSE—PLEADING.

Held, that the paragraph of answer in question does not rely upon the fact that appellee or appellant had no title to the land, except as such fact is incident to the main fact that the notes and trust deed are based upon a consideration, growing out of the violation of a penal statute, and that the defense relies upon the invalidity and unlawfulness of the transaction, and not the mere failure of title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1319-1328; Dec. Dig. § 454.*]

6. CONTRACTS (§ 136*)—VALIDITY—LEGALITY OF CONSIDERATION.

The defense that a contract violates a penal statute, and which shows that defendant participated in such violation, is a dishonest defense, and it is not out of any consideration for the defendant that courts permit such a defense to be interposed, but it is allowed out of public consideration, and in order to better secure the public against dishonest transactions.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 136.*]

7. CONTRACTS (§ 138*)—VALIDITY—LEGALITY OF CONSIDERATION.

Courts will not permit, directly or indirectly, an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to such contract. If a recovery is had, the right must rest upon a disaffirmance of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 138.*]

Appeal from District Court, Dona Ana County; before Justice Parker.

Action by the Third National Exchange Bank of Sandusky, Ohio, and others against D. B. Smith and wife. From a judgment sustaining a demurrer to the answer, defendants appeal. Reversed and remanded, with instructions.

This action was begun in the district court of Dona Ana county by the appellees against appellants to recover a judgment upon three promissory notes, each for the sum of \$4,500 and interest and attorney's fees, and for the foreclosure of a lien given to secure their payment by a deed of trust executed concurrently with said notes on certain real estate, situated in said county, and water rights connected therewith. The notes were alleged to have been given to W. H. Reinhart for the deferred payments on the purchase price of said lands by appellants in due course for value. The notes and trust deed were attached to and made a part of the complaint as exhibits, and the deed of conveyance to appellant Smith, the notes, and the deed of trust were shown by allegations in the complaint to have been all a part of one transaction and of the same date. The complaint further alleged that the

notes and trust deed had been assigned and transferred to the Third National Exchange Bank of Sandusky, Ohio, in due course for value before maturity, and that said notes were the property of said bank at the time of the institution of the suit. The defendants appeared and answered, admitting the execution of the notes and deed of trust, but denied that Reinhart for value sold or assigned or transferred either of said notes to the plaintiff bank before maturity, and pleaded a lack of consideration for said notes, in that said Reinhart had no title to the land for which they were given, and in the eighth paragraph of their answer the defendants pleaded illegality of the entire transaction in the course of which said notes and deed of trust were executed. The paragraph of answer presenting this defense is as follows: "And for further separate defense to said complaint defendant alleges: That the execution of said promissory notes sued on by the plaintiff bank was obtained by W. H. Reinhart, payee, in each of them, in virtue of and through an unlawful assertion of right to the exclusive use and occupancy of the lands therein described, which said lands were public lands of the United States of America at the time when said attempted conveyance was made, and which right to such exclusive use and occupancy thereof the said Reinhart then and there asserted by attempting to convey said land and deliver such exclusive occupancy of the same to the defendant D. B. Smith, in consideration of his payment of the part of the consideration thereof in cash and in part by the execution and delivery to said Reinhart of said promissory notes sued on herein; the said Reinhart being in actual, exclusive use and occupancy, and having fully inclosed said land at the time of so attempting to convey the same to the defendant D. B. Smith, and having delivered to said defendant the said conveyance and exclusive use and occupancy of said land, which said Reinhart then held; which delivery thereof was made in pursuance to agreement and contract on the part of said Reinhart to deliver such exclusive possession as a part of said transaction of attempted conveyance thereof, and for which said notes were executed as aforesaid. That at the time of said conveyance, and at the time of taking of said promissory notes in part payment therefor, the said W. H. Reinhart had not claim or color of title made or acquired in good faith with a view to entry thereof at the proper land office of the United States at the time of asserting said right to exclusive use and occupancy of said land as aforesaid, or at the time he inclosed the same, nor had he at any time theretofore any other claim or color of title made or acquired in good faith to said land so attempted to be conveyed to the defendant D. B. Smith as aforesaid, but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the defendant D. B. Smith alleges, that said Reinhart's said assertion to right to such exclusive use and occupancy of said public land of the United States so asserted as aforesaid in his said attempted conveyance and delivery of such exclusive possession to the defendant D. B. Smith was done in violation of the penal provisions of the Statutes of the United States of America of February 25, 1885, and that the defendant D. B. Smith is informed and believes, and therefore alleges, that the plaintiff bank at the time of taking said notes, if it ever became the owner thereof, had knowledge of all the facts hereinbefore alleged in said paragraph No. 8 of defendant's answer."

The appellees filed a general demurrer to appellant's answer and demurred specially to the seventh and eighth paragraphs of the answer; the grounds of the general demurrer being as follows:

"(1) Because they say defendants do not therein offer to do equity by offering to reconvey to plaintiffs or to their vendor the land in plaintiffs' complaint herein described; (2) because they say it is not shown therein that defendants have been in any manner disturbed in the possession of the land in plaintiffs' complaint herein described; (3) because they say that defendants are in law estopped to deny or question the title conveyed by their said mortgage or deed of trust; and (4) because they say the defendant in the foreclosure of a purchase-money mortgage or deed of trust is in law estopped to deny or question the title conveyed to him by his vendor."

The grounds of the special demurrer addressed to the seventh and eighth paragraph of the answer, which set up substantially the same defense, were as follows: "(1) Because they say defendants are in law estopped to deny or question the title conveyed by their said mortgage or deed of trust; (2) because they say the defendant in the foreclosure of a purchase-money mortgage or deed of trust is in law estopped to deny or question the title conveyed to him by his vendor; and (3) because they say the allegations therein contained are wholly immaterial and irrelevant to any issue tendered by the said complaint."

The demurrers to these paragraphs of the answer were sustained by the trial court, and the appellants electing to stand on their answer, the trial court gave judgment for foreclosure of the deed of trust on the land for the amount of the promissory notes, with interest and attorney's fees, according to the terms of the deed of trust, but did not give a personal judgment against the defendants, but directed that the deficiency, if any, should be reported to the court. From this judgment of the trial court the appellants prosecute this appeal.

Argued before ROBERTS, C. J., HANNA, J., and LEAHY, District Judge.

Morris & Gillett, of El Paso, Tex., and Holt & Sutherland, of Las Cruces, for appellants. Seymour Thurmond, of El Paso, Tex., and J. H. Paxton and R. L. Young, both of Las Cruces, for appellees.

ROBERTS, C. J. (after stating the facts as above). The appellants have assigned as error the action of the lower court in sustaining the demurrer to the answer, and entering judgment for the plaintiff as by default for want of a sufficient answer, claiming that the court thereby lent its aid to the enforcement of an executory contract of mortgage which the answer clearly showed was illegal, in that it was made in the course of, and as a part of a deed of sale, and assertion of exclusive possession by vendor and vendee of public land of the United States in violation of the penal statutes and public policy of the United States, of which appellees had notice, being parties to said illegal transaction. Appellees in support of the judgment contend, first, that the conveyance in question was not illegal, and second, that a grantee of land, though it be public land of the United States, cannot repudiate his purchase-money mortgage of the land, by means of which he procured and acquired possession of the land, and at the same time withhold and retain the possession of the land so acquired.

[1] The statute of the United States, which appellants contend the contract and transaction violate, is Act Feb. 25, 1885, c. 149, 23 Stat. L. 321; 6 Fed. Stat. Ann. 533, the section of which reads as follows: "Section 1. That all inclosures of any public lands in any state or territory of the United States, heretofore, or to be hereafter made, erected or constructed by any person, party, association or corporation, to any of which land included within the enclosure, the person, party, association or corporation, making or controlling the enclosure, had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such enclosure is hereby forbidden, and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title or asserted right, as above specified as to enclosure, is likewise declared unlawful and hereby prohibited." Section 2 makes it the duty of the various district attorneys of the United States to institute injunction suits to prevent violations of the act, and section 4 prescribes a penalty of a fine not exceeding \$1,000 and imprison-

ment not exceeding one year for each offense. It will be noted that the statute defines two offenses, each of which is punishable by fine and imprisonment: First, it is an offense for any person to inclose public lands of the United States in contravention of the statutes; and, second, it is likewise an offense for any person to assert the right to the exclusive use and occupancy of any part of the public domain, the party in either event having no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office, under the general laws of the United States. If a person has claim or color of title, made or acquired in good faith or asserts a right to public land by or under claim made in good faith, with a view to entry thereof at the proper land office, etc., it is not an offense for him to either inclose public land, or to assert the right to the exclusive use and occupancy of public land.

[2] The paragraph of the answer in question alleges that Reinhart "had not claim or color of title made or acquired in good faith with a view to entry thereof at the proper land office of the United States," and that he nor had he at any time theretofore any other claim or color of title made or acquired in good faith to said land," and that he asserted the right to the exclusive use and occupancy of the land described in the deed of trust, and had inclosed the same, and that the unlawful assertion of such right to the exclusive use and occupancy of said land was the inducement for the purchase by Smith, and that Reinhart understood and agreed to deliver such exclusive occupancy of said land to Smith, thus showing that the assertion of the right to the exclusive use and occupancy of the land, which was in violation of the penal statute, was a part of the consideration which entered into the consummation of the contract for the purchase of the land and the execution of the notes and trust deed. The demurrer, of course, admitted the truth of the allegations of the answer, which were well pleaded, hence it is admitted that the land in question was public land of the United States, to which Reinhart had not good-faith claim or color of title, and to which he had no asserted right with a view to entry, etc.; that he had inclosed the land; that he delivered to appellants the exclusive use and occupancy of said land, which said Reinhart then held, which delivery was made in pursuance of the contract to deliver such exclusive use and possession as a part of the transaction and attempted conveyance, and for which the notes and trust deed were executed. The allegations of the paragraph of answer clearly allege that the agreement to deliver the exclusive use and possession of the land, which Reinhart had theretofore asserted to

Smith was a part of and entered into the consideration of the notes and trust deed.

The first question to be determined is whether the contract and conveyance was legal or illegal. Appellees rely chiefly upon the case of Tidwell v. Chiricahua Cattle Co., 5 Ariz. 352, 53 Pac. 192, in support of their position that the conveyance in question was not illegal, but a careful reading of the case will show a distinction between the facts in that case and the one now under consideration. There the court says: "The lands inclosed were not tracts of vast area of wild, unimproved land of the public domain," as contemplated by the act of Congress, but a tract of less than 160 acres, all in cultivation, and actually used for agricultural purposes, and was held by the appellee not without claim or color of title, but by conveyances of record from grantors, under which appellee had for years held, occupied, plowed, seeded, irrigated, cultivated and improved it." And the court distinctly found that the defendant had shown color of title, thus bringing the case relied upon clearly within the prohibition and penalty of the statute in question; but here the allegations of the answer allege that Reinhart did not have good-faith claim, asserted right, etc., or color of title. If issue should be joined upon the allegations of the answer and the proof should establish, as it did in the case of Tidwell v. Chiricahua Cattle Co., that Reinhart held the land in good faith under conveyances, he would then bring himself clearly within the doctrine laid down, and his acts would not be in contravention of the act of Congress in question. The paragraph of the answer now under consideration alleges that Reinhart held the land without good-faith claim or color of title or asserted right, etc. The defense interposed here is that the consideration of the contract out of which the notes and trust deed originated, and which they were given to secure, was based upon the violation of a penal statute of the United States.

[3] We think the authorities uniformly hold that an act done in violation of a statutory prohibition is void, and confers no right upon the wrongdoer. Reinhart had no right, under the law, to assert the right to the exclusive use and possession of government land, to which he had no claim or color of title, made or acquired in good faith, or asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office, etc., and in asserting such right he was acting in violation of law, and any conveyance or contract which he might make to any portion of the land to which he asserted such right to the exclusive use and possession, and into which his assertion of such right to the exclusive use and possession entered, and by which he attempted to confer such right upon another party, was utterly void. Waskey v.

Hammer, 223 U. S. 85; 32 Sup. Ct. 187; 58 L. Ed. 359; Swanger v. Mayberry, 59 Cal. 91; Combs v. Miller, 24 Okl. 576, 103 Pac. 590; McLaughlin v. Ardmore Loan & Trust Co., 21 Okl. 511, 95 Pac. 779; Garst v. Love, 6 Okl. 46, 55 Pac. 19; Tandy v. Elmora-Cooper Live Stock Comm. Co., 113 Mo. App. 409, 87 S. W. 614; Levinson v. Boas, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575; 11 Ann. Cas. 661, and extended note.

We are aware that the rule above stated is subject to the qualification that when upon a survey of the statute and from its subject-matter, and the mischief sought to be prevented, it appears that the Legislature intended that the violation of the statutory prohibition should not render a contract void, effect must be given to that intention, but a survey of the statute in question fails to disclose any such intention. As was said by the Supreme Court of the United States in the case of *Waskey v. Hammer*, supra, in considering a section of a statute of the United States prohibiting officers, clerks, and employes of the General Land Office from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and providing that any person who violated the section should be forthwith removed from office: "The acts described in section 452 (U. S. Comp. St. 1901, p. 257) are expressly prohibited under the penalty of dismissal. There is in its language nothing indicating that its scope is to be confined to the exaction of that penalty, or that acts done in violation of it are to be valid against all but the government. Nor is there anything in its subject-matter or in the mischief sought to be prevented which militates against the application of the general rule. On the contrary, it is reasonably inferable from the language of the section and the situation with which it deals that it is intended that violations of it shall be attended by the ordinary consequences of unlawful acts." In the case of *Garst v. Love*, supra, the Supreme Court of Oklahoma held that a paragraph of answer interposed as a defense to a suit to recovery for the pasturage of cattle within an inclosure on government land, which stated that the inclosure was maintained upon government land, to which the plaintiffs had no right or title, and of which they were holding exclusive possession for rental and speculation purposes, in violation of the Act Cong. Feb. 25, 1885, stated a good defense.

[4] In the case of *McLaughlin v. Ardmore Loan & Trust Co.*, supra, the Supreme Court of Oklahoma, in a suit instituted on a promissory note, where the proof showed the consideration therefor to be a deed of land from the payee to the payor in possession of the payee, and held by him in violation of section 2118, R. S. U. S., which imposed a penalty upon a person making a settlement upon any lands belonging, secured, or granted by a treaty with the United States to any

Indian tribe; that there could be no recovery, as the contract had for its object the violation of law, and was illegal, the court says: "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void." The paragraph of the answer in question alleging that Reinhart had the exclusive use and possession of the land in question, and that he transferred to the appellant the exclusive use and possession of the land, all without right or claimed right or color of title, and being designed to further the violation of the statute, and to aid and assist the appellant in continuing the violation thereof, under the rule announced in the above case, the contract would be clearly void and unenforceable. The assertion of the right to the exclusive use and possession of government land, in violation of the statute, was a crime in itself, and where the notes and trust deed were grounded upon this violation, and the proposed continued violation by the appellant Smith, it would hardly do to permit the party committing the offense to maintain an action upon obligations arising out of a criminal act.

[5] The appellees contend, however, that, even if the notes and trust deed are invalid by reason of the facts above stated, the appellants are estopped to deny that Reinhart had title when he conveyed, or that the appellants had title when they executed the deed of trust, and that they are therefore estopped from setting up title in a third person. The appellees rely upon the doctrine laid down by 2 Herman on Estoppel and Res Judicata, §§ 910, 911, that: "In a suit against a mortgagor for the land mortgaged, he is estopped to deny that he had title when he mortgaged, or to set up title in a stranger." * * * The same principles of estoppel in pais apply in the case of mortgagors, and the rule that no man shall take advantage of his own wrong is one of universal application, and numerous cases cited in support of the principle announced. We concur fully in the above statement of the law, but do not think the principle applicable to this case. The appellant is not relying upon the fact that he had no title, or that Reinhart had no title, except as such a fact or facts are incident to the main fact that the notes and trust deed are based upon a consideration growing out of a violation of a penal statute. It is the invalidity and unlawfulness of the transaction upon which the defense is based, and not the mere failure of title. It is a well-settled rule that a tenant cannot, during his possession of premises, dispute the title of his landlord under whom he entered, yet leases made in violation of the law, or which contemplate the doing of an act in violation of law and the settled public policy of the country, are void. In the case of *Dupas v. Wassell*, 1 Dill. 213,

Fed. Cas. No. 4,182, Judge Caldwell, in passing upon a lease executed to a portion of the "Hot Springs Reservation," which under an act of Congress was reserved for future disposal by the United States, and which under the act could not be entered, located, or appropriated for any other purpose whatever, said: "No rule is better settled than that tenant shall not, during his possession of premises, be permitted to dispute the title of his landlord under whom he entered. And this rule extends to an under tenant. * * *

The plaintiff insists that, applying these rules of law to the facts in this case, he is entitled to judgment. Every agreement that parties may make does not in law amount to a contract having a binding obligation. Contracts to do an illegal act, and contracts against good morals and public policy are void; and the law will not lend its aid to either party to such a contract to compel its performance or enforce any right claimed under it. * * *

A lease of premises for the purpose of prostitution or for any other immoral object is a contract against good morals and absolutely void, * * * and the same is true of leases that contemplate the doing of an act in violation of law and the settled public policy of the country. The lease in this case falls within the last category. * * *

He had no right and could acquire no right to treat this government property as his own; and in attempting to do so he was acting in violation of law, and any lease he may have granted to any portion of the reservation was utterly void."

There can be no estoppel against pleading illegality in the sense of penalized acts. This question was met by the Supreme Court of Arkansas in *Shorman v. Eakin*, 47 Ark. 351, 1 S. W. 559, where some of the authorities are collated. The first paragraph of the syllabus of the case states the facts of the case as follows: "The United States government is the original source of title to lands in Arkansas, and the presumption of the law is that the title remains with the government until some other disposition of it is shown, and where a man sells land in that state, claiming to have derived it from the state upon a swamp land grant, and at the same time, according to the books of the United States Land Office, the land was vacant, and subject to homestead entry under the federal laws, the presumption is that the grantor had no title, and a note given for the purchase money is void." In the opinion of the court it is said: "As a general rule, a purchaser entering into possession under his contract of purchase cannot, in an action like this, so long as he retains such possession, deny his vendor's title. If the vendor is unable to convey the title and he would rescind the contract, he must restore the possession. He cannot enjoy the property and refuse to pay the price. The principle on which this rule rests is the purchaser is estopped to deny the title of his vendor,

because he acknowledged it and gained possession of his purchase, and he ought not in conscience as between them to be allowed to enjoy the fruits of his contract and not pay the full consideration money. *Lewis v. Boskins*, 27 Ark. 64; *Galloway v. Finley*, 12 Pet. 264 [9 L. Ed. 1079]; *Jackson v. Ayers*, 14 Johns (N. Y.) 224; *Jackson v. McGinness*, 14 Pa. 333; *McIndoe v. Morman*, 26 Wis. 589, 7 Am. Rep. 96. But this rule is not without exception. No one, as a rule, can estop himself from taking advantage of that which is contrary to public policy. Contracts, as a general rule, cannot vest in parties any rights in contravention of law or public policy. Mr. Parsons in his work on Contracts says: 'It is obvious, however, that the doctrine of estoppel can go no further than to preclude a party from denying that he has done that which he had power to do.' 2 Pars. Cont. (5th Ed.) 799; Pub. Pol. 1115; *Spare v. Home Mut. Ins. Co.* (C. C.) 15 Fed. 707; *Steadman v. Duhamel*, 1 Man. G. & S. 888; *Dupas v. Wassell*, 1 Dill. 213 [Fed. Cas. No. 4,182]; *Klenk v. Knoble*, 37 Ark. 304; *Webb v. Davis*, 37 Ark. 555. The Constitution of 1868 prohibited the incumbering of homesteads of residents of this state who are married men or heads of families, in any manner, while owned by them, except for taxes, laborers' and mechanics' liens, and securities for the purchase money. In *Klenk v. Knoble* and *Webb v. Davis*, supra, the defendants, while the Constitution of 1868 was in force, executed mortgages, and recited or covenanted therein that the property mortgaged was not their homesteads. The court held in both cases, which were actions to foreclose mortgages, that the mortgagor was not estopped from denying the truth of these recitals and covenants, and claiming the property as his homestead, because such recitals and covenants were contrary to public policy and void. As a rule a tenant cannot dispute the title of his landlord; yet, in *Dupas v. Wassell*, supra, it was held that a landlord could not recover against his lessee ground rent for the use of the lands leased, because the lease was void by reason of its being contrary to the statutes of the United States, and against public policy; and that the lessee was not estopped to deny his landlord's title."

In *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393, the court said of an estopped pleader to an illegal contract: "It is conceded, as we understand, by counsel for the appellant, that an action could not be maintained to enforce the contract, and that *Adye v. Hanna*, 47 Iowa, 264, 29 Am. Rep. 484, is decisive as to this question. But it is insisted such a contract may be relied on as an estoppel, and a recovery, therefore, had. We do not believe this is correct, and are unwilling to hold that a contract void as being against public policy has any vitality whatever. It matters not how it may be pleaded, a substantial right cannot be en-

forced thereunder. That which cannot be recovered in an action on the contract should not be permitted to be done by indirection. Besides this, the defendant did not affirm any fact to be true which turned out to be false. At most, he asserted his legal opinion, and upon that the contract was based."

In *Brown v. First National Bank*, 137 Ind. 355, 37 N. E. 158, 24 L. R. A. 206, the court said: "The contention of counsel that appellee, having received the benefits of the contract, is estopped to defend against it on the principle that a corporation which has such benefit is estopped to assert that it had no power to contract, is unsound, as applied to the case at bar. The rule suggested applies to cases where private rights alone are concerned, while in contracts void as against public policy the public is interested. The public concern cannot be made a matter of private bargain. A number of maxims apply to, interdict, the enforcement of such a contract, and many decisions hold that the receipt of the benefits and retention of property under such a contract give no right of recovery. If the contract has not been executed, it will not be enforced. If it has not been executed, the law will not extend itself. It cannot be rendered valid by invoking the doctrine of estoppel. *Hutchins v. Weldin*, 114 Ind. 80 [15 N. E. 804]; *Perkins v. Jones*, 26 Ind. 499; *Dumont v. Dufore*, 27 Ind. 263; *Root v. Stevenson*, 24 Ind. 115; *Wheeler v. Wheeler*, 5 La. [N. Y.] 355; *Snyder v. Willey*, 33 Mich. 483; *Greenhood*, Pub. Pol. pp. 2, 3, 6, note 3; *Broom, Legal Maxims*, pp. 729, 730; 7 *Wait. Act. & Def.* 92." In *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404, the court said: "The appellants are not estopped to raise the illegality of the contract because of their course of dealing with respondents under the contract. Validity cannot be given to an illegal contract through any principle of estoppel. *Warville, Vendors*, p. 162, § 4; *Durkee v. People ex rel. Askren*, 155 Ill. 354, 40 N. E. 626 [46 Am. St. Rep. 840]; *Brown v. First National Bank*, 137 Ind. 355, 37 N. E. 158, 24 L. R. A. 206; *Pullman Palace Car Co. v. Central Transportation Co.*, 171 U. S. 168, 18 Sup. Ct. 608, 43 L. Ed. 108."

The cases relied upon by the appellees merely go to the effect that in cases where in no illegality arises, but in which some legal defect of title may exist, which renders a deed or mortgage invalid because wanting in some legal requirement or formality, one claiming under a title is estopped to deny its validity, and one affirming a title by conveying or mortgaging is estopped to deny its validity in the absence of illegality. But illegality in the sense of acts forbidden and penalized by law may always be shown with or without pleading, and will be taken notice of by the court whenever it is made to appear in the case when waived by the parties. The vice of appellees' contention

consists in looking to the position of the defendant and in making the weakness of the defendant's position the point of decision, whereas the real question to be decided is not what the rights of the defendant, who is not seeking relief, may be, but the question is, Shall the court enforce at the instance of the plaintiff an illegal contract made in violation of a statute, which renders it criminal and declares a public policy against such transactions as the one brought to the attention of the court in this case was? The plaintiff seeks affirmative relief, and seeks relief upon the very contract, which is illegal, and not otherwise than upon the contract. The question is not what the defendant may plead, but what relief can the plaintiff have on the contract if the facts brought to the attention of the court by the answer be true.

Appellees insist, however, that equity, in the enforcement of a superior public policy, will apply the doctrine of estoppel, contended for by appellees, to preclude the appellants from setting up the illegality of the transaction of which they seek to take advantage, and will wink at the malum prohibitum of Reinhart's conveyance, in order to prevent the malum in se of the defendants' attempted fraud. Appellees rely chiefly upon the case of *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732, in support of the proposition, and attempt to apply to this case the principles of that case, holding that an accounting may be had and enforced of the proceeds of an illegal partnership. This case has, however, been criticised, and the general statements made in the opinion have been repudiated in most of the American cases, and it has been limited by the United States Supreme Court to the very facts of that case in *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 889, 43 L. Ed. 1117. But the facts of that case and the one now before the court are altogether different. There the illegal contract had been fully executed, and the plaintiff was not relying upon the illegal contract and was not seeking to enforce it, but in the case now before the court, as disclosed by the answer, the plaintiff is seeking to enforce the illegal contract. This mortgage contract and the notes are executory, and this action is brought in a court of justice to enforce what the answer shows to be a part of an illegal transaction, and the question is, not as to the rights or standing of the appellant, but is, Will the court enforce at the instance of the appellee an illegal contract? It might be that the appellees could allege such a state of facts in reply as would render it unjust and inequitable to permit appellant to take advantage of the illegality of the transaction, a matter, however, which we do not decide, but from the present state of the pleadings nothing appears necessitating the application of the rule contended for by

appellees. From all that appears, Reinhart, without good-faith claim, color of title, or asserted right, took possession of government land, asserted thereto the right to the exclusive use and possession, inclosed it with a fence, and sold it to appellant, and agreed to deliver, and did deliver, to appellant Smith the exclusive use and possession of said land and the inclosures thereon. It is true that the recitals in the deed to Smith say that the land was obtained by conveyance, but the answer alleges that Reinhart did not hold the land under color of title, made or acquired in good faith, or claim or asserted right, made in good faith, and if these allegations are true, and they must be taken as true upon demurrer, no equities are shown to exist in favor of Reinhart, which require a departure from the rule announced in the case of McMullen v. Hoffman, supra, that: "No court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."

[6] The appellees contend that it would be inequitable to permit appellant to retain possession of the land, acquired by the contract, even if it is illegal; and that they should not be permitted to plead the illegality of the contract, and still retain possession of the land. It is true that the defense interposed in this case is a dishonest defense, and it lies ill in the mouth of the defendants to allege it. But it is not out of any consideration for the defendants that courts permit such a defense to be interposed, but it is allowed for public considerations, and in order to better secure the public against dishonest transactions. McMullen v. Hoffman, supra.

[7] As said by the Supreme Court of the United States in Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108, in speaking of the holding of the courts in regard to illegal contracts: "They are substantially unanimous in expressing the view that in no way and in no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract, where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of a desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which

will weaken the rule founded upon principles of public policy already noted." As the appellees seek a recovery upon the alleged illegal contract, and not upon a disaffirmance thereof, equity can extend to them no relief.

Being of the opinion that the answer properly alleges that the notes and trust deed were founded upon a contract, which was illegal, in that its consideration was grounded upon the violation of a penal and prohibitory statute of the United States, and that it stated a good defense, it follows that the trial court erred in sustaining the demurrer thereto. The cause is therefore reversed, with instructions to the lower court to overrule the demurrer, and to permit a reply to be filed thereto by appellees, and to proceed with the case in accordance with this opinion.

HANNA, J., and LEAHY, District Judge, concur. PARKER, J., having heard the case in the court below, did not participate in this opinion.

STATE v. HALL

(Supreme Court of Montana, May 10, 1912.)

1. EMBEZZLEMENT (§ 30*)—INDICTMENT—OWNERSHIP OF PROPERTY.

An indictment charging that accused had in his possession as bailee of S. certain money, and that he appropriated it to his own use with intent to deprive and defraud the true owner, the said S., of her property, sufficiently alleges that S. was the owner of the property under Rev. Codes, § 9147, requiring indictments to contain a statement which will enable a person of common understanding to know what is intended.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 44, 45; Dec. Dig. § 30.*]

2. EMBEZZLEMENT (§ 41*)—EVIDENCE—ADMISSIBILITY.

Accused was charged with embezzling payments on a note which the holder had obtained from a corporation of which accused was president, and which was a mere cloak for his operations. The interest on the note was collected by the holder through accused as the corporation, and there was testimony that accused admitted receiving and converting the principal. Held, that the admission of the note in evidence was proper as explanatory of other circumstances, regardless of whether it was induced to the holder by accused, or by an employee of himself or the corporation.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 63; Dec. Dig. § 41.*]

3. EMBEZZLEMENT (§ 44*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence on a trial for larceny by a bailee held sufficient to show the receipt of the money by accused.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67-70; Dec. Dig. § 44.*]

4. CRIMINAL LAW (§ 872*)—EVIDENCE—OTHER OFFENSE.

Where it was claimed that accused was engaged in a scheme to defraud on a trial for larceny in connection with one of the transactions, proof of other transactions having

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

similar features indicating a common design, but somewhat different in details, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

5. CRIMINAL LAW (§ 374*)—EVIDENCE—OTHER OFFENSE.

The length of time over which an inquiry concerning other offenses constituting a part of the same scheme should be permitted to extend is within the sound legal discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 835; Dec. Dig. § 374.*]

6. CRIMINAL LAW (§ 1169*)—REVIEW—HARMLESS ERROR.

On a trial for larceny by a bailee where there was testimony that accused had admitted, and on the stand he virtually confessed that he had received the proceeds of the note and converted it to his own use, evidence that the holder demanded payment from the maker and asked to see his receipts, if error, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

7. CRIMINAL LAW (§ 372*)—EVIDENCE—OTHER OFFENSE.

Where accused was charged with collecting and appropriating the principal of a note which he had transferred, and the interest of which he had been collecting for the holder, and it was claimed that this was one of a series of transactions constituting a scheme to defraud investors, testimony that he transferred a mortgage to another witness and afterwards collected and converted the proceeds was competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

8. CRIMINAL LAW (§ 1169*)—REVIEW—HARMLESS ERROR.

Where accused was charged with embezzling the proceeds of a note and proof of the embezzlement of the proceeds of a mortgage was admitted as part of a scheme by which accused transferred securities, and then collected them from the debtors and converted the proceeds, the admission in evidence of another mortgage transferred by accused to the same witness at the same time which had not been paid to accused was immaterial, and not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

9. CRIMINAL LAW (§ 1169*)—REVIEW—HARMLESS ERROR.

On a trial for embezzling the proceeds of notes collected by accused for the holder, the admission in evidence of receipts produced by the maker of a note purporting to show its payment was not reversible error, if not competent evidence of the payment, where accused had admitted to the holder that he received and converted the proceeds.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

10. CRIMINAL LAW (§ 1169*)—REVIEW—HARMLESS ERROR.

The admission of testimony that a witness inquired of accused's employé relative to a transaction between her and accused, if error, was harmless, where the employé's answer was that he did not know.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

11. CRIMINAL LAW (§ 410*)—EVIDENCE—DECLARATIONS BY THIRD PERSONS.

What an employé of accused did and said in connection with and in assisting accused to defraud his customers was competent evidence on a trial for embezzling his customer's money.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 897, 1254; Dec. Dig. § 410.*]

12. WITNESSES (§ 277*)—CROSS-EXAMINATION—SCOPE.

Where accused, charged with defrauding the customers of the corporation of which he was president, attempted to give the impression that an employé was responsible for the manner in which the corporation's affairs were conducted, and testified that such employé was a stockholder, a director, and secretary and treasurer, but that he was not elected a director at a stockholders' meeting, all of which was denied by the employé, it was competent to ask accused on cross-examination if he knew of any authority for electing a board of directors at any meeting except a stockholders' meeting.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

13. WITNESSES (§ 330*)—CROSS-EXAMINATION—SCOPE.

Where the president of a corporation who was accused of defrauding its customers claimed that another had charge of its affairs, it was competent to cross-examine him relative to the purchase of a house with the corporation's money to show that he used its money as his own.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.*]

14. CRIMINAL LAW (§ 372*)—EVIDENCE—OTHER OFFENSE.

Where accused charged with embezzlement testified that he did not know a note secured by mortgage, and claimed to be a part of the same fraudulent scheme as the transaction in issue had been paid, but he identified his signature to the satisfaction of the mortgage, the mortgage, release, and satisfaction were properly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

15. WITNESSES (§ 277*)—CROSS-EXAMINATION—SCOPE.

Where, after accused transferred notes, he continued to collect and pay the interest to the holder, and was subsequently charged with collecting and converting the principal, and he testified that he did not notify the holders of notes when they were collected, that "the firm" was paying some interest on the notes, and that they gave a check to the holder for the interest although indorsed "without recourse," he was properly obliged to answer whether in his judgment there was any obligation on him to pay the interest or guarantee the payment of principal or interest.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-984; Dec. Dig. § 277.*]

16. CRIMINAL LAW (§ 338*)—EVIDENCE—ADMISSIBILITY.

Testimony that the corporation of which accused was president, and which was merely a cover for his operations, was short nearly \$40,000, was competent to corroborate testimony that accused had admitted receiving and embezzling the proceeds of a note, especially where accused testified substantially to the same shortage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752-757, 787, 788, 801, 855; Dec. Dig. § 338.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

17. CRIMINAL LAW (§ 372*)—EVIDENCE—OTHER OFFENSE.

On a trial for embezzling moneys collected by accused, where it was claimed that it was one of a series of embezzlements constituting a scheme to defraud, a witness testified over objection that he loaned money to accused which was never repaid; that accused collected from a number of parties to whom he had made loans; that the notes of these parties were held by the witness, and that he was the owner thereof; and that accused had authority to collect, but no authority to make any disposition of the proceeds except to pay to the witness. It was claimed by accused that these transactions involved no criminality. *Held*, that the jury were justified in believing that the witness was the victim of a series of embezzlements similar to the one charged, and hence that this testimony was properly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

18. CRIMINAL LAW (§ 1168*)—APPEAL—EXAMINATION OF WITNESSES—RESPONSIVENESS OF ANSWER.

On a trial for embezzlement claimed to have been one of a series of embezzlements constituting a scheme to defraud, a witness who testified to a similar embezzlement was asked on cross-examination whether accused admitted receiving the money claimed to have been embezzled, to which he answered that he did, and that he also admitted receiving \$8,000 for the witness' mother which he could not show. *Held* that, while not strictly responsive, the answer was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3106; Dec. Dig. § 1168.*]

19. CRIMINAL LAW (§ 372*)—EVIDENCE—OTHER OFFENSE.

On a trial for embezzlement claimed to have been one of a series of embezzlements constituting a scheme to defraud, it was not error to permit a witness to read a list of notes which he testified accused admitted having collected, where he also testified that the list was made by himself and was correct, especially where accused admitted a shortage of \$40,000.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372.*]

20. EMBEZZLEMENT (§ 48*)—TRIAL—INSTRUCTIONS DEFINING OFFENSE.

On a trial for larceny by a bailee, an instruction defining "embezzlement" was properly refused; there being no such crime known to the law of the state.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72-75; Dec. Dig. § 48.*]

21. EMBEZZLEMENT (§ 48*)—TRIAL—CONFUSING INSTRUCTIONS.

On a trial for larceny by a bailee, an instruction that the taking or conversion of personal property which renders a person guilty of simple larceny or embezzlement is a felonious taking or conversion was properly refused, as having a tendency to confuse; accused not being charged with a felonious taking.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72-75; Dec. Dig. § 48.*]

22. CRIMINAL LAW (§ 1173*)—TRIAL—REQUESTS FOR INSTRUCTIONS—NECESSITY.

Under Rev. Codes, § 9271, providing that, on the settlement of the instructions on a criminal trial, the parties must specify the particular grounds on which instructions are objected or excepted to, and that general objections that they do not state the law are insufficient, and that no case shall be reversed for errors not pointed out and excepted to where

the trial court made a reasonable effort to advise the jury on the issues, defined grand larceny, and without objection gave the statutory definition of larceny by a bailee, which omits all reference to criminal intent, and the only attempt of accused to call the court's attention to the failure to charge that to constitute grand larceny the act must have been done feloniously was by a requested instruction embodying this element, but otherwise incorrect and properly refused, the court's failure to give on its own motion a correct instruction as to the necessity of a felonious intent was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

23. CRIMINAL LAW (§ 783*)—INSTRUCTIONS—PURPOSE AND EFFECT OF EVIDENCE.

Where the court was not asked to charge that evidence of other offenses could only be considered on the question of intent, but was asked to charge that such evidence was insufficient to justify a conviction, the instruction was properly refused, especially where, when the evidence was offered, the court told the jury that it was only admitted on the question of intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1734, 1735, 1872-1876; Dec. Dig. § 783.*]

24. EMBEZZLEMENT (§ 44*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence on the trial of a person for embezzling the proceeds of a note *held* to show that he had authority from the holder to collect the note, and hence that the proceeds were her property as charged in the indictment, and not the property of the maker.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67-70; Dec. Dig. § 44.*]

25. EMBEZZLEMENT (§ 44*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence on a trial for larceny by a bailee *held* to show that he had no authority from the bailor to convert the money embezzled to his own use.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67-70; Dec. Dig. § 44.*]

Brantly, C. J., dissenting.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

Sam A. Hall was convicted of grand larceny, and he appeals. Affirmed.

J. R. Boardman, of Butte, and W. B. Rodgers, of Anaconda, for appellant. Albert J. Galen, Atty. Gen., and J. A. Poore, Asst. Atty. Gen., for the State.

SMITH, J. Defendant appeals from a judgment of conviction of grand larceny, and from an order denying his motion for a new trial.

[1] 1. The charging part of the information reads as follows: "That on or about the 28th day of February, 1908, the defendant, Sam A. Hall, then and there having in his possession, custody, and control, as bailee and agent of Maggie Stephens, certain personal property, to wit, money, in amount and of the value of five hundred and sixty-four and 50/100 dollars (\$564.50) lawful money of the United States, did willfully, unlawfully, knowingly, fraudulently, intentionally

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

and feloniously appropriate said money to his own use, with intent in him, the said Sam A. Hall, then and there to deprive and defraud the true owner, the said Maggie Stephens, of her property and of the use and benefit thereof." It is contended that the county attorney has failed to set forth by direct averment that Maggie Stephens was the owner of the money. We think the information is sufficient. A person of common understanding would undoubtedly know from reading it that it was intended to so charge. That is the criterion. Rev. Codes, § 9147. It was not necessary to describe the money. Rev. Codes, § 9184.

2. It appears from the state's evidence that Hall Bros., a corporation, was engaged in the insurance, real estate, and other business in Butte. The defendant was its president and also attorney in fact for one Frank E. Southmayd, who resided in Wisconsin. On August 29, 1906, Christopher Stephens, brother of Maggie Stephens, visited Hall Bros.' place of business, and procured a note for \$564.50, dated June 28, 1906, due 10 months after date, payable to the order of Frank E. Southmayd, signed by Joseph F. and Annie Wynne. The defendant and one Wigginton were present at the time. Stephens paid \$564.50 for the note, and it was thus indorsed: "Without recourse pay to the order of Maggie Stephens. [Signed] Frank E. Southmayd by S. A. Hall, attorney and agent in fact." Not anything was said at the time by the defendant as to how the note should be paid or collections made on it. Stephens continued to go to Hall Bros. place of business every month and collect 1 per cent. interest on the sum evidenced by the Wynne note and also on 12 other notes, of various persons, which he procured or purchased at different times at the same place and under substantially similar circumstances. Some of these notes were purchased from the defendant personally. At times he was present at the transaction, and sometimes not. Occasionally he paid the interest himself and made the indorsement. At other times it was paid by Wigginton. Nothing was ever said as to whether the Wynnes had paid interest on their note or as to where the interest came from. In August, 1910, Stephens went to Hall at his office, and, as narrated by the former, this conversation, in substance, was had: "I told him that I had three or four notes I bought of him in 1906 and I was going to call them in; and to that he told me he had called in quite a number of notes. I asked him what he did with the money, and he told me he paid it out here and there. He said his big creditors were rushing him, and he said, 'You won't get anything out of it and I won't,' and he says, 'I will take all your notes you have got and you take my personal note. He says, 'I will give you a note and pay you \$1,000 in one year and another note in 18 months and another in 2 years, and so on

till I get you paid.' He told me he had lots of assets that would amount to more than the liabilities, and he would settle up as soon as he could. So I never got a cent from him since that time. He stated he had collected the principal on all those notes I had." The notes all ran to Frank E. Southmayd, and were indorsed as was the Wynne note. Stephens never notified the makers of the notes to pay the interest directly to him. Once or twice Hall complained that some of the parties were not paying interest regularly, but he always paid it himself whether he had received it or not. Stephens also testified: "There were three notes I told him to collect for me. The first note I had him collect for me was in 1907 or 1908. That note was taken up. He collected the principal on that note, and notified me, and I brought down the note, and he gave me the principal. I had a conversation with him relative to collecting the principal on the notes introduced in evidence marked 1 to 13 for identification. I went to Hall last May or June, 1910, and I told him I had three notes outstanding since 1908; and I requested him to call them in and I mentioned the notes, and he told me he would see the parties and have them pay the principal on these notes. Those were the Wynne note, the Mattock note, and the Hornbeck note. So I went to him later, and he told me he was doing all the business himself at that time, and was so busy he could not get around to see the parties. I went there three or four times; and one time he told me that he saw the parties, and, as soon as they could raise the money, they would come in and pay them. That was about a month before he told me he had collected the principal and put it here and there. This note of \$564.50, signed by Joseph P. Wynne and Anna Wynne, which is the one set out in the information and which I claim Sam Hall embezzled, if that money was paid by the Wynnes in February, 1908, to Sam Hall, I had not told Sam Hall to collect it, but I authorized his agent. I authorized his agent Wigginton to collect it, but I did not tell Sam Hall personally. If that money was paid to them, it was authorized by me. It was authorized by me in 1907. I told Mr. Wigginton, and Wigginton was working for Sam Hall. In August Hall told me each and every one of those notes had been paid. That is what he told me, that every one of those notes had been paid. He told me he had collected the principal on all the notes I held."

Nellie Jory, bookkeeper for Hall Bros., testified: "The method of keeping account as to those outstanding notes of Maggie Stephens was that the makers of the notes continued to pay the interest at Hall Bros. We collected the interest and we paid it to him. The \$564.50 Wynne note was paid on the 28th day of February, 1908. Assuming that was paid on the note indorsed to Miss Ste-

phens, and we had the money belonging to Miss Stephens, we would not enter it as a credit in the Maggie Stephens account, not until we paid it over to Stephens. I don't know why it was not turned over. After Hall Bros. had received this money from Mrs. Wynne and in payment of the Stephens note, I do not know why it was not credited to Maggie Stephens or Chris. Stephens. As a matter of fact, Hall Bros. had received \$564.50 money which was paid by the debtor on a note which Stephens held. Mr. Hall knew that I was receiving money on those notes, and not giving the holder of the note credit in his account. I carried everything reading to Frank E. Southmayd under the name of 'S. A. Hall, general.' The 'S. A. Hall, general,' account is a bills receivable account to Hall Bros. So far as I know, there was no account whatever with Frank E. Southmayd. The personal account of Sam Hall was carried in the name of A. F. Hall, his sister. The Stephens account never showed the amount of money that had been paid in for him."

There is an abundance of evidence in the record to warrant the conclusion that Hall Bros., the corporation, was simply a cloak or cover for the operations of the defendant Sam A. Hall. The latter testified: "Whenever I needed any cash, I drew on the account of Hall Bros. and charged myself with it. When I needed money, I got it there because, when I got money in return, I paid it back there. As each one of these notes was made it was made to Frank E. Southmayd. The loans were taken in his name for the purpose of convenience and to save a heavy tax, and I was attorney in fact for him. Whenever one of these parties, for instance, Mr. Wynne, or other parties, would come in and pay the principal on a note, that would be deposited at the Daily Bank in Hall Bros. account. I always had access to that bank book. I was not handling the account with the bank, but I was interested in it. The firm was drawing money on the strength of it and declaring dividends to various parties out of Hall Bros. assets, and I was getting credit for mine. We never notified any of these people that the principal of their notes had been collected. Hall Bros. agreed to pay the interest on those notes. That was the usual custom when money was paid in there. We paid the interest. Mr. Stephens looked to us for the interest on that money. The money that Stephens had in there it was understood that he was getting 1 per cent. per month. I have no knowledge as to how much shortage there is in our accounts due to this failure to turn over moneys which were collected on those notes. I do not think it is over \$40,000."

Wigginton testified: "Every nickel that was paid in there Hall knew about. I think there never was an instance to my knowledge where the party that held the note was

notified that the principal was paid. I suggested to Hall that money was paid in by a certain party, and this money should be paid over. He was highly insulted, and said: 'I will guarantee every note that is sold in that office. It is none of your business.' I know that, when Wynne came in and paid his note, we made an entry in the Wynne account showing that he had paid the note, but we made no entry in the Stephens account showing that \$564.50 or any other sum was received for Stephens' benefit upon the Wynne note. I called Hall's attention to the principal on those notes being paid, and told him they should be advised of the payment of the principal. I did not see anything crooked in Hall's buying an automobile or piano and other transactions, but the money was coming out of Hall Bros. I knew that the money should have been in Hall Bros., and should have been paid to the people to pay the notes, the holder of the notes. It was to them the money should have been paid. I called his attention to it two or three times—to various notes."

[2] 3. It is contended that the court erred in admitting the Wynne note in evidence, for the reason that it was not shown the defendant had indorsed it or delivered it to Stephens. This contention is disposed of by reference to the testimony of Stephens that the defendant admitted having received and converted the principal of the note to his own use. The note was properly received in evidence as explanatory of, and leading up to, other facts and circumstances in the case, to enable the jury to understand the relations existing between Hall and his customers or clients, and their manner of transacting business. It was sufficient to show by any competent testimony how the note in question came into the possession of Stephens, through the medium of Hall Bros., the subterfuge employed by the defendant for cloaking his nefarious operations. It was of no consequence who indorsed it or transferred it. As a matter of fact, however, the indorsement was probably made by Wigginton who testified that he had full authority from Hall for all his actions.

[3] Again, it is argued that there is no evidence to prove that any money was ever collected on the note. We have quoted sufficient testimony, we think, to show that this point is not well taken. Let us make it plain from the outset that in our judgment there is ample evidence that the corporation Hall Bros. in all the transactions set forth in the record was simply a disguise for Sam A. Hall, and that his own confession to Stephens was sufficient proof that he actually and personally received and converted the principal of the Wynne note.

[4] 4. It is contended that the court erred in allowing the state to prove other offenses of the same nature as that involved in the specific charge. All of these transactions were consummated through the medium of

Hall Bros., and ranged in time from prior to February 28, 1908, to January 28, 1909. They were numerous, and flagrant of felonious intent and criminal conduct. The transaction of the Wynne note was clearly proven to have been one of a class of similar dealings on the part of the defendant through the agency of Hall Bros. All of them had similar features. A course of conduct was proven by which the defendant converted to his own personal use the moneys of those who dealt with the Hall Bros.' corporation. All of these several felonies appear to have been part of a general scheme or plot to defraud the unsuspecting and credulous people of Butte and elsewhere, who could be induced to leave their money with Hall Bros. by promises of large returns thereon in the way of interest; and others who, through false and fraudulent representations were persuaded to pay their outstanding obligations without receiving back the evidences thereof, which had in fact been transferred to others without their knowledge. Some of these fraudulent schemes were somewhat different in details from others, but all possessed common features indicating a common design.

[6] The length of time over which the inquiry should extend was within the sound legal discretion of the trial court. *Spurr v. United States*, 87 Fed. 701, 31 C. C. A. 202. We find no error in the admission of the testimony and no abuse of discretion. See 1 Wigmore on Evidence, §§ 304, 315, 316; 12 Cyc. 411. The author of the article in Cyc. says: "This rule is often applied where the crime charged is one of a series of swindles or other crimes involving a fraudulent intent for the purpose of showing this intent." The District Court of Appeals of California in the *Ruef* Case (*People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54) said: "The rule is that, where several crimes are connected as part of one scheme or plan, all of the same character, and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, and thus directly tending to show logically that the crime in question was a part of such common scheme. If the several crimes are part of a chain of cause and consequence so linked as to be necessarily connected with the system or general plan, they are admissible." The case of *People v. Hill* (Cal.) 34 Pac. 854,¹ is not in point. That case involved two separate and distinct transactions, neither of which could have shed any light upon the other. In the case of *People v. Bartnett*, 15 Cal. App. 89, 113 Pac. 879, cited by appellant, the defendant was accused of embezzling certain bonds. The court compelled the prosecuting attorney to elect which

particular offense he would rely upon, and afterwards instructed the jury that, if they believed the defendant had aided or abetted in the sale or disposition of any of the bonds, it was their duty to convict him. This instruction was properly held to be erroneous. The trial court also advised the jury to consider the sales of other bonds, for the sole purpose of determining the intent of the defendant, but the appellate court declared that this instruction was simply in conflict with the former, and did not cure the error therein.

[8] 5. The error, if any, in permitting the witness Atkins to testify that Stephens demanded payment of his note and asked to see his receipts, was immaterial and non-prejudicial in view of defendant's admission to Stephens that he had collected all of the notes, and his virtual confession while a witness that the proceeds thereof had been received and converted.

[7] 6. The witness Annie Harrington testified, over objection, that she loaned the defendant personally \$2,980; that he gave her a paper that was worthless, that was "no good." She appears not to have been very alert mentally. Two real estate mortgages, one for \$184 and another for \$1,500, were received in evidence. Both ran to Frank E. Southmayd, and were assigned by Hall, as attorney in fact, to Daniel D. Harrington, a brother of the witness. She testified that the principal of neither mortgage had been paid over by Hall to her brother. It was shown by the records in the office of the county recorder that defendant had satisfied the \$1,500 mortgage of record, certifying that it had been fully paid. While the scheme to defraud disclosed by the foregoing evidence is somewhat different in some of its details from that practiced upon Stephens and others, we are of opinion that it falls within the general plan that was being carried forward by the defendant, and the evidence was competent.

[8] 7. There was no prejudicial error in the action of the court in admitting in evidence the mortgage for \$184 above mentioned and the assignment thereof to Harrington. No showing was made that Hall had received the sum secured by the mortgage. The evidence was simply immaterial.

8. We think the \$1,500 mortgage and the assignment thereof were properly admitted in evidence. The whole affair discloses the fact that, after assigning the mortgage to Harrington, he collected it himself and kept the money. Annie Harrington testified positively that Hall had never paid over any of the proceeds to her brother, who appears to have been her agent in the transactions. Counsel are mistaken in supposing that she testified she knew nothing of the fact of nonpayment to Harrington. What she did admit was that she knew nothing personally as to whether Hall had collected the prin-

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 100 Cal. xviii.

principal of the note. That was shown by the record, as aforesaid. Our attention has not been called to any testimony by the defendant while on the stand, wherein he denied having received the proceeds of this note and mortgage, or asserted that he had paid them over to either of the Harringtons. We think the release of the mortgage by the defendant as attorney in fact for Southmayd, who appears to have been simply a convenience or "dummy" employed by him to carry out his schemes, coupled with other facts and circumstances in the case, was sufficient to warrant the conclusion that Hall actually received the amount of the mortgage debt from the mortgagor.

[9] 9. There is no merit in the contention that the court erred in admitting in evidence certain receipts produced by the witness Atkins, purporting to show that a note executed by him to Southmayd and afterwards transferred to Christopher Stephens had been paid. As we have already stated, Hall's confession to Stephens that he had collected and converted the proceeds of all the notes held by the latter sufficiently established that fact. Moreover, we are of opinion that in the light of the evidence as to the manner of operations employed by the defendant, through the medium of Hall Bros.' corporation, Wigginton and his sister, the receipts were competent evidence of the fact of payment.

[10, 11] 10. The witness Frances J. Atkins, wife of C. D. Atkins, testified that, having paid a note to Hall, she demanded the "original" but he gave her a "renewal," that he promised to send the "original" by mail, but never did so. She afterwards asked Wigginton if he knew where the "original" note was, and he replied he knew nothing about it. Objection was made to her statement that she made inquiry of Wigginton, but, in view of the answer that he knew nothing about the matter, there was no prejudice. Other portions of the testimony of this witness which are now claimed to be incompetent were received without objection. We are clearly of opinion, moreover, that what Wigginton said and did in connection with the operations of Hall Bros. and the defendant in assisting the latter to defraud his customers was competent evidence.

[12] 11. When the defendant took the stand as a witness in his own behalf, he made an effort to create the impression that Wigginton was responsible for the manner in which the affairs of Hall Bros. were conducted. He testified that Wigginton held stock in the corporation, and was its secretary and treasurer. On cross-examination the state attempted to show that this latter statement was untrue, and Wigginton subsequently denied the truth thereof. The defendant declared it was not at a stockholders' meeting that Wigginton was elected as a director. He was asked: "Do you know of any authority for electing a board of directors at a

meeting other than a stockholders' meeting?" He answered, over objection, that he believed the by-laws of the corporation made such a provision. We think this was proper cross-examination.

[13] 12. Defendant testified, without objection; on cross-examination that he got "some money once [from Hall Bros.] to buy a house with." He was then asked: "How much money did you get for that purpose?" The question was objected to as incompetent, and not proper cross-examination. He answered that he paid \$4,250 for the house; that he took it from Hall Bros., and charged his account with it. We find no error in the ruling of the court. The question propounded was proper cross-examination, after defendant had testified that Wigginton was an officer of the corporation and had exclusive charge of its business. It was competent to show that defendant was using the moneys of the corporation as his own.

[14] 13. Defendant testified that he did not know a certain note, executed by one Carter and secured by mortgage, had been paid until after the failure of Hall Bros. He then identified his signature to a satisfaction of the mortgage dated the 30th day of December, 1908. The mortgage from Carter and wife to Southmayd, together with the release and satisfaction thereof, executed by Hall as attorney in fact for Southmayd, were then received in evidence over his objection. No error.

[15] 14. Defendant having testified that he did not notify any of the holders of notes that the same had been collected, that "the firm" was paying some interest, that he might have signed "those checks" every now and then, that they paid Stephens a check for the interest he had coming although the notes were all indorsed "without recourse," was properly compelled to answer whether in his judgment any obligation rested upon him to pay interest or to guarantee the payment of either interest or principal. He answered that he was advised by counsel that there was a liability on the part of Hall Bros.

[16] 15. Wigginton's testimony that Hall Bros. were short \$39,000 or \$40,000 was competent to corroborate Stephens' statement that Hall admitted having collected all the notes and having paid the proceeds out "here and there." There could be no prejudice in receiving the evidence in any event, as the defendant testified to substantially the same thing without objection.

16. Specifications of error Nos. 32 and 38 relate to testimony to which no objection was interposed at the trial.

[17] 17. The state's witness Karsted testified that he had had dealings with Hall. He was then requested to state what those dealings were. Over objection he answered: "I loaned out some money, about \$3,000, to Mr. Hall, and he never paid back a cent. He admitted that he collected money for me

or on my account. I asked him point blank whether he had collected money for me, and he said he had. He collected from a number of loans that I had, a number of parties in the city to whom I had given out loans—that is, which he had given out loans." The witness then named six persons to whom he had loaned money, and then continued: "The notes of those various parties whose names I have just stated were held by me. I was the owner of those notes. Hall had authority to collect the interest and principal. He admitted to me that he had collected them. I asked him what he had done with the money and he would not admit what he had done with it. He didn't turn it over to me. I never authorized him to make any other disposition of the money than to turn it over to me. Prior to that time I was not aware that these notes had been paid to Mr. Hall or that he had the money." It is contended by counsel for the defendant that this testimony shows a perfectly innocent transaction, involving no criminality. To our minds, however, the jury were justified in believing that Karsted was the victim of a series of embezzlements similar to the one charged in the complaint.

[18] 18. Karsted also testified on cross-examination, in answer to the inquiry, "Mr. Hall admitted that the payments came to him?" "He did, and he admitted that \$6,000 of my mother's notes had been paid in and he could not show the money—\$6,000 of my mother's." The court refused to strike the answer, and it is now urged that in his direct examination he had said nothing about his mother's money. The answer was not strictly responsive to the question, but we find no prejudicial error.

[19] 19. The witness on redirect examination was asked: "What notes did you refer to as your mother's notes?" He answered: "I have a list of them here. I made the memorandum myself, and know it is correct." He was then, properly we think, allowed to read off a list of the makers and amounts of 20 promissory notes, aggregating \$6,069.12. The objection becomes altogether immaterial when we reflect that Hall admitted a shortage of some \$40,000, and the witness Karsted testified that he admitted to him that he had collected the principal on all of the notes mentioned.

20. Specification of error No. 39 goes to the refusal of the court to direct a verdict of acquittal. What is hereafter to be said, taken in connection with what we have already determined, will dispose of this assignment.

[20] 21. It is contended that the court erred in neglecting and refusing to instruct the jury as to an essential element of the crime of larceny, to wit, the felonious appropriation of the property. Error is assigned on the refusal to give three instructions which are claimed to correctly state the law relating to the necessary ingredients of the crime. The

instructions were numbered 2a, 4a, and 5a. 2a did not directly raise the point, and 4a attempts to define a crime called "embezzlement." There is no such crime known to the laws of this state. 2a also is not a correct statement of the law relating to the crime of larceny as bailee; but, even so, we are of opinion that the substance thereof was sufficiently covered by other instructions.

[21] The best that can be said of 5a is that it suggests the necessity of instructing the jury that a felonious intent is necessary to constitute a crime. The first part of the instruction is so framed as to be confusing and almost meaningless. Certain words appear to be omitted therefrom. The expressions "simple larceny" and "embezzlement" are found therein, but the crime of which the defendant was accused is not mentioned, save in the last sentence, and it is there coupled with the declaration that the "taking or conversion of personal property which renders a person guilty of simple larceny or of embezzlement is a feloniously taking or conversion." The defendant was not charged with a felonious "taking." We think the court was justified in refusing this instruction, for the reason that, if given, it would have had a tendency to confuse the jury, rather than to enlighten them.

Counsel argue: "The court's attention, by these instructions was called to the proposition that the word 'feloniously' or some equivalent word or language is absolutely essential to a correct instruction where the crime of grand larceny is charged." They cite *State v. Peterson*, 96 Mont. 104, 92 Pac. 302; *State v. McLeod*, 35 Mont. 372, 89 Pac. 831; *State v. Sloan*, 35 Mont. 367, 89 Pac. 829; *State v. Allen*, 84 Mont. 403, 87 Pac. 177, and *State v. Rechnitz*, 20 Mont. 488, 52 Pac. 284, in support of their contention. The question arises, therefore, whether under our system of settling instructions a defendant in a criminal action may, without tendering one which is correct in point of law or which should have been given, or by offering one which is incorrect, predicate error upon the refusal of the court to give a correct instruction or any instruction on the subject by simply suggesting or calling attention generally to the fact that the instructions proposed to be given do not cover the point.

[22] For the purposes of this action, we shall assume that it is the duty of the trial court to charge the jury of its own motion in a criminal case, and that the charge should substantially cover the main issues, so as to enable the jury to intelligently decide them. This does not mean, however, that the court must, without request, cover every point in the case, or explain every issue, or deliver a charge so comprehensive in scope as to be beyond fault or criticism. If such were the law, very few criminal convictions could stand. In the instant case, the court of its own motion gave many instructions to the

jury. The information charges that the defendant, feloniously, appropriated the money of Maggie Stephens to his own use. The jury were instructed (1) that his plea of not guilty made it incumbent upon the state to prove all of the material allegations contained in the information beyond a reasonable doubt; and that the evidence must be sufficient to establish every element of the crime charged; (2) that, if they entertained any reasonable doubt upon any single fact or element necessary to constitute the crime, it was their duty to acquit; (3) that in every crime there must exist a union or joint operation of act and intent. The court also defined the crime of larceny as bailles in the words of the statute. As is well known to the profession, this definition is defective, in that it omits any reference to a criminal intent. Grand larceny was also defined. Altogether 19 instructions were given. So it appears that the court made a reasonable effort to advise the jury of the issues in the case and the constitutional rights of the defendant. They were also given the usual and ordinary rules for their guidance in weighing evidence and determining the credibility of witnesses. The instruction defining larceny as bailles was given without objection. It was defective. The Legislature has endeavored to minimize reversals in criminal actions growing out of the charge, or failure to charge, by the court, by enacting section 9271, Revised Codes. That section provides, among other things, as follows: "When the evidence is concluded, if either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, * * * and together with a written request asking the same * * * delivered to the court. At all times prior to the charging the jury the instructions to be given shall be * * * settled by the court, at which settlement counsel for the parties shall be allowed reasonable opportunity to examine the instructions requested and proposed to be given by the court and to present and argue to the court objections and exceptions to the adoption or rejection of any instruction offered by counsel or proposed to be given to the jury by the court. On such settlement of the instructions the respective counsel, or the parties, shall specify and state the particular ground on which the instruction is objected or excepted to, and it shall not be sufficient in stating the ground of such objection or exception to state generally that the instruction does not state the law, or is against law, but such ground of objection or exception shall specify particularly wherein the instruction is insufficient, or does not state the law, or what particular clause therein is objected to. * * * No motion for a new trial on the ground of errors in the instructions given shall be granted by the district court, unless the error so assigned was specifically point-

ed out and excepted to at the settlement of the instructions, as herein provided; and no cause shall be reversed by the Supreme Court for any error in instructions which was not specifically pointed out and excepted to at the settlement of the instructions * * * and such error and exception incorporated in and settled in the bill of exceptions. * * * In charging the jury, the court shall give to them all matters of law which it thinks necessary for its information and guidance." The spirit as well as the letter of the foregoing provision is that general requests and objections are to be disregarded both by the trial court and by this court. The purpose of the Legislature was that the attention of the trial court must be specifically directed to any alleged defect in a proposed instruction, and requests for particular instructions must be reduced to writing and delivered to the court. Ample time is given for examination of the court's proposed charge, to the end that specific objections may be made thereto. The particular ground of objection must be stated and general objections are not sufficient. The objection must specify particularly wherein the instruction is insufficient, or does not state the law. It will readily be seen, therefore, that a suggestion contained in a defective offered instruction is not sufficient to constitute a specific objection to another instruction proposed to be given by the court. Not having offered a good instruction and having failed to point out the particular defect in that of the court, the defendant cannot be heard to say that the trial court erred to his prejudice. The statute forbids this court to grant a reversal in the circumstances.

[23] 22. Defendant's instruction No. 3a was refused. It reads as follows: "You are instructed that considerable evidence was admitted with reference to transactions other than the larceny of \$564.50, and in this connection the court instructs you that, even if there may be evidence that the defendant Sam Hall converted other money at other times to his own use, this is not sufficient evidence to find the defendant guilty; and you are instructed that unless you are satisfied beyond a reasonable doubt that the defendant Sam Hall committed the crime of grand larceny and appropriated, as is set out in the information, the sum of \$564.50, or some part thereof, belonging to Maggie Stephens, then you must find him not guilty." It is now argued that this instruction was intended to advise the jury that evidence of other crimes was only to be considered as bearing upon the question of intent. Many cases are called to our attention holding that the court should inform the jury, on request, that such evidence must be so limited in effect. But the instruction offered did not so limit the effect of the evidence. It told the jury that evidence of other crimes

was not sufficient to convict the defendant of the particular crime charged. This, of course, was true. But the evidence was nevertheless competent, as we have heretofore shown. To have given this instruction as offered would almost have amounted to a direction to disregard the evidence. If counsel desired the court to charge the jury that evidence of other similar offenses was only admitted to guide them in determining the intent of the defendant, they should have made a specific request for such an instruction. The record shows that the court told the jury when the evidence was offered that it was only admitted as bearing on the question of intent.

[24] 23. Again, it is contended that the verdict is not supported by the evidence, in that there was no showing that the defendant, or Hall Bros., had authority to collect the Wynne note. The gist of the argument is that, if the defendant converted any money, it belonged to the Wynnes, and not to Maggie Stephens. There is no merit in this contention. Stephens was the agent for his sister. He had power to act for her. As early as 1907 he gave authority to Wigginton for Hall Bros. to collect the Wynne note. He so testified. Hall Bros., while ostensibly the title of a corporation, was in reality the name under which the defendant was carrying on his operations. Wigginton was its agent and his agent. Acting on such authority, Hall Bros. collected the Wynne note, and the defendant appropriated the proceeds thereof to his own use. He confessed as much to Stephens. He knew every detail of the business. He was informed that the makers of notes were paying the amounts thereof into the office of the corporation. He knew that these amounts were being deposited in the Daly Bank to the credit of the corporation, and he treated the moneys so deposited as his own personal property. Wherever the technical title to these moneys may have rested, as between the makers and indorsees of the notes, the fact remains and may be gathered from a multitude of circumstances disclosed by the record that Hall encouraged the makers to pay the interest and principal of their notes to him, assuming the right to collect the same. He collected and paid over to Stephens the interest on the Wynne note from the time of its purchase by the latter, assuming to act as the agent of Maggie Stephens. It seems to have been understood between him and his victims that he should collect the amounts due, and hold the same as bailee for the owners of the notes. The proceeds of one note was paid to him as agent for Stephens, and he subsequently turned the amount over to the latter. When Stephens desired to call in notes for payment, he went to Hall. The whole course of conduct of the defendant, his agent Wig-

ginton, Stephens, and the Wynnes, shows that Hall not only assumed, but that he actually had, authority to collect the Wynne note. His confession to Stephens and the attempt to induce the latter to take his notes in payment of the amounts of which he had defrauded him and his sister clearly shows that the defendant himself never questioned his authority to collect the note.

[25] 24. Finally, it is urged that there is not any testimony in the record to show that Maggie Stephens did not consent to the appropriation by the defendant of the proceeds of the Wynne note. Maggie Stephens did not appear in the case as a witness or otherwise. Her brother was her agent with full power to act in her behalf. He purchased the notes and collected the interest. He testified that the defendant was never given authority to convert the proceeds of any of the notes to his own use. Hall virtually confessed as much in the conversation with Stephens to which we have just referred. He was palpably guilty of the crime charged, and, although there were many technical errors committed at the trial, we are clearly of opinion that he was properly and justly convicted.

The judgment and order are affirmed.
Affirmed.

HOLLOWAY, J., concur.

BRANTLY, C. J. I cannot agree with my associates in the disposition made of this case. I think the defendant is entitled to a new trial. In my opinion the evidence does not show that the money alleged to have been appropriated by the defendant belonged to Maggie Stephens. To sustain the verdict, it was indispensable that this fact be established.

The court submitted the case to the jury without giving them any definition of larceny, other than that embodied in the statute. This court has repeatedly held, as appears from the case of *State v. Allen* and the others cited in the majority opinion, that this is not sufficient. It is true that counsel for the defendant did not submit a properly drawn request for an instruction covering the point, yet I think the requests submitted indicated clearly what the desire of counsel was, and that the court should of its own motion have submitted a proper instruction. Even under the liberal rule prescribed by the statute (*Rev. Codes, § 9271*), a trial court cannot neglect the duty to give such instructions as will enable the jury to find properly with reference to each element of the crime charged. Under the instructions as given, the jury were justified in finding the defendant guilty upon the theory that his appropriation of the money was wrongful, though not felonious.

STATE v. MORRISON.

(Supreme Court of Montana. June 25, 1912.)

1. RAPE (§ 22*)—INFORMATION—SUFFICIENCY.

An information is sufficient to charge the crime of rape, though not alleging that the ravished female was not the wife of accused.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 26; Dec. Dig. § 22.*]

2. INDICTMENT AND INFORMATION (§ 110*)—RAPE—SUFFICIENCY.

An information for rape, alleging that the act was committed by force and against the will and consent of the female, is sufficient, under Rev. Codes, § 8386, subds. 3 and 4, declaring that rape is committed where the female's resistance is overcome by force or threats, and authorizes proof that the act was committed under the circumstances provided for in either subdivision.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

3. CRIMINAL LAW (§ 741*) — TRIAL — QUESTIONS FOR JURY.

The weight and sufficiency of the evidence in a criminal prosecution is a question for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. § 741.*]

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

John P. Morrison was convicted of rape, and he appeals. Affirmed.

Geo. A. Maywood, of Phillipsburg, for appellant. Albert J. Galen, Atty. Gen., and J. A. Poore, Asst. Atty. Gen., for the State.

SMITH, J. Defendant appeals from a judgment of conviction of rape, and from an order denying his motion for a new trial.

[1] 1. The information fails to charge that the female upon whom the crime is alleged to have been committed was not the wife of the accused. It is therein alleged, however, that she bears another name than that of Morrison. As long ago as 1890, this court held, under a statute similar to that now in force, that the allegation was unnecessary. See *State v. Williams*, 9 Mont. 179, 23 Pac. 335. It was proven at the trial that the prosecutrix was not the defendant's wife. A mere rule of criminal pleading is involved—a rule which has been settled for over 20 years in this state. No injustice or hardship can result, whichever rule is adopted; and we therefore decline to overrule the case of *State v. Williams*, supra.

[2] 2. Section 8386, Revised Codes, declares that rape is committed: " * * *

3. Where [the female] resists, but her resistance is overcome by violence or force. 4. Where she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution," etc. It is contended that the information should set forth with particularity the

facts constituting the offense under either paragraph 3 or paragraph 4 of the statute, supra. The information alleges that the defendant willfully, violently, and feloniously, and against the will and consent of the prosecutrix, feloniously ravished and carnally knew her. "When the information stated that the act was committed by force and violence, and against the will and consent of the female, it was substantially equivalent to stating that she resisted, but that her resistance was overcome by violence, or that she was prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution. Under the information as it reads, it was competent to prove that the act was committed under the circumstances provided for in either of the subdivisions" of the statute. *People v. Pacheco*, 70 Cal. 473, 11 Pac. 761. We think the foregoing is both good common sense and good law, and therefore hold the information sufficient in this regard.

3. What has just been said disposes of the contention of the appellant that the court erred in inserting in his requested instruction No. 9 the words, "or was not prevented by threats of immediate and great bodily harm, accompanied by apparent power of execution."

[3] 4. It is contended that the evidence is insufficient to sustain a judgment of conviction. We shall not quote it. Suffice to say that, in our judgment, it has substance enough to warrant a verdict of guilty, if the jury believe the tale of the prosecutrix. Different minds might form different conclusions as to its weight, force, and effect; but under the jury system it was for that body to determine those questions. The writer of this is of the opinion that, taking all of the evidence in the record into consideration, the jury ought not to have believed her story to the effect that she was raped; but they did believe it, and it was their privilege and province to do so, if they saw fit.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

SMITH v. IRON MOUNTAIN TUNNEL CO.
(Supreme Court of Montana. June 21, 1912.)

1. STATUTES (§ 212*)—PRESUMPTIONS TO AID CONSTRUCTION—USE OF WORDS IN SENSE PREVIOUSLY DEFINED.

Where the term "stockholder" has been given the legislative definition, it must be presumed that since that date the term whenever used in legislation was intended to be understood in that sense, and a person contending for a different construction has the burden of showing that a different meaning was intended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. § 212.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexed

2. CORPORATIONS (§ 175*)—“STOCKHOLDER”—MANAGEMENT OF CORPORATION AFFAIRS—CHANGE FROM NONASSESSABLE TO ASSESSABLE STOCK.

Civ. Code 1895, § 408 (Rev. Codes, § 3822), defined “stockholders” as the owners of shares in a corporation which has a capital stock. Rev. Codes, § 3887, provides that any corporation whose capital stock is not assessable may, with the written consent of three-fourths of its “stockholders” spread upon its records, make its stock assessable. A corporation whose capital stock was nonassessable, upon a vote of 96 out of 301 individual stockholders who owned more than three-fourths of all the capital stock, recorded that its stock had been changed from nonassessable to assessable stock. *Held*, that “stockholders,” as used in the provision making stock assessable, referred to the owner of the stock and not to the shares themselves, and that the vote of the 96 stockholders, being less than three-fourths, was without effect.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. § 175.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6667-6669; vol. 8, p. 7804.]

3. CORPORATIONS (§ 175*)—CONSTRUCTION—CIRCUMVENTION OF LAW.

It is no argument in favor of construing a statutory provision authorizing a corporation to change from nonassessable to assessable stock, that, if construed to require a vote of the owners of three-fourths of the stock, such owners may circumvent the law by “splitting” stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. § 175.*]

4. STATUTES (§ 212*)—CONSTRUCTION—MEANING OF LANGUAGE.

Statutes should be their own interpreter, and, where the intention is obvious, there is no room for construction, and the courts must presume that the Legislature intended what it plainly says; it is only in the case of ambiguous or doubtful and uncertain enactments that the principles of interpretation are required.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289; Dec. Dig. § 212.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by Edward G. Smith against the Iron Mountain Tunnel Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Maury, Templeman & Davies, of Butte, for appellant. Henry C. Stiff, of Missoula, for respondent.

HOLLOWAY, J. This cause was tried upon an agreed statement of facts. From a judgment in favor of defendant, plaintiff has appealed.

Omitting all unnecessary details, it appears that the defendant is a domestic private corporation, organized in 1905; that its capital stock was made nonassessable; that plaintiff became a stockholder; that thereafter, on January 24, 1911, an order was entered upon the records of the corporation reciting that on that day the stock of the corporation had been ordered changed from nonassessable to assessable stock, and proper certificates setting forth that fact were

filed; that there were then 301 individuals owning stock in the corporation; that only 96 of such stockholders consented to the change, but that these 96 owned more than three-fourths of all the capital stock. This action was brought by a nonconsenting stockholder to enjoin the sale of his stock for delinquent assessments, and the single question presented for determination is: Does it require the consent of at least three-fourths of the whole number of stockholders, regardless of the number of shares owned by them, to change the stock from nonassessable to assessable stock, or is the consent of the owners of three-fourths of the shares of stock sufficient, even though these owners constitute less than three-fourths of the whole number of individuals holding stock in the corporation?

Section 3887, Revised Codes, provides: “Any corporation whose capital stock is not assessable may, with the consent of three-fourths of its stockholders, in writing, spread upon the records of such corporation, make its stock assessable under the provisions of this article.” If this language be accepted literally, then clearly it requires the vote of three-fourths of the whole number of individuals owning stock, regardless of the number of shares owned by them, to effect the change. But counsel for respondent insists that the use of the term “stockholders,” in the section above, is an inadvertence, and that the Legislature meant that the consent of the owners of three-fourths of the capital stock is sufficient, even though those owners constitute less than three-fourths of the whole number of stockholders. This view was adopted by the trial court, and the question above is presented for our review. The argument in favor of the trial court’s conclusion has its foundation in the history of the rise and growth of industrial corporations in England and America. It is insisted that the share of stock has come to be regarded as the unit of voting power, and that our Legislature has recognized the rule in practically every instance where the subject was considered. However, it is conceded that these corporations are the creatures of statute, and that it is within the power of the Legislature to adopt either the share of stock or the individual owning stock as the unit of voting power, unless restrained by the Constitution. The only constitutional provision upon the subject is found in section 4 of article 15 of our state Constitution, which establishes the share of stock as the unit of voting power in the election of trustees or directors of such corporations. Since this restriction is limited to a single purpose, the Legislature is left free to establish either the share or the individual as the unit for any purpose other than the election of trustees or directors. Is there, then, any evidence that the use

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the term, "stockholders" in section 3887 is an inadvertence? We think not, and the history of the legislation furnishes ample evidence to support our conclusion.

The share of stock as the unit of voting power in the election of trustees or directors of industrial corporations was recognized uniformly in all our territorial legislation upon the subject; but beginning with the Codified Statutes of 1871-72, and continuing down to the present day, we find that the Legislature has not adopted either standard uniformly. Section 23, chapter 18, General and Miscellaneous Laws, Codified Statutes above, provides that the consent of the owners of two-thirds of the stock is necessary to increase, or diminish the capital stock; while section 43 of the same chapter provides that the consent of two-thirds of the stockholders is necessary, to disincorporate. The same provisions are found in the Revised Statutes of 1879, div. 5, c. 15, §§ 263, 266. In the Compiled Statutes of 1887, div. 5, c. 25, the same provisions also are found in sections 468 and 483; and the act of March 5, 1888 (Laws 1888, p. 88, § 18), brought forward therein as section 518, for the first time makes provision for changing nonassessable stock to assessable stock. That section provides that the change may be made "by and with the unanimous consent of its stockholders." The next legislation which throws any light upon the subject under review is found in the Acts of the Third Legislative Assembly. The act of March 2, 1893 (Laws 1893, p. 111), provides that to increase or diminish the capital stock the "vote of at least two-thirds of all the shares of stock shall be necessary." Another act, approved the same day (Laws 1893, p. 83), provides that to alter, change, or amend the name of any existing corporation "a vote of a majority of the stockholders of such corporation duly assembled at any regular meeting or at any special meeting duly called for that purpose" shall be necessary. The act approved March 7, 1893 (Laws 1893, p. 92), provides that to change nonassessable to assessable stock "the consent of the stockholders holding two-thirds of the stock" shall be necessary, but this act refers only to corporations theretofore organized. By the adoption of the Codes of 1895 the Legislature provided a more comprehensive scheme for the government and control of domestic industrial corporations than had been in vogue theretofore. Section 408 of the Civil Code defines stockholders: "The owners of shares in a corporation which has a capital stock are called stockholders. If a corporation has no capital stock, the corporations and their successors are called members." Provision is made in the same Code for the adoption of by-laws (section 430); for the amendment of by-laws (section 433); for the removal of a director (section 439); for a change in the number of directors (section 450); for increasing or diminishing the capital stock

(section 525); and for extending the term of corporate existence (section 562). In all of these provisions the share of stock is made the unit of voting power. But section 510 provides that the stock of such corporation may be changed from nonassessable to assessable stock "with the consent of three-fourths of its stockholders"; while section 560 provides for a dissolution of such corporation according to the provisions of the Code of Civil Procedure, which are contained in sections 2190-2196 of the Code of Civil Procedure. These sections provide for dissolution by the district court upon an application setting forth, among other things, that at a meeting called for that purpose the dissolution was ordered "by a two-thirds vote of all the stockholders." With slight modifications these several provisions were carried forward into the Revised Codes of 1907 and are the law upon the subject to-day. Section 408 above is now section 3822; section 510 is now section 3887; section 560 is now section 3905; while sections 2190-2196, Code of Civil Procedure, are found in the present Codes as sections 7323-7329.

[1] It will thus be seen that our Legislature has never adopted a uniform standard for a voting unit, but has recognized the share or the individual stockholder as such unit in different instances. Indeed, the very same legislative assembly has recognized both units, as is evidenced by reference to the legislative acts of 1893 above. Since the term "stockholder" was given a legislative definition in 1895, it must be presumed that since that date, whenever the term has been used in legislation, it was intended to be understood in the sense as defined by the Legislature, and the respondent must assume the burden of showing that in the present instance a different meaning was intended.

[2] From the review of the history of the legislation upon the subject above, the conclusion seems inevitable that in employing the term "stockholders," in section 3887, the Legislature referred to the individuals who are the owners of shares of stock, and not to the shares themselves, and that, when the Legislature declared that the nonassessable stock of a corporation can be made assessable "with the consent of three-fourths of its stockholders," it meant just what it said. To declare that the use of the word "stockholders" is a mere inadvertence is to impeach the intelligence of the legislators. If an inadvertence in section 3887, the same rule would apply with equal force to the provisions of the Codified Statutes of 1871-72, the Revised Statutes of 1879, the act of 1883, and the Codes of 1895, and we would be confronted with the anomaly that the same mistake or inadvertence has occurred repeatedly in our legislation for more than 40 years. To adopt the construction urged by counsel for respondent would be a usurpation of legislative function, which this court cannot undertake.

[3] If there are incongruities in the law, the Legislature must make the correction, and it is no argument in favor of the construction urged to say that the owners of three-fourths of the capital stock may circumvent the law by the familiar practice of "splitting" stock.

[4] So far as the provisions of section 3887 are concerned, they are plain and unambiguous, and the province of this court in determining the meaning of the statute is manifest. The rule of statutory construction under these circumstances was announced in *Smith v. Williams*, 2 Mont. 195, as follows: "Statutes should be their own interpreter. Courts must look at the language used, and the whole of it, and derive therefrom the intention of the Legislature. Where this intention is obvious, there is no room for construction. When the language is plain, simple, direct, and without ambiguity, the act construes itself, and courts must presume the Legislature intended what it plainly says. It is only in the case of ambiguous, doubtful, and uncertain enactments that the rules and principles of interpretation can be brought into requisition. It is not allowable to interpret what has no need of interpretation." That rule has been adhered to uniformly from that date to the present time. See *Osterholm v. Boston & Mont., etc., Co.*, 40 Mont. 508, 107 Pac. 499.

Since in the present instance the change was ordered by only 98 of the 301 stockholders, the action was without effect, and the assessment levied upon appellant's stock cannot be enforced. The judgment is reversed, and the cause is remanded, with direction that a decree be entered conformably with the prayer of plaintiff's complaint.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

LELAND v. BOURNE.

(Supreme Court of Utah. June 3, 1912.)

1. BOUNDARIES (§ 83*)—EVIDENCE—PRESUMPTION—FIELD NOTES OF SECOND SURVEY.

The presumption that corners have been established at the places indicated by the field notes relates to the field notes of the controlling survey, and has no application where the question is what was the corner of a lot as established by an original survey, and the field notes in evidence are those of a second survey by another surveyor; but the only presumption as to such field notes is that what is recited in them is *prima facie* correct.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 146-152; Dec. Dig. § 33.*]

2. BOUNDARIES (§ 33*)—EVIDENCE—PRESUMPTION—FIELD NOTES OF SECOND SURVEY.

From the fact that the field notes of a second survey recite that certain monuments were found, one at the intersection of certain streets, and another at a certain corner of a certain lot, a statement by the surveyor making such notes that the monuments are the originals, or that they were placed by an of-

ficial surveyor, or that they are precisely where they were placed by the original surveyor, cannot be assumed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 146-152; Dec. Dig. § 33.*]

3. BOUNDARIES (§ 33*)—EVIDENCE—PRESUMPTION—FIELD NOTES OF SECOND SURVEY.

Even if from the recital of the field notes of a second survey that certain monuments were found, one at the intersection of certain streets, and one at a certain corner of a certain lot, an inference may be deduced that the monuments were placed there by some one in authority, and that the field notes of the original survey if found would show that the monuments were where they were placed, the inference is weaker than is the presumption founded on field notes of the original survey, and so requires less to overcome it.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 146-152; Dec. Dig. § 33.*]

4. APPEAL AND ERROR (§ 842*)—REVIEW—QUESTION OF FACT OR LAW.

Where findings are based merely on a presumption of fact, and the presumption is entirely dissipated, they are unsupported by evidence, and the question becomes one of law.†

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8316-8330; Dec. Dig. § 842.*]

5. BOUNDARIES (§ 33*)—EVIDENCE—PRESUMPTION—FIELD NOTES OF SECOND SURVEY.

Any presumption as to the original location of a boundary, arising from the recital of the field notes of a second survey as to certain monuments being found, held entirely dissipated by the other facts and circumstances in evidence.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 146-152; Dec. Dig. § 33.*]

6. APPEAL AND ERROR (§ 1009*)—REVIEW—EVIDENCE—EQUITY CASE.

A suit to quiet title being an equity case, the judgment of the Supreme Court on the whole evidence may be invoked, and the findings being, in its judgment, clearly against the weight of evidence, it will vacate them and substitute others.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8970-8978; Dec. Dig. § 1009.*]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Davis M. Leland against Anna O. Bourne. Decree for plaintiff. Defendant appeals. Reversed and remanded, with directions.

Evans & Evans, of Salt Lake City, for appellant. C. S. Patterson, of Salt Lake City, for respondent.

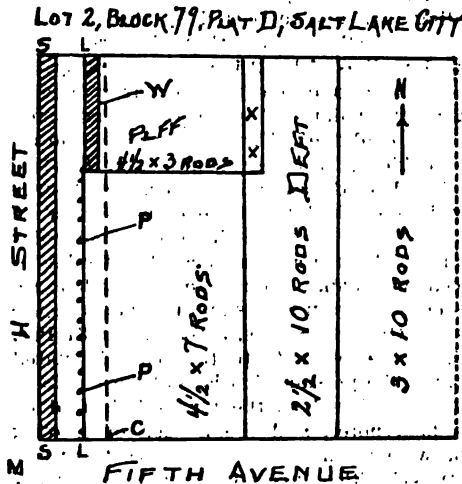
FRICK, C. J. Respondent brought this action to quiet the title to a strip of ground about 4 feet in width by 3 rods in length extending along the rear end of his lot which is $4\frac{1}{2}$ by 3 rods, and which strip he alleges is a part thereof. Both respondent and appellant purchased from a common source, and owned a part of lot 2 in block 79, plat D, Salt Lake City, as hereinafter shown. Lot 2 is a piece of ground 10 by 10 rods, constituting the southwest quarter of block 79, plat D, Salt Lake City, and was originally owned by one person. In November, 1899,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig., Key No. Series & Rep'r Indexes

† *State v. Brown*, 26 Utah, 44, 103 Pac. 641, 24 L. R. A. (N. S.) 546.

the original owner sold 3 by 10 rods off the east side, and in April, 1901, sold $4\frac{1}{2}$ by 10 rods off the west side of lot 2, which left a $2\frac{1}{2}$ by 10 rod strip between the two parcels sold as aforesaid. The latter strip the owner sold and conveyed to appellant in December, 1901. Afterwards, in 1906, the respondent became the owner of the west $4\frac{1}{2}$ by 10 rods, but he apparently disposed of all of it except the $4\frac{1}{2}$ by 3 rods in the northwest corner of said lot 2, and it is a strip about 4 feet by 3 rods on the rear of said $4\frac{1}{2}$ by 3 rods that is in dispute.

The following plat will help to explain the evidence hereinafter referred to:



The strip marked "X, X," is the strip in controversy. "M" represents the monument in the intersection of H street and Fifth avenue, and is the initial point from which all the surveys of lot 2 herein referred to were made. "L, L," represents the west line as the same is claimed to be by appellant, while "C" indicates the southwest corner of lot 2, and the broken or dotted line running parallel with "L, L," indicates the west lot line of said lot as is claimed by respondent. The dots on the line marked "P, P," indicate the stumps of old fence posts which mark the line of an old fence erected many years ago, and which were supposed to be on the west boundary line of lot 2. "S, S," represents a permanent cement or concrete walk laid by the city within the last few years, and the shaded portion running north and south along the west margin of respondent's property and marked "W" indicates a permanent concrete retaining wall that respondent erected within the last three or four years, and is about four feet west of the lot line as claimed by him. The fence or the posts that remain in the ground, marked "P, P," are about four feet west of the lot line as claimed by respondent.

At the trial respondent introduced in evidence the field notes of a survey of lot 4 in block 79, or the northeast corner of said

block, which was made in September, 1890, at the request of one Thomas Marioneaux. Said field notes were introduced in evidence as a part of the records of the city engineer's office of Salt Lake City. Who made the survey or the field notes is not disclosed, but it is shown that they were made by a person connected with the city engineer's office. In making the survey aforesaid the monument marked "M" was found at the intersection of H street and Fifth avenue. There was also found a monument on the southwest corner of lot 2 at the point marked "C" on the plat which was 39.37 feet north and 43.46 feet east from the monument "M." Similar monuments to that found on the southwest corner were also found on the other three corners of block 79. There were also two other surveys made in said block at the request of private parties, one of which was made in lot 2. The field notes of both of those surveys were also introduced in evidence, and in making the said surveys the monument "M" and the corner monument marked "C" were used as initial points. It is not disclosed by the evidence who made the latter surveys or field notes, and they were received in evidence as the preceding ones as a part of the records of the city engineer's office. Respondent also proved that there was a resurvey of some city blocks adjoining block 79, and that block 62, immediately south of block 79, was shifted three feet west, but in making said shift the monuments found as aforesaid were not changed in any way. It was also made to appear, and the fact is admitted in the pleadings, that there was an original survey and plat made of that portion of Salt Lake City in which block 79 and the surrounding blocks are located, and that no field notes of such a survey or any record thereof is in existence so far as any one knows.

Appellant, as a part of his case, produced evidence showing that about 35 years prior to the trial a post fence had been erected along the west boundary of lot 2 aforesaid, which fence stood on the line marked "L, L"; that portions of the fence posts still remain in the ground indicating where the fence was located; that a permanent cement or concrete sidewalk has been laid by the city west of the line marked "L, L," which sidewalk is indicated by the letters "S, S," on the plat; that respondent has erected a permanent cement or concrete retaining wall marked "W" on the plat which is on the line marked "L, L"; that more than 25 years preceding the trial a fence had also been erected on the east line of lot 2 a part of which still exists, and which is precisely in the center of block 79 in case the west boundary line is established on the line "L, L," and that said fence is directly in line with the center of the blocks lying to the north and south of block 79, and that, if the line claimed by respondent prevails, this

fence is about four feet west of the center of the block; that the west line of lot 2, as indicated by the line "L, L," corresponds with the west line of the blocks north and south thereof, while, if the line claimed by appellant is taken as the true boundary line, the west margin of block 79 will be about four feet east of the west line of the other blocks north and south. It is also made to appear that, if the line contended for by respondent is to govern, then there is a strip of ground nearly six feet in width between the east margin of the permanent sidewalk as laid by the city and the west margin of lot 2, and that respondent has encroached on the street with his retaining wall about four feet. It is also shown that the distance between the line marked "L, L," and the east line of lot 2 as marked on the plat is just 10 rods, or 165 feet, and that, if the block is considered as a whole, the distance between the line as claimed by respondent and the east boundary line of the block is 330 feet or 20 rods; that there is a surplus of 4 feet somewhere, either in the block or in the street or in both. It would appear that, if the boundary line contended for by respondent is taken, the surplus is in H street, and, if the line marked "L, L," controls, then the surplus must be in the east half of the block.

The county surveyor also made a survey of lot 2, and he found the monument "M" as indicated in the field notes introduced in evidence, and also found the monument "C" at the southwest corner of lot 2. There were thus four surveys made which with slight differences, agree with respect to the distance that the southwest corner of lot 2 is located from the monument "M" found in the intersection of the streets aforesaid. The county surveyor insists that the lines fixed by the original survey must have been located about four feet west of where the same are located by the three other surveys to which we have referred, and the field notes of which were given in evidence as heretofore stated. He, however, has no evidence to support his theory, except the fact that the resurvey ordered by the authorities of Salt Lake City almost universally differs from the original survey. In this case counsel for respondent, however, insist that the two surveys coincide. There is no proof of this latter claim either except as indicated by what is said herein. The county surveyor also testified that, if the line contended for by respondent prevails, then all the lines running north and south through lot 2 must be shifted about four feet to the east in order to give each claimant his proportionate share of lot 2 as purchased, while, if the line "L, L," prevails, then all the lines in said lot 2 are correctly indicated on the ground by fences or otherwise, and each claimant, including the respondent, will obtain his correct proportion without changing anything.

Upon substantially the foregoing evidence, the court made findings of fact in which he found the true west boundary line of lot 2 to be on the dotted or broken line and in conformity therewith found as a conclusion of law that respondent was the owner of the strip of ground in controversy marked "X, X," and entered a decree quieting the title thereto in him. Appellant prosecutes this appeal to reverse said decree.

[1] We remark that there is no question in this case of an agreed boundary line, and that the evidence is entirely without conflict except where conflicting inferences may be deduced from the conceded or undisputed facts. The appellant asserts that the findings are not supported by the evidence. Is the court's finding that the true west boundary line of lot 2 is as indicated by the broken or dotted line on the plat commencing at the point "C" sustained by any substantial evidence? There certainly is no direct evidence from any source that the line as found by the court is the original boundary line marked by the original survey of block 79. Neither are there any field notes from which such a result may directly be deduced or found. Counsel for respondent relies entirely upon a presumption which in the case of *Greer v. Squire*, 9 Wash. 359, 37 Pac. 545, in the headnote to that case is stated thus: "The presumption is that corners have been established at the places indicated by the field notes, and the burden of proving otherwise is on him who disputes their correctness." See, also, *Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916. The foregoing statement is sound in law as it is sound in common sense. All the authorities are to the same effect, and it is not necessary to refer to them here. It seems the district court also based its finding on the foregoing presumption. The important question in the case, therefore, is whether the foregoing presumption is applicable, and hence controls this case.

As we have seen, in this case the monuments relied on were not placed as "indicated by the field notes" introduced in evidence, but the field notes produced in evidence were made many years after the original survey was made, and after the monuments found had been placed by some one whose field notes indicating where they were placed were lost or destroyed. The field notes introduced in evidence therefore do not represent the character of field notes that are spoken of in the cases where the presumption relied on by respondent's counsel is given as the law. The field notes there spoken of constituted, so to speak, the original entries of the surveyor made by him or under his direction at the time of the survey, and as evidence indicating where the monuments placed by him may be found and for the purposes of identification the field notes gave the descriptions of the monu-

ments. Such field notes, therefore, are the direct evidence of what the officers who made them did, and how and where the monuments placed by him may be found. The field notes introduced in evidence in this case were not made by the surveyor who made the original survey, which is the survey that must control in this case, or by any officer having knowledge of the facts, but they merely show what was found by the surveyor making a subsequent or secondary survey. The latter field notes are, therefore, not original notes, nor are they even a copy or duplicate of the original notes. What is meant by original notes here is the notes of the original or first survey. The only presumption in favor of the field notes introduced in evidence therefore is that what is recited in them is prima facie correct, and the burden to show the contrary is on him who disputes their correctness.

[2] Nor can it be assumed that in the latter field notes the surveyor who made them assumed to state that the monuments found by him are the originals, or that they are precisely where they were placed by the original surveyor who placed them. Indeed, the surveyor making the latter field notes does not even certify, nor can he, that the monuments found by him were placed by an official surveyor, unless there is some evidence connected with the monuments showing that fact. The most that can be claimed is a presumption or inference that they were placed in making an official survey which may have been the original survey. If the presumption contended for by counsel and relied on by the court is to prevail, then it must not only be presumed that what the last surveyor recites in his field notes is correct, but one must go a step back, and also presume that what the last surveyor found is precisely as it was placed by the original surveyor, and that the person placing the same was a person in authority. This, in one sense at least, is heaping one presumption upon another, and this falls far short of constituting the presumption spoken of by the authorities referred to. That such is the fact is, we think, easily demonstrated. As we have pointed out, respondent introduced in evidence the field notes of three separate and distinct surveys in which the monuments marked "C" and "M" were found, and in which their relative positions and distance from each other were found to be nearly the same. That is, there is found to be a slight difference in the distance that "C" is from "M" in the field notes of the different surveys. While this difference is small, yet it illustrates the very point we desire to make. The presumption referred to in the books is based upon the fact that officers usually perform their duty, and in doing so, if they are required to make a record of their acts, that such record speaks the truth, and can be relied on until

its correctness is overturned. But this is all. If, therefore, there are two or more resurveys or secondary surveys so called of the same parcel or piece of ground in which the same initial starting point is used and such surveys differ in any essential, which one will be presumed to correctly indicate the original survey? In such event the presumption that each surveyor speaks the truth in his field notes and that they are to be relied on still prevails, but there is no presumption that either one or the other correctly locates the original monuments except as such may be inferred from other facts and circumstances. When there is a difference, therefore, in giving either course or distance in two or more surveys, there certainly can be no presumption that both are correct, nor that one is correct and the other is wrong. The presumption relied on by counsel, therefore, cannot apply with its full force in case of resurveys or secondary surveys.

[3] But let us assume that, in view that it is recited in the field notes introduced in evidence certain monuments were found both at the intersection of the streets and at the southwest corner of lot 2 from that fact an inference may be deduced that the monuments were placed there by some one in authority, and that the original field notes, if found, would show that the monuments were where they were placed. Surely such an inference, or, call it a presumption if you will, is one which may be disputed, that is, disproved. Even the original field notes can be shown to be incorrect and the presumption of their correctness overcome. The question, therefore, is, Does it require the same quantum and character of evidence to overthrow the inference or presumption if it be so called arising from the production of the field notes of a secondary or resurvey as it would to overthrow the presumption respecting the correctness of the original field notes? It would seem that but one answer is possible, and that is that the inference or presumption that the monuments were originally placed where they were found in making a secondary survey, and that some one in authority placed them where found must be much weaker when such inference is deduced from the field notes of a secondary survey than if the presumption were based upon field notes of the original survey. If the secondary field notes be considered as evidence, their probative force must necessarily be much weaker than would be that of the original field notes, and, as we think, nothing can be deduced from the former except the mere inference more or less strong but not rising to a presumption of fact. No other conclusion is logical or permissible.

[4, 5] The real question to be decided, therefore, is, Were the inferences arising from the secondary field notes introduced

in evidence entirely dissipated or disproved by the other facts and circumstances in the case? Further, is it made to appear from such facts and circumstances that the boundary line as claimed by respondent is not as located by the original survey? What are those facts and circumstances? (1) That the respondent improved his own property, long after all of the secondary surveys were made in conformity to the lot line as claimed by appellant by extending a permanent concrete or cement retaining wall along the entire width of his property. If the lot line is where he now says it is, this wall is four feet in the street. He thus recognized the boundary line as claimed by appellant when he made the permanent improvement aforesaid. (2) The city laid a permanent concrete sidewalk along the entire west side of lot 2 and of block 79. If the boundary line is where respondent says it is, the sidewalk is nearly six feet distant from the west margin of respondent's property, and is at least four feet farther west than naturally it should be. The city officials, then, also recognized the line "L, L" as being the west boundary line of lot 2. (3) If respondent's boundary line prevails, then the west line of lot 2 is about four feet east of the west boundary lines of the blocks to the north and to the south of it, and, in case the north half of block 79 should remain as it is, there would be a jog of about four feet in the west boundary line of said block 79. (4) If the boundary line prevails as contended for by appellant, all of the owners of property in lot 2 would have precisely what they bought and paid for and all the improvements will be as they were intended by the owners, but, if respondent prevails, he will either have four feet in excess of what he bought or the four feet will be in the street which would make the street four feet wider along block 79, or lot 2, as the case may be, than it is anywhere else. (5) If the broken or dotted line is taken as the true boundary line, then for more than 35 years all of those who either owned or improved property in lot 2 by building fences or making other improvements were mistaken in locating the boundary line, notwithstanding that the lines located by them correspond with similar lines in the blocks both north and south of block 79. (6) If the line contended for by appellant prevails, then there can be no other or further litigation with regard to lot or division lines because, so far as appears from all of the evidence, all the parties with their fences and improvements agree with the boundary lines aforesaid, but, if respondent's line is adopted, then all lines, except where the statute of limitations can be made to apply, must be shifted, and thus disarrange to some extent buildings and improvements.

The probative force to be given to fences and other improvements placed on boundary lines many years prior to a resurvey or

secondary survey is well stated by Judge Cooley in the case of Diehl v. Zanger, 89 Mich. 601, and also by the Supreme Court of Wisconsin in City of Racine v. Emerson, 85 Wis. 80, 55 N. W. 177, 39 Am. St. Rep. 819. The same doctrine is approved by this court in Moyer v. Langton, 37 Utah, 9, 106 Pac. 508. It may be contended, however, that in the foregoing cases the original monuments had disappeared, while in the case at bar such is not true. But this is precisely what is assumed by both court and counsel. It is contended that because in a secondary survey monuments are found that no one knows when or by whom placed such monuments must be assumed to be the original ones, and that they were originally placed where found, although they are found to be contrary to all the other visible landmarks and old improvements found on the surface of the ground. If there were no other landmarks which are contrary to such monuments, or any such other marks were made by those who had no interest in the soil on which they are found, or if it were made to appear that when made they were not intended to mark a boundary line, the case would be different. Here, however, the monuments found and relied on are all in direct conflict with the established improvements indicating the boundaries and which latter are in harmony with all other landmarks found upon independent ground such as are found on the blocks north and south of the block in question. It is but reasonable, therefore, that the latter should control the former.

Counsel for respondent has to some extent endeavored to meet the claim that litigation will result by insisting that nothing is in issue now except the small strip marked "X, X." In this counsel is clearly mistaken. The real question is, Where is the west boundary line of lot 2 located? When that is found, what follows is merely incidental. If this boundary line as located by the district court prevails as between appellant and respondent, it can and probably will also be claimed to be as fixed by said court by other property owners in said block 79 as well as by the owners of property in lot 2, and hence considerable needless litigation may ensue. Of course, it goes without saying that the mere fact that litigation may ensue is no reason why a person should be deprived of any of his property or that boundary lines should not be declared to be as established, yet it may be urged as a good reason why courts should consider carefully whether there is any evidence authorizing a change in the existing condition of things by declaring that the boundary lines are not where they for a generation or more have appeared to be, but that they were established at some other point. When findings of the trial court are based merely upon a presumption of fact, as in this case, and the presumption is entirely dissipated, then there is no evidence in support of the

findings, and hence, as held in *State v. Brown*, 36 Utah, 46, 102 Pac. 841, 24 L. R. A. (N. S.) 545, the question is merely one of law.

We are of the opinion that in this case the presumption arising from the secondary field notes that the west boundary line of lot 2 was originally located along the dotted or broken line is entirely dissipated by the other facts and circumstances in the case, and hence the findings are entirely unsupported by the evidence. This being so, the conclusions of law and decree are erroneous, and cannot be sustained.

[8] Assuming, however, that we are in error in assuming that respondent's whole case rests upon a presumption and that such presumption has been entirely dissipated, yet he cannot prevail. This is an equity case to quiet the title to real property. In such a case both parties have a right to invoke our judgment upon the whole evidence. If in such a case in our judgment the findings are clearly against the weight of the evidence, it is our duty to vacate them and substitute others. In this case in our judgment the findings are manifestly against the great weight of the evidence, and for that reason cannot be permitted to stand. In cases of this kind, no hard and fast rule can be laid down with respect to whether the boundaries as indicated by the old fences and landmarks or those as claimed by a secondary survey shall prevail. Each case must be determined upon its own facts and circumstances, and the trier of fact from a consideration of all of them must determine the weight to be given to the evidence. We think in this case the court erred in assuming that the same presumptions must be indulged in favor of a secondary survey and the field notes thereof as the law requires to be given to the original when in fact a mere inference more or less strong exists in favor of the field notes of a secondary survey as has been explained.

In conclusion, we remark that the strip claimed by respondent is a few inches in excess of four feet; but, while this is true, the evidence is not conclusive that the difference between the boundary line as claimed by the parties is not also a few inches in excess of four feet. It seems reasonably clear that, if the west boundary line of lot 2 is located as contended for by appellant, respondent has all the ground called for in his deed, and hence has no claim upon any ground east of appellant's west boundary line, and that appellant obtains no more than the precise amount called for by her deed. All that it is necessary to do, therefore, is to remand the case, with directions. The findings of fact, conclusions of law, and decree are therefore vacated, set aside, and reversed. The case is remanded to the district court, with directions to enter findings of fact and make conclusions of law in accordance with the views herein expressed,

and enter a decree establishing the west boundary line of lot 2 on the line marked "L, L," and also establishing the east boundary line of respondent's $4\frac{1}{2}$ by 3 rods coterminous with the west line of appellant's $2\frac{1}{2}$ by 10 rods, $4\frac{1}{2}$ rods east of the line marked "L, L," and as the same is indicated on the ground by the existing fence, and to enter a decree quieting the title to the strip "X, X" in appellant as prayed for in her answer, and make such disposition of the costs as to the court may seem just and equitable. Appellant to recover costs on appeal.

MCCARTY, J., concurs.

STRAUP, J. (concurring). Let me add to this that the respondent and his predecessors in interest treated and acquiesced in the old fence line "L, L" as the west line of the block and the west line of respondent's parcel of land. That among other things is evident by his construction of the permanent concrete retaining wall on a line with the old fence line "L, L." He ought not now to be permitted to assert that the west lot line and the west line of his land is four feet to the east of his wall, and that the east line of his land is correspondingly four feet to the east, and thereby disturb the boundary lines and permanent improvements of about every occupant of the block.

SALT LAKE CITY v. ROBINSON.

(Supreme Court of Utah. March 18, 1912.)

1. INTOXICATING LIQUORS (§ 224*)—SALE WITHOUT LICENSE—BURDEN OF PROOF.

The burden is on one charged with selling intoxicants without a license to show that he had a license to sell.¹

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. § 224.*]

2. CRIMINAL LAW (§ 37*)—ILLEGAL SALES OF LIQUOR—ESTOPPEL TO CONVICT.

Two police officers went into accused's drug store and one of them asked for lemonade with a "stick" in it and received lemonade with whisky in it, and also purchased three bottles of beer, paying with money procured from the police funds of the city, after which they arrested accused for selling intoxicants without a license. Held, that the city was not estopped by public policy or otherwise from prosecuting accused for selling intoxicants without a license on the ground that the officers induced the commission of the offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 42; Dec. Dig. § 37.*]

3. CRIMINAL LAW (§ 555*)—EVIDENCE—SUFFICIENCY.

A conviction is not necessarily illegal merely because some of the witnesses for the prosecution were paid for gathering evidence against accused; the court having some discre-

¹ *State v. Wells*, 36 Utah, 400, 100 Pac. 681, 136 Am. St. Rep. 1058, 19 Ann. Cas. 681; *Wilkinson v. O. S. L. R. Co.*, 35 Utah, 110, 99 Pac. 466.

tion in determining whether a conviction based on such evidence should stand.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 555.*]

4. CRIMINAL LAW (§ 785*)—INSTRUCTIONS—CHARACTER OF EVIDENCE.

In a prosecution for selling intoxicants without a license in which police officers testified without contradiction that they purchased intoxicants from accused, there was no abuse of discretion in refusing a requested charge that the testimony of witnesses who were interested in or employed to find evidence against accused should be received with the greatest caution and distrust.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1174; Dec. Dig. § 785.*]

5. CRIMINAL LAW (§ 1173*)—HARMLESS ERROR.

Any error in a prosecution for selling intoxicants without a license, in which police officers testified without contradiction that they purchased intoxicants from accused, in refusing a requested charge that the testimony of witnesses employed to find evidence against accused should be received with the greatest caution and distrust, was not prejudicial where the jury could not legally have acquitted accused under the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

6. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

The court instructed that if, after due consideration of the whole case and discussion thereof with other jurors, any juror entertains a reasonable doubt of guilt it is the duty of such juror not to vote for a verdict of guilty nor to be influenced in so voting for the sole reason that other jurors would be in favor of a verdict of guilty. Held, that the instruction was not erroneous as permitting a juror who entertained a reasonable doubt to still vote guilty because other jurors do so provided he find some additional reason for so voting, such as that he may believe accused "may" be guilty, so that it was not error to refuse a requested charge that if any one of the jurors entertained a reasonable doubt of guilt they could not convict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1890, 1904-1922, 1900, 1907; Dec. Dig. § 789.*]

Straup, J., dissenting.

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

L. P. Robinson was convicted of selling intoxicants without a license, and he appeals. Affirmed.

S. P. Armstrong, for appellant. H. J. Dinny and P. J. Daly, for respondent.

FRICK, C. J. The appellant was charged in the criminal division of the city court of Salt Lake City with having sold intoxicating liquors within the city of Salt Lake without obtaining a license to do so. He was convicted in said court, appealed to the district court of Salt Lake county where he was again convicted, and he now presents the record containing the proceedings of his last conviction to this court on appeal.

The only evidence heard at the trial was produced by the city, which is to the effect

that one Herman Bauer, who was the private secretary of the chief of police of Salt Lake City, and who was clothed with the powers of an ordinary policeman, and one J. E. Woodward, also a police officer, went into the appellant's drug store in Salt Lake City; that they went there for the express purpose of obtaining evidence that he was selling intoxicating liquors in his place of business; that they knew at the time that appellant had no license from the city to sell such liquors; that they went into appellant's place of business and Mr. Bauer called for lemonade with a "stick" in it and Mr. Woodward asked for a glass of coca cola; that when Mr. Bauer asked appellant to put a "stick" in his lemonade appellant seemed to know just what Mr. Bauer wanted and put whisky in it; that, after drinking the lemonade and coca cola purchased as aforesaid, Mr. Woodward called for and received three bottles of lager beer which appellant produced from a back room in his store; that Mr. Woodward paid appellant \$1 for the drinks and three bottles of beer, including two cigars, and got back 20 cents in change from him; that after having purchased said drinks and the beer, and after having paid therefor as aforesaid, they, as public police officers of Salt Lake City, arrested the appellant and took him and the beer to the police station where a complaint charging him with selling intoxicating liquors without a license was lodged against him, and on which he was subsequently tried and convicted as aforesaid. It was also made to appear upon the cross-examination of the two police officers that, while Mr. Woodward paid for the cigars, the drinks, and the beer out of his own money, he was subsequently reimbursed, but the source from whence the money out of which he was reimbursed was derived was left in doubt. For the purpose of this decision we shall assume that the fund from which Mr. Woodward was reimbursed was the contingent fund of the chief of police of Salt Lake City. The three bottles, two with their contents intact, were produced in evidence. The city did not prove that appellant had not obtained a license to sell intoxicating liquors, although the ordinance prohibiting the sale of such liquors without first obtaining a license from the city was produced in evidence.

[4] Upon substantially the foregoing facts the appellant requested the court to charge the jury to return a verdict of not guilty. This request was based upon the theory that, since the city had failed to prove that appellant did not have a license to sell intoxicating liquors, it had failed to prove that the sale in question was illegal. The court refused the request and in substance charged the jury that the burden of proving that appellant had a license was cast upon him, and in view that he had failed to produce

any evidence upon that subject the jury must assume that he had no license authorizing the sale in question. Appellant's counsel vigorously insists that the court erred both in refusing his request and in charging the jury that the burden of proof with regard to whether appellant had a license or not was cast upon him. Counsel has cited some respectable authorities which sustain his contention. The overwhelming weight of modern authority, in the absence of an express statute to the contrary, is, however, in accordance with the rule adopted by the trial court in the instruction complained of.

The author of *Black on Intoxicating Liquors*, after referring to the decisions which hold that the burden of proving that the sale in question was without a license is upon the prosecution, says: "But these decisions are exceptional. The rule established by the vast preponderance of authority is that, in cases where a license to sell, if produced and relied on, would constitute a complete defense to the action, the prosecution is not bound to produce any evidence in support of the negative allegation that the sale was made without license, but on the contrary the defendant must assume the burden of proving that he was duly licensed." *Black, Intox. Liq.* § 507.

In a recent work (1910) entitled, "The Law of Intoxicating Liquors by Woollen & Thornton," the authors, in discussing the question of the burden of proof, in volume 2, § 947, state the rule in the following language: "In all cases, therefore, of a sale without a license, the prosecution need not prove it was made without a license, but the burden is upon the defendant to show it was authorized by a license he had at the time the sale was made."

Joyce in *Intoxicating Liquors*, § 686, says: "Where the possession by the defendant of a license or authorization would be a defense to the act alleged to be criminal upon his part, the burden of proof rests upon him to show that he possesses the same."

In 23 Cyc. 247, the prevailing rule is stated thus: "In cases where a license to sell is relied on as a defense to the prosecution, the government is not bound to produce any evidence in support of the negative allegation that the sale was made without license, but on the contrary defendant must assume the burden of proving that he was duly licensed."

In support of the foregoing text, decisions from the courts of last resort of 25 states, and also decisions from the Supreme Court of the United States, are cited. In a few of the states mentioned, notably Massachusetts, Kansas, and Texas, and perhaps a few others, the subject is regulated by statute. In two of the states a contrary rule had been adopted by the courts, and the Legislatures promptly passed statutes fixing the rule in accordance with the great weight of authori-

ty. But even in those states the courts conceded that, independent of any statute, the rule was a reasonable and a practicable one. See *State v. Crow*, 53 Kan. 662, 37 Pac. 170.

In 17 A. & E. Ency. L. (2d Ed.) 330, the rule is stated in the following language: "Although there are a few decisions which maintain a contrary doctrine, the rule is settled by the weight of authority that, where a license or permit to sell intoxicating liquors would be a defense to a prosecution for a violation of the liquor laws, the burden is on the defendant to show that he has such license or permit, and not on the state to show that he is without it."

In referring to the rule in 7 Ency. Ev. 726, it is said: "Where a valid license is a defense to a prosecution, or its nonexistence is an essential element of the crime charged, the rule generally obtains that the burden is upon the defendant to establish the existence of the license."

The author of *Underhill on Criminal Evidence*, after discussing upon whom rests the burden of proving a negative, at page 33 states the rule as follows: "But if a fact is peculiarly within the knowledge of the accused, as for example his own age when he pleads nonage as a defense, or the fact that he has a license to carry on a prohibited business or to do a forbidden act, the burden of proof is on him as he has much better means of proving the fact alleged than the prosecution has of proving the contrary. The matter is peculiarly within his knowledge and to require the state to prove the lack of a license is to require proof of a negative allegation."

In 4 Elliott on Evidence, § 3170, the author, after showing that the courts are somewhat divided upon the question, says: "It is now settled, however, in most jurisdictions, either by statute or judicial decision, in the absence of any express statutory provision upon the subject, that the burden is upon the defendant to show his license or authority as a defense." See, also, Jones on Evidence (2d Ed.) § 181; 2 Chamberlayne, Modern Law of Ev. § 983.

From the foregoing excerpts it is manifest that the great weight of authority supports the law as it is stated by the trial court in the instruction of which complaint is made. It is also clear that the rule is generally applicable to those cases where an act, especially the sale of some article, is prohibited unless licensed, and where the production of such license would be a complete defense to the prosecution. If the defendant in this case had produced a license to sell intoxicating liquors within the limits of Salt Lake City, the prosecution must have failed, and hence this case falls squarely within the rule announced by the foregoing authorities. Moreover, the rule is as practicable as it is general, and we can conceive of no case where its application could

work a hardship or even an inconvenience, much less result in injustice to any one who is engaged in the traffic of intoxicating liquors, whether licensed or unlicensed.

It is, however, asserted that we are committed to a contrary principle by what is said in *State v. Wells*, 35 Utah, 400, 103 Pac. 681, 138 Am. St. Rep. 1059, 19 Ann. Cas. 631, which was a prosecution under Comp. Laws 1907, § 4226, in which the administering of drugs or the use of instruments for the purpose of producing a miscarriage of a pregnant woman except to preserve her life is denounced and made a felony. It is true that in that case we, in harmony with the weight of authority, held that in prosecutions based upon statutes like the one just referred to the state must produce some evidence direct or inferential that the miscarriage was not produced in order to preserve the life of the woman. While it is also true that in that case the proposition of proving a negative by the state was to some extent at least involved, yet the question of a license was not involved. If in that case the production of a license by the accused would have been a complete defense, to the prosecution or to the act charged, and the overwhelming weight of authority were to the effect that the burden of proof rested on the accused to produce such license, the result of that case, in the judgment of the writer, would have been entirely different.

Again, it is asserted that in the case of *Wilkinson v. O. S. L. R. Co.*, 35 Utah, 110, 99 Pac. 466, we in effect laid down a contrary doctrine to what we are now doing. It is sufficient to say that the principle applied in that case is one of universal application, namely, that where the question of negligence is involved negligence will not be presumed but must be proved. The most that can be said, therefore, is that there appears to be an inconsistency between the rule adopted in this case and the one in the *Wells Case*. This inconsistency, if not entirely assumed, nevertheless for the reasons already given is more apparent than real. Furthermore, in order to avoid this assumed inconsistency, we are asked to adopt a rule in this state which is contrary to the one that is generally applied by the great majority of the courts in this country and which in practice is found to be just, fair, and practicable. We do not feel disposed to place this court in opposition to the general trend of authority upon this subject where nothing is accomplished except to reconcile an apparent inconsistency, and especially where a rule is sought to be adopted that could benefit no one. We are of the opinion, therefore, that the rule adopted by the trial court should prevail.

[2] The next assignment is stated in the following language: "The court erred in holding that the city is not estopped by its

acts in soliciting and procuring the defendant to sell the liquor in question." Counsel contends that the two police officers to whom the sale was made represented the city that is here prosecuting; that the sale in question would not have been made if the officers had not solicited it; and hence the offense alleged was induced by the officers. It is contended that under such circumstances the general rule is that the prosecutor is either estopped from asking a conviction or public policy prevents one. It would subserve no good purpose to discuss the reasons for the rule contended for by counsel, since we are clearly of the opinion that it has no application to the undisputed facts in this case. The alleged offense in question here, namely, the sale of the intoxicating liquor, was not induced or procured in the sense that those terms are generally used and applied. While it may be conceded that the particular sale in question here would not have been made if the two officers had not asked to purchase the liquor, yet in view of the facts and circumstances the appellant was no more induced to make this sale than he would be induced to make any sale in his place of business. Moreover, the sale in question was seemingly only one of many that appellant was prepared to make. When the intoxicating liquor was called for by the officers, appellant seemed to have a stock of it on hand from which he could supply any reasonable demand. In case the officers had called for intoxicating liquor and had been informed by appellant that he did not have it for sale, or that he did not keep it in stock, and in such event they had induced him to obtain some for them from some one else, which he did, and after it was so procured upon their solicitation he had sold them what he had procured, the case would be different. Here, however, the sale was freely and voluntarily made from a supply which apparently was on hand in appellant's store and which could have been kept on hand only for the purpose of making sales to those who desired to purchase. While it is true that one sale constitutes the offense, yet it is clear that it was not the purpose of the officers to induce the appellant to make a sale for the sole purpose of convicting him of making that sale, but it seems their object was to obtain evidence from which it was made manifest that appellant was engaged in the illegal traffic of intoxicating liquors and that they desired to break up such traffic. As public officers who under their oaths were required to enforce the ordinances of the city, we cannot see wherein they offended against public policy or against good morals in seeking to obtain evidence against a willing offender against the law for the purposes aforesaid. No doubt if public officers have induced or procured a defendant to commit a burglary or larceny or other

offense which he did not intend to commit nor would have committed except for the inducement of such officer, public policy will not justify a conviction for an offense committed under such circumstances. But suppose it is an offense to carry concealed weapons or to have burglar's tools in one's possession and an officer, in order to obtain evidence of the fact, induced the supposed offender to exhibit the weapon or tools to such officer for the purpose aforesaid, is there any public policy that will prevent a conviction of the offender under such circumstances? We think no one will contend for such a doctrine, and yet the inducement in the case at bar is in principle no different from the inducement in the supposed case of concealed weapons. Convictions obtained under circumstances like those in the case at bar have frequently, if not universally, been sustained by the courts. The rule under which prosecutions will be sustained is well stated in 2 Woollen & Thornton, Law of Intoxicating Liquors, § 707, where a large number of cases are collated in support of the rule there stated.

We think the true doctrine applicable here is clearly pointed out in a recent case entitled *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370.

By what we have said we do not mean to be understood as offering any encouragement to a certain class of so-called private detectives or informers who may, in pursuance of offered rewards, or for other valuable considerations, act as decoys and as such induce certain individuals to commit offenses. When it is made to appear that the offense charged was induced by a detective or other person, or that such detective or person was paid for obtaining the evidence necessary to convict, or that he is to receive additional compensation in a case of conviction, both the prosecuting officers and the trial courts should carefully scrutinize the evidence and should permit no conviction to be had, or, if had, to stand in case the offense was induced as aforesaid, and in case of paid evidence none should be permitted to stand if there is any doubt of the guilt of the accused.

[3] But it does not follow that a conviction is unlawful merely because certain witnesses testifying for the prosecution may have received pay for looking up evidence against the accused. In such case the trial court must be permitted to exercise some discretion with regard to whether a conviction should stand or not. If no legal rights have been invaded and there is no abuse of discretion apparent, we should not interfere.

[4] It is also contended that the court erred in refusing appellant's request to charge the jury as follows: "The testimony of witnesses who are interested in or employed to find evidence against the accused should be received with the greatest caution and distrust." We do not think it is the law that

merely because one may be "interested" * * * to find evidence against the accused" his testimony should be "received with the greatest caution and distrust." Nor do we think that the officers who were witnesses in this case come within the class who may be said to have been "employed to find evidence against the accused." While the courts are not unanimous upon this question, it has nevertheless been held that "it is error for the court to charge the jury that the officers were persons hired to obtain evidence and their testimony subject to scrutiny, for they are in no sense detectives, but public officers." 2 Woollen & Thornton, Law of Intoxicating Liquors, § 707. No doubt there are many cases wherein it has been held that, where it was made apparent that the witnesses, or some of them, are private detectives, or were paid for obtaining evidence against the accused, their testimony should be received with caution and should be carefully scrutinized, and that it constituted error to refuse to so charge the jury. We know of no case, however, where the court has gone to the extent that counsel asked the court to go in the request that was refused.

We think the law upon this subject is well stated by the Supreme Court of Colorado in the case of *O'Grady v. People*, 42 Colo. 312, 95 Pac. 346, where, in the headnote, it is said: "The giving of instructions as to the caution to be observed in weighing the testimony of private detectives, or persons employed to find evidence, is based upon rules of practice rather than of law, and rests largely in the discretion of the trial court." That the trial court should be permitted to exercise at least some discretion with regard to the giving of cautionary instructions is, we think, clearly illustrated by the undisputed facts of this case. Here, so far as the record discloses, were two reputable public officers who produced the evidence of appellant's transgressions in court and whose testimony was not disputed, not even questioned, by any one. Everything that took place at the sale as well as the motives and purposes of the officers was detailed by them, and therefore all of the facts relating to their statements were before the jury unquestioned. There was therefore no disputed questions of fact in the case. Under such circumstances, why should the court have given a special cautionary instruction with regard to the weight to be given to the officers' testimony, to say nothing about giving the one asked for by appellant?

[5] But if it be assumed that it was proper for the court to have given a cautionary instruction, or should have given appellant's request, still the question remains, in what way were any of his legal rights prejudiced by the court's refusal to give his request? The evidence was all one way, and no jury, under their oaths, would have been justified to have found the facts otherwise than they

found them. True the jury could arbitrarily have found appellant not guilty regardless of the evidence against him, but it cannot be assumed that honest and conscientious men would have done so under any circumstances unless required to do so by a binding instruction. The failure to give appellant's request, even though it were held error, was therefore error without prejudice.

[8] Complaint is also made that the court erred in refusing to give appellant's request to the effect that if any one of the jurors entertained a reasonable doubt of guilt they could not convict. The court instructed the jury upon that subject as follows: "You are instructed that, if after due consideration of the whole case and discussion thereof with your fellow jurymen any juror entertains a reasonable doubt of the guilt of defendant, it is the duty of the juror so entertaining such a doubt not to vote for a verdict of guilty nor to be influenced in so voting for the sole reason that other jurors would be in favor of a verdict of guilty." The criticism of counsel is aimed at that portion of the instruction in which the jury is told that a juror should not be influenced in voting for a conviction "for the sole reason that other jurors would be in favor of a verdict of guilty." In addressing himself to this subject, counsel in his brief says: "The error of the instruction given is in the fact that it permits a juror, though entertaining a reasonable doubt, still to vote guilty because other jurors so vote, provided he may find some additional reason (as that he may believe defendant *may* be guilty) for so voting." This seems to us a mere refinement. In fact, the point to us seems so nice that although we possessed the powers of Hudibras, of whom it is said that

"He could distinguish and divide
A hair 'twixt south and southwest side,"

we still could offer a reasonable excuse for failing to grasp the reason why, under the circumstances of this case, the appellant was prejudiced in a legal right by the refusal to give the request. Moreover, an instruction in effect precisely like the one given by the court in this case was held to state the law correctly by the Supreme Court of California in *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50. The court therefore committed no error in refusing appellant's request.

Finally it is urged that the court erred in admitting in evidence an ordinance other than the one upon which the complaint was based. In the complaint it was alleged that appellant had violated the provisions of "section 1 of chapter 24 of the Revised Ordinances of Salt Lake City," passed April 5, 1909, approved April 7, 1909. It seems that the original complaint was prepared on a printed blank in which the ordinances of the city were designated as the Revised Ordinances, etc. It seems further that the book in which the ordinances appear, which was

offered in evidence, was not entitled or designated as the Revised Ordinances, etc. This, however, is the only difference between the ordinances pleaded and the one introduced in evidence. The ordinance introduced in evidence was in fact the ordinance on which the complaint was based and approved as stated in the complaint. Counsel's contention, therefore, that there was a variance, is, in our judgment, entirely without merit.

The judgment is affirmed. Costs to be awarded against appellant as provided in Salt Lake City v. Robinson, 116 Pac. 448, 35 L. R. A. (N. S.) 610.

MCCARTY, J., concurs.

STRAUP, J. I dissent. It is alleged in the complaint that the defendant sold and disposed of intoxicating liquors—one drink of brandy and three bottles of beer—"without first having obtained a license so to do, contrary to the provisions" of an ordinance of Salt Lake City. The only evidence of the city, was that the defendant sold to two policemen of Salt Lake City at their solicitation and request, and who were sent for that purpose to the defendant's place of business by the chief of police, a drink of whisky and three bottles of beer paid for out of city funds. Upon that proof the city rested. The defendant also rested. No evidence was given of the nonexistence of a license, nor were any facts or circumstances shown from which such fact might be inferred. The court instructed the jury that the defendant was charged with selling intoxicating liquors "without first having obtained a license so to do from Salt Lake City." The court further instructed them that the defendant's plea of not guilty "put in issue every material allegation of the complaint and cast upon the city the burden of proving every essential fact constituting the offense charged." The court then instructed them that the burden was upon the plaintiff, the city, to prove that the defendant sold and disposed of intoxicating liquors, and that, "if the defendant at the time it is alleged he sold intoxicating liquors had had a license from Salt Lake City so to dispose of intoxicating liquors, that would have been a defense to the offense charged; but the court instructs you that the burden of proving that defense is on the defendant, and, no evidence having been introduced on behalf of the defendant that he had such license, the court instructs you that you must assume that at such time the defendant had no such license." The court not only charged as to the burden of proof, but in effect directed a verdict as to one of the ingredients of the alleged offense, for the court upon the state of the evidence required the jury to assume—"you must assume"—that the defendant had no license. If the court in a criminal case may so direct a jury as to one essential element of the alleged of-

ference, I do not see why it may not do so as to all other ingredients when in the opinion of the court there is no substantial conflict in the evidence. The court gave the usual instruction as to the presumption of innocence and the defendant's right to testify or decline, as he saw fit, and charged that his declining to testify, or his motive in so doing, could not be considered as indicating guilt or as affecting the question of his guilt or innocence.

The judgment is assailed on several grounds. One of them relates to the burden of proof as to the nonexistence or existence of a license. In that particular it is contended by the appellant that the burden was upon the city to show the want of a license; that there is no evidence to show that fact; and that the charge of the court in respect of such burden is erroneous. Upon this question there are a great variety of decisions. When analyzed, much of the conflict found in them is more apparent than real. The respondent has referred us to text-books on intoxicating liquors and to a half hundred cases, mostly those cited by Mr. Black in his work on intoxicating liquors, in support of its contention and of the charge. It is not practicable here to refer to all of them. They may be divided in groups: (1) Where by statute it is expressly provided that the burden of showing a license is on the defendant and that until such proof is made by him the presumption is to be indulged that he had no license or was not authorized. The cited case of *Commonwealth v. Carpenter*, 100 Mass. 204, and the cited later cases from that court, and the case of *Durfee v. State*, 53 Neb. 214, 73 N. W. 676, are illustrations of this group. (2) Where the exception or proviso was no part of the enacting clause, and was not descriptive of the offense, among them cases where the sale of, or the traffic in, intoxicating liquors was by statute forbidden, and where in sections other than the enacting clause exceptions were made permitting druggists or agents of the town or municipality, or other persons, to sell liquors for medicinal, mechanical, or some other specified purpose on a permit or license. In such case the offense is complete by the mere proof of the sale of intoxicating liquors; the nonexistence of a license not being descriptive and no part of the offense. The permit or license in such case is matter in defense. This group is illustrated by the cited case of *State v. McGlynn*, 34 N. H. 422, and other cited cases from that court, the earlier Massachusetts cases, especially *Commonwealth v. Tuttle*, 12 Cush. 602, the Maine cases, and cases from other jurisdictions. Most of the cases cited by respondent fall within this group. (3) Where the existence or nonexistence of a license is a fact peculiarly within the knowledge of the defendant, and where, if he had one, it could readily have been produced by him, and where the want of it could not be shown

by the prosecution, at least, not without great inconvenience. This is a reason generally given by courts for holding that the burden is on the defendant to show a license in cases falling within the second group. Some courts, however, have applied it to cases which do not fall within either the first or second group as is illustrated by the cited case of *Williams v. State*, 35 Ark. 430, and other cases.

In determining this question, and in reading the cases, due regard must be had to the various statutes fixing the burden of proof and defining the ingredients of the offense and to the facility or means of proof. These have been disregarded by some courts and text-writers. Mr. Black in his work on *Intoxicating Liquors*, § 507, lays down the doctrine broadly that the defendant in all cases must assume the burden of proving that he was duly licensed. In support of this he cites, among other cases, the case of *Commonwealth v. Carpenter*, supra, and three other later cases from Massachusetts where, by an express statute, the burden to show a license was placed upon the accused, and many cases where by statute the offense was complete by the mere proof of the sale of intoxicating liquors, and where the exception or proviso was no part of the enacting clause nor descriptive of the offense. Cases are thus cited by the respondent indiscriminately, and regardless of statutes fixing the burden of proof and of the fact, of whether the exception or proviso was or was not a part of the enacting clause or in part descriptive of the offense, and in disregard of the means or facility of proof to show the want of a license. These cases can have no application to the case in hand unless the statute and the facts are similar. We have no statute fixing the burden of proof or declaring what shall be prima facie or presumptive evidence of the want of a license, and hence the cases falling within the first group have clearly no application. Does the case fall within either of the other groups?

At the time of the commission of the alleged offense the traffic in intoxicating liquors was not prohibited. It was regulated. The statute (Comp. Laws 1907, § 1242) provides that no person shall manufacture, sell, etc., or otherwise dispose of intoxicating liquors, "without first obtaining from the board of county commissioners of the county, or city council of the city, or board of trustees of the town in which he intends to do business, a license therefor as hereinafter provided." The statute authorizes such boards and city councils to grant licenses in their respective counties, cities, and towns. Provisions are then made for the manner of applying for, and the granting of, licenses. It is provided that one seeking a license to sell liquors in a city is required to file with the city recorder a written application in

which he is required to definitely state certain particulars enumerated in the statute. Before a license is granted, he is also required to execute and file a bond with the city recorder to be approved by the city council and conditioned for the payment of all damages, fines, and forfeitures which may be adjudged against him. In harmony with the statute, Salt Lake City by ordinance provided that "it shall be unlawful for any person," etc., to manufacture, sell, etc., intoxicating liquors "without first obtaining a license so to do as hereinafter provided." Provisions are then made for the manner of applying for liquor licenses, the granting of them, and the giving and approval of bonds. The applicant is required to file a petition with the city recorder, and a copy with the license assessor, and a bond with the city recorder to be approved by the city council. If it approves the bond, the license is granted by it. A record of such proceedings is made and kept. Under such a statute and under such an ordinance the gravamen of the offense is the manufacture, sale, or other disposal of intoxicating liquors without a license. The want of a license is a part of the enacting clause defining the offense and constitutes a descriptive part and is an ingredient of it. The criminal act is not complete without it.

In the case of *State v. Williamson*, 22 Utah, 248, 62 Pac. 1022, 83 Am. St. Rep. 780, this court said: "If the exception is stated in the enacting clause of the statute, it is ordinarily necessary to negative it in order that the description of the crime may correspond with the statute as, if a statute imposes a penalty for the sale of spirituous liquors without a license, the indictment should aver the want of a license." This is a familiar and the general rule. 22 Cyc. 344; 1 Bishop Crim. Pro. § 631; Bishop Stat. Crim. § 1042.

It, however, is urged that, while it was essential to aver in the complaint the want of a license, it nevertheless was not essential for the city to prove it because the proof of such fact involved proof of an exception or proviso, or of a negative peculiarly within the knowledge of the defendant. But such a doctrine is generally applied to those cases whether the exception is not in the enacting clause and is not descriptive of the offense, and where the negative allegation does not constitute a part of the original substantive cause of action. *Melone v. Ruffino*, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127.

Wharton in his work on criminal evidence, § 842, well states the principle: "As a general rule a license to do a particular thing, when a purely extrinsic defense, is to be proved by the defendant by a preponderance of proof, but whether the license is so extrinsic depends upon the concrete case. When the nonexistence of the license is not averred

in the indictment, and the license is particularly within the knowledge of the party holding it, the burden is on him to procure such license in those cases in which the existence of the license is in question. But where the nonexistence of the license is averred in the indictment, and is essential to the case of the prosecution under the rules announced, the nonlicense must be proved by the party to whose case it is essential."

Bishop on Statutory Crimes, § 1051, says: "Must the negative averment that the defendant was not licensed or otherwise authorized to make the sales (of liquors) be proved? Now in principle, as this negative matter is a part of the government's case against the defendant, it must in some way be made prima facie to appear at the trial."

And in his work on New Criminal Procedure, vol. 1, § 1049, the same author says: "On the plea of not guilty where the defendant admits nothing against himself, the burden of proof is on the prosecuting state; and it must affirmatively establish, as the indictment must charge, every element in the offense."

That the city was here not only required to allege but also to prove the want of a license, though the proof of such fact involved proof of a negative, is supported by the cases of *Hepler v. State*, 58 Wis. 50, 16 N. W. 42; *State v. Nye*, 32 Kan. 201, 204, 4 Pac. 134, 136; *State v. Richeson*, 45 Mo. 575; *State v. Evans*, 50 N. C. 250; and *State v. Downs*, 116 N. C. 1064, 21 S. E. 689. We, however, need not look outside of this jurisdiction for authority on this question, for such a doctrine was expressly held by us in the case of *State v. Wells*, 35 Utah, 400, 100 Pac. 681, 136 Am. St. Rep. 1059, 19 Ann. Cas. 631. That case involved a statute relating to the crime of abortion. The statute provided that every person who provides or administers to any pregnant woman any drug, etc., or uses or employs any instrument, etc., "with intent thereby to procure a miscarriage of such woman, unless the same is necessary to preserve her life, is punishable," etc. We there held that the state was not only required to allege the exception or negative, but that it also was required to prove it. We there, quoting from the case of *State v. Aiken*, 100 Iowa, 643, 80 N. W. 1073, said: "As a general rule when the offense is grounded on a negative, and when that negative is an essential element of the crime, the burden is on the state to prove it." No doubt all that is required of it in the first instance is to make out a prima facie case, but that it must do in order to make out its case. And quoting from *Moody v. State*, 17 Ohio St. 110, we also said: "The absence of such necessity is then so far descriptive of the crime that the offense cannot be established without proof that such necessity did not exist. It is the producing an abortion in the absence of such neces-

sity that, upon the theory of the statute, constitutes the offense."

So here I think it is clear that the want of a license is an essential element of the alleged crime and a descriptive part of it. The charged offense is a sale without a license. The defendant could not properly be convicted without a finding that he had no license. That fact constituted a part of the substantive cause of action. To support the judgment a finding in favor of the city on the alleged negative put in issue by the defendant's plea was an essential and must necessarily be implied in the general verdict. When such is the case, the prosecution is not only required to allege but also to prove the negative allegation. Of course a less amount of proof as to such an allegation than is usually required may avail, but the truth of it, as a part of the case of the prosecution must in some way be made *prima facie* to appear, or must otherwise be made to appear at the trial by evidence.

In 16 Cyc. 927, the doctrine is stated, and is supported by numerous cases of many of the states and of England that, whenever an affirmative case requires proof of a material negative allegation, the party, whether plaintiff or the defendant, has the burden of proving it, even as to facts within the knowledge or control of the other side. This is a rule of evidence well established and frequently applied both in criminal and civil cases. It was again but recently applied by this court in the case of *Wilkinson v. O. S. L. R. Co.*, 35 Utah, 110, 99 Pac. 466. There a statute (Comp. Laws 1907, § 447) required a locomotive before crossing a main track at grade of another railroad to come to a full stop at a distance not exceeding 400 feet, "provided that, whenever interlocking signal apparatus and derailing switches are adopted, such stop shall not be required," and made a violation of the provisions a misdemeanor and rendered the corporation operating the engine liable in damages to one injured through such neglect. This court held that the burden of proving the negative that there were no interlocking signal apparatus and derailing switches was upon the plaintiff, the party who had alleged and asserted that the locomotive was in violation of the statute operated over a main track at grade of another railroad without stopping.

I think the Wells Case and the Wilkinson Case on this point were correctly decided, for in the one the exception, and in the other the proviso, was a part of the enacting clause creating the offense, and was in part descriptive of it.

That the want of a license, under a statute or an ordinance as here, was a necessary and essential allegation of the complaint, and that the alleged criminal act was not complete without it, is conceded by all of the authorities. And, if the cases of this court

just referred to are observed, I think it follows that the burden of proving the want of a license was upon the city though the proof of such fact involved proof of a negative, and even though it were peculiarly within the knowledge of the defendant. It was here no more within his knowledge than was the fact of the averred negative within the knowledge of the defendant in the Wells Case.

But what is there here to justify the conclusion that the fact of the averred negative was peculiarly within the knowledge of the defendant and that the city had not the facility or means of proving it? In some of the cases there was some reason for such a conclusion. On this point the case of *The King v. Turner*, 5 M. & S. 206, is freely cited as a leading case by text-writers and courts. In that case there was a conviction upon a statute against a carrier for having game in his possession. As stated by Lord Ellenborough, there were 10 different heads of qualifications enumerated in the statute, among them a person having lands or entitled to an estate. Proof of any one of the qualifications enumerated under the different heads justified the accused's possession. The enumerated qualifications were in effect exceptions and not ingredients of the offense. Lord Ellenborough observed that, if the prosecution should be required to prove the negative of all of the qualifications under the 10 different heads, "there would be a moral impossibility of ever convicting upon such an information," Justice Bayley, "We cannot but see that it is next to impossible that the witness for the prosecution should be prepared to give any evidence of the defendant's want of qualification," and Justice Holroyd, "All these qualifications are peculiarly within the knowledge of the party himself, whereas the prosecution has probably no means whatever of proving a disqualification."

Here the defendant was complained against and prosecuted by Salt Lake City, the only person, the corporation, authorized to grant a license to sell liquors within the corporate limits of the city. Under the ordinance liquor licenses were granted for a term of only three months. Before any license was granted by it a written petition therefor and a bond were required to be filed with the city recorder and a copy of the petition and an affidavit with the license assessor. A record of such facts and of the granting of licenses were made and kept. It is by statute made the duty of the city recorder to keep "all papers and records of the city, and keep a record of the proceedings of the city council whose meetings it shall be his duty to attend." The fact of whether the plaintiff had or had not granted a license to the defendant to sell intoxicating liquors was therefore not peculiarly within the knowledge of the defendant, but

was equally within the knowledge of the plaintiff, its agents, and officers. It had not only ready and convenient means of ascertaining the want of a license if one was not issued to him, but it also had the facility and ready means of proving it. I see no good reason for here saying or holding that the fact was peculiarly within the knowledge of the accused, or that the city had not the means and facility of proving it.

True the defendant, if he had a license, could readily have produced it. So could he readily have testified that he sold no liquor to the persons named in the complaint, if such had been the fact. The fact of whether he had or had not sold intoxicating liquor to them was as much within his knowledge as was the fact of whether he had or had not a license. Among the fundamental principles of our criminal jurisprudence are those that the accused is presumed innocent until he is proven guilty; that the burden is upon the prosecution to prove not one or several, but all of the essential elements constituting the alleged offense; that burden does not shift, and at no stage of the proceedings is the defendant required to prove his innocence as to any of the essential alleged facts; and he may or he may not be a witness on his own behalf, and "his neglect or refusal to be a witness shall in no manner prejudice him nor be used against him on the trial or proceeding." These provisions are established and guaranteed by our Constitution and statutes, and are recognized by well-established rules of evidence. They, of course, may be changed by direct legislative enactments not inconsistent with the Constitution. But in the language of the court in the case of *Hepler v. State*, supra, "It certainly is not the duty of the court to break down established rules of evidence nor to bend them to the exigencies of a particular case. On the contrary, it is the recognized duty of courts to be the conservators of the law as it is in all its integrity."

When an exception or a negative is not an essential element of the offense, nor descriptive of it, and when it is matter in defense and as such is relied on, I see much reason for holding that the burden is on him who seeks a justification or an exemption under it. But when it is an essential element of the alleged offense, and where the alleged criminal act is not complete without it, and where the affirmative case of the prosecution requires proof of the material negative allegation, I do not see on what principle it may be said that the burden of proof as to such negative allegation is shifted to the accused, without doing violence to the fundamental principle that the defendant's plea of not guilty admits nothing and casts the burden of proof on the prosecution to "affirmatively establish, as the indictment must charge, every element in the offense,"

and every ingredient necessary to a conviction. And whatever reasons may have been given by courts for casting on the defendant in a criminal case the burden of disproving a material negative averment in the complaint or indictment because it involved proof of a fact peculiarly within his knowledge, and because of a want of means or facility on the part of the prosecution to prove the negative, are here not present; and, where the reasons fail, the rule itself falls.

I think the judgment should be reversed and the case remanded for a new trial.

STATE ex rel. MURDOCK v. RYAN et al.

(Supreme Court of Utah. June 24, 1912.)

1. QUO WARRANTO (§ 24*)—NATURE OF PROCEEDING—PARTIES ENTITLED TO SUE.

The proceeding in the nature of quo warranto, regulated by Comp. Laws 1907, § 3609 et seq., authorizing an action against one usurping a public office, or against a corporation to forfeit its privileges and franchises, and requiring the Attorney General, when directed by the Governor, to commence such action, and providing that when ~~on~~ complaint or otherwise he has good reason to believe that any case can be established, he shall commence an action, and that he may on leave of court bring the action on the relation of another, is to determine and vindicate rights of a public nature only, and in all cases the Attorney General must bring the action in the name of the state on his own relation, or on leave of court on the relation of another, except that one claiming to be entitled to a public office unlawfully exercised by another may bring an action in quo warranto in the name of the state.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 27; Dec. Dig. § 24.*]

2. QUO WARRANTO (§ 36*)—NATURE OF PROCEEDING—PARTIES ENTITLED TO SUE.

Where a statute authorizes an individual claiming a right to a public office to bring quo warranto, he alone may control the action.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 43; Dec. Dig. § 36.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 24*)—ACTION TO TEST VALIDITY OF SCHOOL DISTRICT—RIGHT OF CITIZEN OR TAXPAYER.

A citizen and resident taxpayer of an alleged high school district has no such interest in the validity of the organization of the district as to authorize him to sue in the name of the state to test the validity of the organization of the district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 42, 45, 47-49; Dec. Dig. § 24.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 24*)—CORPORATIONS—VALIDITY—RIGHT TO QUESTION.

A school district is created by law, and is an arm of the state, and the state alone may attack the validity of its organization.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 42, 45, 47-49; Dec. Dig. § 24.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 24*)—ORGANIZATION—VALIDITY—RIGHT TO QUESTION—REMEDIES.

A resident and taxpayer of an alleged high school district may, under Comp. Laws 1907,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† *State v. Elliott*, 12 Utah, 200, 44 P. 248.

§ 814 et seq., contest an election to determine the question of the organization of the district, but the remedy is not exclusive, but cumulative with the remedy by quo warranto.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 42, 45, 47-49; Dec. Dig. § 24.*]

6. QUO WARRANTO (§ 16*)—PARTIES ENTITLED TO ATTACK—ESTOPPEL.

The state, unless estopped for special reasons, may assail the organization of any public corporation by quo warranto, and others having the necessary interest in the subject of the action may in a proper manner also assail such organization.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 17; Dec. Dig. § 16.*]

7. QUO WARRANTO (§ 34*)—PARTIES ENTITLED TO SUE.

Where there is a union of public and private interest, an individual in whom the private interest is vested may file an information setting forth the facts, including the nature of his interest, and present it to the Attorney General, or state's attorney, who may bring such action to determine the rights of the individual, and, where the Attorney General or state's attorney refuses to sue, the individual may present the information to a court having jurisdiction to hear actions in quo warranto to require the Attorney General or state's attorney to show cause why he should not bring the action on the relation of the individual, and, on such application, the Attorney General or state's attorney may show good cause why the action should not be instituted, and the court, if satisfied with the reasons, may refuse the application, but otherwise it may order the bringing of the action on the relation of the individual, and on a hearing render judgment granting proper relief.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 41; Dec. Dig. § 34.*]

Appeal from District Court, Wasatch County; J. E. Booth, Judge.

Quo warranto by the State, on the relation of T. J. Murdock, against Orson Ryan and others to test the validity of a high school district. From a judgment for relator, defendants appeal. Reversed and remanded.

W. S. Willes, of Heber, and E. A. Walton, of Salt Lake City, for appellants. J. W. N. Whitecotton, of Provo, for respondent.

FRICK, C. J. The respondent asked, and obtained, leave from the district court of Wasatch county, Utah, to file an information and bring an action in the nature of quo warranto to test the validity of the organization of what is known as the "Wasatch High School District," in said Wasatch county, and also to test the right of the several appellants to act as the trustees of the said high school district. The information was filed on the 1st day of June, 1910, and the action or proceeding was commenced and prosecuted in the name of the state of Utah on the relation of respondent. Respondent in the information, in substance, alleged that at the time the information was filed he was a citizen, a resident, and taxpayer within Charleston school district No. 4, in Wasatch county, Utah; that on the 8th

day of February, 1908, a certain notice was posted in five public places within said Charleston school district, giving notice to the electors that an election would be held at a time and place therein specified for the "purpose of voting by ballot for or against the organization of a high school district to be composed of two or more of the following named contiguous school districts within the county of Wasatch." The notice also contained the names of the districts, and stated the hours at which the polls would open and close; that, in pursuance of said notice, a pretended election was held in said Charleston district on the 3d day of March, 1908, a return of which was made, and which showed that a majority of the qualified electors of said district had voted in favor of uniting with the other school districts named for the purpose of organizing a high school district; that the ballots voted at such election were in the following form:

"For High School

Yes
No

," that no other notice of election was ever given and no other election except as stated ever held; that like notices were posted in each of the other school districts in said Wasatch county, and that a pretended election was held in each one at which similar ballots were cast and returns of said elections were made showing that a majority of the qualified electors in each of said school districts had voted in favor of organizing a high school district in said Wasatch county as aforesaid; that said school districts out of which said high school district was intended to be formed are not contiguous territory, and that there is no such municipal corporation as "Wasatch High School District"; that each of the appellants named, except Orson Ryan, claims to be a member of the board of trustees of the said alleged Wasatch high school district, and that appellant Orson Ryan claims to be ex-officio president of said alleged board by reason of the fact that he is the county superintendent of schools in said Wasatch county; that each of said appellants holds said office without any right in law, and that they and each of them "do now usurp unlawfully upon the state of Utah, to the damage of the state of Utah, and against the peace and dignity thereof, and against the form of the statute thereof." It is also alleged in the information that the relator apprised the Attorney General of the state of Utah of the foregoing facts, "and requested him in his official capacity to institute these proceedings, but to do so the said Attorney General has refused, and still refuses, to the great detriment of the state of Utah, and therefore, and that the wrongs done to the state of Utah in manner and form above set forth may be corrected, this relator institutes these proceedings on behalf of the state." The prayer is as fol-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dows: "Wherefore, plaintiff demands judgment as to the validity of the organization of said Wasatch high school district, and as to the right of the defendants to exercise the office of trustees thereof."

The appellants assailed the right of the respondent to institute and prosecute the proceedings, and also assailed the jurisdiction of the court to permit him to do so, first, by a motion to rescind the leave granted by the court to file the information; second, by a general demurrer for want of facts; and, third, by special demurrer in which they assailed the power and jurisdiction of the court and the legal capacity and right of the respondent to prosecute the proceedings for and on behalf of the state. The motion and demurrers were overruled, and the appellants answered. In view of the conclusions reached by us, it is not deemed necessary to refer either to the defenses set forth in the answer or the findings of the court, except to state that findings were made in favor of the relator, and that judgment was entered in which it was adjudged and decreed "that Wasatch high school district has never been legally" organized, and has never had "and has not now any legal existence." It was further adjudged "that the exercise of the office of trustees of Wasatch high school district by the defendants is a usurpation upon the state of Utah, is wrongful and without any warrant of law," and that the relator recover his costs. We have been thus particular in stating the claims of the relator and the relief granted by the court to show that the rights involved and the relief granted were clearly and entirely of a public, and not of a private, nature.

Counsel for appellants contend that for the reasons just stated the court clearly erred in permitting the information to be filed by respondent as a private citizen and taxpayer, and further erred in not sustaining the special and general demurrers to the information, and in entering the judgment and decree as aforesaid.

[1] The proceeding in the nature of quo warranto is regulated by statute in this state. Comp. Laws 1907, § 3609, is as follows: "A civil action may be brought in the name of the state: (1) Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this state, or an office in a corporation created by the authority of the state; (2) against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office; (3) against an association of persons who act as a corporation within this state without being legally incorporated." Section 3610, in substance, provides that a like action may be brought against a corporation (1) when it has offended against any law under which

it was created; (2) when it has forfeited its privileges and franchises; (3) when it has committed or omitted an act amounting to a forfeiture of its franchises; (4) "when it has misused a franchise or privilege conferred upon it by law, or exercised a franchise or privilege not so conferred." Section 3611 is as follows: "The Attorney General, when directed by the Governor, shall commence any such action; and when, upon complaint or otherwise, he has good reason to believe that any case specified in the preceding section can be established by proof, he shall commence an action." Section 3612 is as follows: "Such officer may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under sub. 1, sec. 3609, he may require security for costs to be given as in other cases." Section 3613, among other things, provides that "a person claiming to be entitled to a public office unlawfully held and exercised by another may, by himself or by an attorney and counselor at law, bring an action therefor in the name of the state, as provided in this chapter." There are additional sections relating to what must be stated in the information, what courts have jurisdiction, the procedure and judgment, but none of these matters are material here. By a mere cursory examination of the foregoing provisions of our statute it will be seen that there is one, and only one, condition under which a private person may bring an action in the nature of quo warranto in the name of the state, and that is when he is "claiming to be entitled to a public office unlawfully held and exercised by another." In all other instances mentioned in the foregoing section the Attorney General must bring the action in the name of the state on his own relation, or, "on leave of court," may bring it "upon the relation of another person." It is not necessary for us to pause at this time to show the nature and history of an action or proceeding in the nature of quo warranto. It must suffice to say that such a proceeding always was, and still remains, a proceeding for the purpose of determining or vindicating rights of a public, and not those of a private, nature. It is true that there are instances where statutes like ours permit a private person to bring the action in the name of the state to determine his right to a public office. Even in such a case the state or public is interested, and, unless there be a statute expressly permitting the claimant of a public office to bring the action, it must be brought by some state official on the relation of the claimant of the office. To this effect is the great, we may say the overwhelming, weight of authority.

[2] Where, however, there is a statute authorizing the individual claiming the right

to a public office to bring the action, he alone may control the same. *State v. Elliott*, 13 Utah, 200-206, 44 Pac. 248. By what we have said we do not mean that a person claiming an office in a private corporation may not bring an action in the nature of quo warranto to determine his right thereto.

[3] By referring to the information or complaint filed by the respondent in this proceeding, it becomes apparent that he did not claim the right to any public office, nor, so far as the statements in the information are concerned, does it appear that he had any interest in the controversy except such as any other citizen and taxpayer has. Such an interest under the almost uniform holdings of the courts is entirely insufficient to sustain an action in the nature of quo warranto. The rule prevailing in most states is admirably stated in 32 Cyc. 1432, in the following words: "The right to file an information in the nature of a quo warranto belongs to the state, and the institution of the action is a matter within the discretion of the Attorney General; and the Attorney General or other authorized state officer must institute quo warranto proceedings for the redress of injuries to the public right. Statutes abrogating the common-law rule have not usually affected it so far as it concerns proceedings essentially public in purpose. *A refusal by the Attorney General to prosecute in such cases does not give a private person the right to proceed, nor can the state officer be compelled to bring quo warranto proceedings.* Under statutes which authorize the Attorney General or state's attorney to petition for a writ of quo warranto at the instance of private persons, if private rights are involved, the consent of the state officer is essential, and the writ cannot otherwise be issued for the redress of the private injury. Provision has been made by statute in several states for quo warranto proceedings to redress private injuries, whereby an applicant may obtain the writ upon showing an interest distinct from that of the public, such as a right in himself to an office. In such cases the consent of the state is not required, and it need not be alleged that the Attorney General has refused to act." (Italics ours.) The foregoing text, with the exception of the italicized portion, to which we shall refer later, is fully sustained by the following well-considered cases: *People v. Healy*, 230 Ill. 280-296, 82 N. E. 599, 15 L. R. A. (N. S.) 603; *Haupt v. Rogers*, 170 Mass. 71, 48 N. E. 1080; *Porter v. People*, 182 Ill. 516, 55 N. E. 849; *State v. Taylor*, 208 Mo. 442, 106 S. W. 1023, 13 Ann. Cas. 1058; *Toncray v. Budge*, 14 Idaho, 621, 95 Pac. 32-33; *State v. Olson*, 107 Minn. 186, 119 N. W. 799, 21 L. R. A. (N. S.) 685; *City of Chicago v. People*, 80 Ill. 496; *Miller v. Town of Palermo*, 12 Kan. 14; *State v. Tracy*, 48 Minn. 497, 51 N. W. 613; *Steelman*

v. Vickers, 51 N. J. Law, 180, 17 Atl. 153, 14 Am. St. Rep. 675; *Mills v. State*, 2 Wash. 566, 27 Pac. 560.

In *State v. Olson*, supra, the Supreme Court of Minnesota so well reflects the situation in this state, and so clearly states the reasons why private persons without special interests should not be permitted to interfere in matters such as are involved in this proceeding, that we take the liberty of adopting the following extract from the opinion in that case: "We have, then, squarely presented the question whether, where the Attorney General refuses to interfere, proceedings in the nature of quo warranto may be instituted in this court by a private citizen having no interest in the subject-matter of the controversy distinct from the general public to determine the legality of the proceedings had for the purpose of creating and organizing municipal subdivisions of the state. The question has been informally presented in other applications, and disposed of without a formal opinion. We deem it advisable at this time definitely to settle the question for guidance in the future. The question whether proceedings may be so instituted to determine the title of a person to a public office has often been before the court in one form or another, and in *Barnum v. Gilman*, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304, the right was denied. But in *State v. Dahl*, 69 Minn. 108, 71 N. W. 910, it was held discretionary with the court whether to grant the writ or not, where the office was filled by appointment, and not by election. But neither of those cases necessarily applies to one involving the legal existence of a municipal or quasi municipal corporation. Corporations of that character can be created only by the state, acting through the legislative department, and are brought into existence for public, and not private, purposes. They derive their franchise from the state, and are created for the better regulation and government of local affairs, and for the enforcement of laws enacted for the general welfare. Conceding for present purposes the right of a private citizen in special cases to institute proceedings to test the right of another to hold an office in such a corporation, and for which the applicant for the writ is not a claimant, when he goes further with his application, and seeks to attack the legal existence of the corporation and its right to exercise its public functions, a right derived wholly from the state, he encroaches upon a domain in which his interests are not distinct from those of the other citizens, and he should not be heard. In such a case the right to institute an inquiry into the legality of the acts of the corporation should be confined to the law officer of the state, the Attorney General." Numerous cases are there cited.

In *Miller v. Town of Palermo*, 12 Kan. supra, the rule is stated in the headnote

(which correctly reflects the decision written by Mr. Justice Brewer) as follows: "Private individuals who have no interest other than as citizens, residents, and taxpayers of a municipal corporation cannot maintain an action of quo warranto against such corporation." In that case the purpose of the proceeding was to "dissolve" the corporation because not legally organized and to oust the "pretended officers" of said corporation. Without quoting from the cases, we say, without hesitation, that all those that we have cited, as well as many others, will be found to fully sustain what is said in the foregoing quotation.

So far as is disclosed from the information filed by respondent, all his interest in this controversy consists in being a citizen of this state and a resident and taxpayer within Charleston school district, Wasatch county. It is not such an interest as will authorize him, under our statute, to bring an action of quo warranto to test the validity of a public corporation, although such corporation is but a school district with but limited and defined powers.

[4] Such a corporation is, nevertheless, one that is created by the laws of this state, and is an arm of the state through which the state government, to some extent at least, is benefited. What right has a private individual, without some special interest, to rush into the courts of the state, and ask to dissolve the governmental agencies of the state? Although the organization of such an agency may be very irregular, yet the state, whose agent it is, for very good and sufficient reasons, may not desire the agency to be dissolved. Moreover, conditions may have arisen subsequent to the organization, however imperfect that may have been, which estop even the state from asking a dissolution of such corporation. Shall a private citizen be permitted to do what even the state might not be allowed to do with regard to one of its own creatures? There is, there can be, but one answer to the foregoing question. In this case the court proceeded to hear and determine matters in which the state was vitally interested without even inviting it to come into court, and this, too, after the only officer whose right it is under the law to bring such an action had refused to do so. Counsel for the respondent, however, contends that where, as in this case, the Attorney General refuses to act, a private individual should be permitted to bring the action, and, unless this is done, there can be no remedy or relief for an injured individual. This does not at all follow.

[5] In the first place, it appears from the information that the ground upon which respondent bases his right to maintain this action is that the votes cast at the election at which the proposition of whether a high school district should be organized in Wasatch county or not were not legally cast.

If this be so—that is, if there were illegal votes cast for any reason—respondent had the right to institute an election contest under the provisions of Comp. Laws 1907, § 914 et seq., without asking leave from any one. True, such a proceeding would have to be commenced and prosecuted promptly, and could not have been commenced when this proceeding was instituted. It was, however, a remedy which the respondent could have invoked, and thus, instead of seeking to dissolve a public corporation, he could have prevented its organization, and would thus not have been required to intermeddle with or assail any rights because none would have then existed. Counsel for appellants insist that such a contest was respondent's only remedy. Although there are some authorities to that effect, we think that the best reasoned cases are to the contrary.

[6] It is certainly clear that the state, unless estopped for special reasons, can assail the organization of any public corporation in an action of quo warranto, and, if the state can, we can see no good reason why others in a proper manner cannot, provided such others have the necessary interest in the subject of the action. In the latter class of cases the courts hold that the remedies by contest and by quo warranto may be cumulative, and not exclusive.

[7] Where the courts differ and divide is upon the proposition we have italicized in the quotation taken from Cye., namely, whether the Attorney General, in whom is vested a discretion to bring all such actions, may be controlled by the courts. Some courts hold that, although there may be some special interest in a private citizen which would entitle him to invoke the aid of the Attorney General to bring an action on his relation, yet, if the Attorney General refuses to bring such an action, the courts cannot control him or compel him to do so. In our judgment the better reasoned cases are to the contrary. In cases holding to the contrary it is held that, if there is a union of public and private interests, the individual in whom the private interests are vested may prepare an information in which all the facts are set forth, including the precise nature of his interest, and he may present such an information to the Attorney General, or the state's attorney if there be one, who may bring such an action and demand that the Attorney General, or the state's attorney, bring an action to determine such individual's rights. If in case there is some private interest the Attorney General or state's attorney refuses to bring the action, the individual having such special interest may then present the information to the court having jurisdiction to hear actions in quo warranto and may make an application to that court to require the Attorney General, or state's attorney, to show cause why he should not bring an action upon the relation of the individual insisting as aforesaid. Upon such

an application the Attorney General may show that there are reasons or good cause why such an action should not then be instituted, and the court, if it should find the Attorney General's reasons well founded, may refuse the application. Or, if the court finds that the individual's interests can be segregated and the state's interests preserved without prejudice to either, the court may order the Attorney General to bring an action of quo warranto on the relation of such individual, and, upon a hearing, render such judgment, or grant such relief, as may be just and proper. To this effect are the following cases: *Lamontaux v. Attorney General*, 89 Mich. 146; 50 N. W. 812; *Cain v. Brown*, 111 Mich. 657; 70 N. W. 337; *In re Bank of Mt. Pleasant*, 5 Ohio, 250; *People v. Healy*, 280 Ill. 280, 82 N. E. 599, 15 L. R. A. (N. S.) 608. In the foregoing cases others are referred to which we need not cite here. In a later Ohio case entitled *Thompson v. Attorney General*, 48 Ohio St. 552, 31 N. E. 742, it is held that the discretion of the Attorney General cannot be controlled by the courts, but in that case the rights involved were entirely public. Where the rights are purely public, then many courts hold that a private citizen may not intervene to compel the Attorney General to act, since such a citizen has no right to interfere with the duties of the Attorney General.

The respondent, therefore, not only had a remedy by instituting an election contest, but in case he has a special interest he may also request the Attorney General to bring an action of quo warranto upon his relation; and, if the Attorney General refuses to do so, respondent may then invoke the aid of the court, and, if he can show that he has a special interest to protect, the court may order the Attorney General to bring the action upon his relation, and the court will then determine his rights, and give him such relief as he may be entitled to under the law. Our statute, however, does not permit, nor can the courts of this state allow, a citizen to interfere with the state agencies without showing that he has some special interest which requires protection. Counsel for respondent has referred us to the case of *State v. Small*, decided in 1908 by the St. Louis Court of Appeals and reported in 131 Mo. App. 479, 109 S. W. 1079. Counsel seems to rely upon that case. A mere cursory examination, however, shows that that case was prosecuted under the provisions of the Revised Statutes of Missouri, § 4457. The general rule, and the one we have attempted to follow, is laid down by the Supreme Court of Missouri in the case of *State v. Taylor*, 208 Mo. 442, 106 S. W. 1023, 13 Ann. Cas. 1058, to which we have already referred. The case of *State v. Small*, therefore, has no application here. Counsel also cites the cases of *Roeser v. Gartland*, 75 Mich. 143, 42 N. W. 687, and *State v. Alexander*, 129

Iowa, 538, 105 N. W. 1021. The case from Michigan was in fact prosecuted by the state's attorney, and hence the state was represented by its counsel, and the case from Iowa, like the Missouri case, was prosecuted under a statute expressly authorizing the prosecution. Code of Iowa, Annotated, 1897, § 4316. These are the only cases counsel has referred us to, none of which is in point. We have not been able to find a case where, in the absence of an express statute, any court has permitted a private person to bring and maintain a case under facts and circumstances like those disclosed in the information filed in this case.

For the reasons stated, we are clearly of the opinion that the court erred in overruling the demurrers, and in proceeding to hear and determine the case. The judgment is therefore reversed, and the cause remanded to the district court of Wasatch county, with directions to sustain the demurrers, and, in view that respondent cannot maintain this proceeding for the reasons herein stated, said court is directed to dismiss the proceedings at the cost of respondent. Appellants to recover costs on this appeal.

MCCARTY and STRAUP, JJ., concur.

ROHWER v. DISTRICT COURT OF FIRST JUDICIAL DIST. et al.

(Supreme Court of Utah. May 11, 1912.
Rehearing Denied June 20, 1912.)

1. INFANTS (§ 22*)—CAPACITY TO TAKE TITLE TO LAND.

The mere fact that a grantee in a deed is an infant does not prevent the title from passing.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 22, 23; Dec. Dig. § 22.*]

2. CERTIORARI (§ 64*)—PROCEEDINGS—REVIEW.

Where a district court has taken probate jurisdiction of an estate, the Supreme Court, on certiorari to determine whether it had jurisdiction therein, cannot inquire into the irregularity of the proceedings, or whether the court may have erred in matters of law, when the acts constituting the alleged irregularities were not in excess of jurisdiction.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. § 64.*]

3. BASTARDS (§ 1*)—WHO ARE ILLEGITIMATE.

Under the common law a child not conceived or born in lawful wedlock was denominated *filius nullius*—a bastard.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

4. BASTARDS (§ 11*)—LEGITIMATION—STATUTES.

Const. art. 3, effective January 4, 1896, forever prohibits polygamous or plural marriages. Comp. Laws 1907, § 1184, makes plural marriages void, and section 1185 provides that the issue of all such marriages, if contracted in good faith, are legitimate issue of both parents if born or conceived before it was discovered that the marriage was void. Section 2833 provides that an illegitimate child

*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r. Indexer

is the heir of his mother. Section 10 provides that the father of an illegitimate child, by publicly acknowledging it as his son, receiving it into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it, and such a child is deemed for all purposes legitimate from the time of its birth. Sections 2833 and 2834 relate to inheritances by and from illegitimate children. Section 2850 legitimates the issue of polygamous marriages heretofore contracted between members of the Church of Jesus Christ of Latter Day Saints, born on or before January 4, 1896, the date of the beginning of the state government, and entitles them to inherit from both parents and to all rights and privileges to the same extent and in the same manner as though born in lawful wedlock. *Held*, in view of the constitutional and statutory provisions as to plural marriages and legitimacy, that section 2850, was intended to apply only to the issue of Mormon or plural marriages, and not to children illegitimate at common law.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 13; Dec. Dig. § 11.*]

5. BASTARDS (§ 100*)—PROPERTY—INHERITANCE BY BASTARDS.

Under the common law an illegitimate child had no inheritable rights and could not inherit property.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 250, 256; Dec. Dig. § 100.*]

6. BASTARDS (§ 104*)—PROPERTY—TRANSMISSION BY.

Under the common law an illegitimate child had no inheritable blood and could not transmit property except to the heirs of his body.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 251, 257-262; Dec. Dig. § 104.*]

7. BASTARDS (§ 104*)—PROPERTY—TRANSMISSION BY BASTARDS—STATUTES.

Comp. Laws 1907, § 2850, which legitimizes the issue of polygamous marriages between members of the Church of Jesus Christ of Latter Day Saints, born on or before January 4, 1896, the date of the commencement of the state government, and entitles them to inherit from both parents and to all rights and privileges, to the same extent and in the same manner as though born in lawful wedlock, was intended to remove the stigma of bastardy, including the disability to transmit property, and thereunder the father of a child born of a plural marriage, who has publicly acknowledged the child and cared for him in his own family as his son, may inherit from such child.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 251, 257-262; Dec. Dig. § 104.*]

8. CERTIORARI (§ 5*)—EXISTENCE OF REMEDY ON APPEAL—DISCRETION.

Where an application for a writ of certiorari to the district court acting in a probate proceeding, in which its jurisdiction was denied, was presented at a time when an appeal might have been taken and was pending for a time within which the right to appeal lapsed, the existence of the right to appeal was not jurisdictional, and the court had a discretion in granting or refusing the right.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

Certiorari by Annie C. Rohwer to the District Court of the First Judicial District, Hon. W. W. Maughan, Judge, presiding, and others, to require defendant Judge to certify a transcript of the proceeding had in the estate of Joseph T. Anderson, deceased. Writ quashed, and proceeding dismissed.

B. H. Jones, of Brigham City, for plaintiff. J. D. Call, of Brigham City, for defendants.

FRICK, C. J. The plaintiff applied for a writ of certiorari to require the defendant, as judge of the district court of Box Elder county, Utah, to certify to this court a transcript of the proceedings had in the estate of one Joseph T. Anderson, deceased. A writ was duly issued requiring defendant to certify said proceedings, which has been done. From the application it is made to appear that the plaintiff is the mother of one Maggie Rohwer, who, on the 22d day of March, 1898, died intestate leaving surviving her said Joseph T. Anderson, a minor child, as her only heir at law; that an administrator was duly appointed of the estate of said Maggie Rohwer, deceased; that, to wit, on the 28th day of October, 1897, a patent was duly issued by the United States to said Maggie Rohwer wherein there was conveyed to her the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, section 28, township 11 N., range 4 W., S. L. M., Box Elder county, Utah; that thereafter, and before said estate had gone to final distribution, to wit, on the 12th day of August, 1906, said Joseph T. Anderson died intestate leaving surviving him neither mother, brother, nor sister; that notwithstanding the fact that said Joseph T. Anderson died before reaching the age of maturity and at his death was the only heir at law of said Maggie Rohwer, deceased, the defendant, as judge of the district court of Box Elder county, Utah, on the application of one Nephi P. Anderson, appointed him administrator of said estate, and is proceeding to administer and will distribute the same contrary to the provisions of Comp. Laws 1907, § 3953. The defendant has certified up all the proceedings in both of said estates. The proceedings are very voluminous, but we shall refer only to such facts as are material in this proceeding.

The material and undisputed facts, briefly stated, are as follows: Maggie Rohwer, the daughter of the plaintiff, and said Nephi P. Anderson, were both members of the Church of Jesus Christ of Latter Day Saints; that some time in the 80's said Anderson married said Maggie Rohwer as his plural wife; that said Joseph T. Anderson is the fruit of said marriage and was born on the 18th of October, 1895; that during the lifetime of said Maggie Rohwer, to wit, on the 28th day of October, 1897, she, through a patent from the United States, became seised of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, section 28, township 11 N., range 4 W., S. L. M., Box Elder county, Utah; that thereafter, on the 15th day of March, 1898, she, by warranty deed, duly conveyed said property to said Joseph T. Anderson as her only child, which deed was, on the 30th day of March, 1898, duly recorded on the records of Box Elder county;

that said Maggie Rohwer, on March 22, 1896, died intestate leaving her surviving said Joseph T. Anderson as her only child and heir at law; that pending the administration of her estate, to wit, on the 12th day of August, 1906, said Joseph T. Anderson died intestate leaving him surviving neither mother, brother, nor sister, but left him surviving said Nephi P. Anderson, his father, and who had married said Maggie Rohwer, the mother of said decedent, as his plural wife, as before stated; that the real estate aforesaid was, in the petition for the appointment of an administrator, alleged to belong to said Joseph T. Anderson, and was inventoried as belonging to said estate, and was by the district court of Box Elder county distributed to said Nephi P. Anderson as a part of the estate of the said decedent.

The only question to be determined by us in this proceeding is whether the district court of Box Elder county, sitting as a probate court, had jurisdiction to administer upon the estate of said Joseph T. Anderson, deceased. Plaintiff's counsel insists that by reason of the provisions contained in section 3953, supra, the district court exceeded its jurisdiction in attempting to administer upon the estate of Joseph T. Anderson, and that such attempt was in direct violation of the provisions of that section, which, so far as material here, are as follows: "If the decedent has left a surviving child, and the issue of other children, and any of them, before the close of the administration, have died while under age and not having been married, no administration, on such deceased child's estate is necessary, but all the estate to which such deceased child was entitled by inheritance must, without administration, be distributed to such child's heirs at law." It is insisted that the land hereinbefore referred to was a part of the estate of Maggie Rohwer, deceased; that the only heir at law she left surviving her was said Joseph T. Anderson, her only child; that he died pending the administration of her estate; therefore said estate should have been distributed to the heirs at law of said Joseph T. Anderson without administration as provided in the foregoing section. Further, that inasmuch as said Anderson died under the conditions we have stated above, his grandparents, of whom the plaintiff is one, were his only heirs at law, and hence entitled to his estate. In making the foregoing contention, it is assumed that the conveyance from Maggie Rohwer to said Anderson, as her only child, and to which we have referred, is of no legal effect. No reason is assigned why said conveyance should not be given its ordinary legal effect.

[1] The mere fact that the grantee in said deed was an infant—a mere child—certainly would not prevent the title from passing. If the title passed, and for the purposes of this proceeding we must assume that it did

pass, then the real estate described in said deed was the property of said Joseph T. Anderson at his death, and not the property of his mother, Maggie Rohwer, at the time she died. This being so, the provisions of the section we have quoted have no application, because the estate of said Anderson, although he was a minor, could legally be administered upon the same as any other estate. In view that the law governing the appointment of an administrator in the estate of said minor was complied with, the court acquired jurisdiction of said estate.

[2] The court having acquired jurisdiction of the estate, we cannot, in this proceeding, inquire into the regularity of the proceedings, or whether the court may have erred in matters of law when the acts constituting such assumed irregularities were not without or in excess of jurisdiction.

[3, 4] If we shall assume, however, that the title to the real estate in question did not pass to Joseph T. Anderson by the deed referred to herein, still the plaintiff must fail in this proceeding. It is not disputed that Maggie Rohwer was the plural wife of Nephi P. Anderson, nor that Joseph T. Anderson was born as the fruit of said marriage, nor that said Nephi P. Anderson is the father of said Joseph T. Anderson, deceased. What follows? Simply this: That although said Joseph T. Anderson was the fruit of a plural marriage, yet in view that he was born before the 4th day of January, 1896, he, in law, must be treated the same as a legitimate child born in lawful wedlock would have to be treated.

Comp. Laws 1907, § 2850, reads as follows: "The issue of bigamous and polygamous marriages, heretofore contracted between members of the Church of Jesus Christ of Latter Day Saints, born on or prior to the 4th day of January, A. D. 1896, are hereby legitimated; and such issue are entitled to inherit from both parents, and to have and enjoy all rights and privileges to the same extent and in the same manner as though born in lawful wedlock." (Italics ours.)

It is contended, however, that the foregoing statute relates to the subject of illegitimate children generally, and therefore must be construed and applied in connection with the provisions of other sections relating to the same subject. It is insisted that, if this be not done, the provisions of Comp. Laws 1907, §§ 2833 and 10, will be ignored. The former section, among other things, provides that an illegitimate child is heir of his mother, and the latter reads as follows: "The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thenceforth deemed for all purposes legitimate from the time of his birth." ; to

We are of the opinion that in adopting section 2850, supra, it was not intended to legislate upon, or to modify, or interfere with, the provisions or effect of any other section or sections relating to the subject of that class of illegitimate children which, under the common law, were denominated "bastards." Under that law, a child not conceived or born in lawful wedlock was denominated *filius nullius*; that is, nobody's son—a bastard. Schouler's Domestic Relations (4th. Ed.) § 276. Comp. Laws 1907, § 2850, we think, was intended to apply to children only which were the issue of so-called Mormon polygamous or plural marriages. There can be no reasonable doubt with regard to this, since the statute, in terms, speaks of the issue of plural marriages, and not of illegitimate children generally. Moreover, the statute applies only to such issue, as were born on or prior to the 4th day of January, 1896, the day on which the territorial government of Utah was merged into a state government. In our judgment, the language of the statute, entirely independent of the conditions then prevailing, which were then and are now known to all Utah residents—and which need not be detailed here—leaves no room for doubt that the provisions of section 2850 were intended to apply to a particular class of children only, which is clearly pointed out in the section itself. To now construe the provisions of that section so as to make them applicable to the illegitimate children who under the common law were termed bastards, or to those that are referred to in sections 10, 2833, and 2834, requires not only that a forced construction be given to the language used in section 2850, but it also requires that certain terms of the latter section be given no meaning or effect whatever.

But there are still other sections of our statute which shed some light upon what the Legislature intended to accomplish by adopting section 2850. There is also a constitutional provision which must not be overlooked that became effective January 4, 1896. Article 3 of the Constitution of this state forever prohibits polygamous or plural marriages. This requirement was a condition imposed by the enabling act, and proper statutes through which the constitutional provision is made effective have been duly adopted and have been in force ever since statehood. Although Congress had passed laws whereby polygamous and plural marriages were prohibited, yet, at the time the territorial government was merged into a state government, there were a large number of children who were born as the fruit of the plural marriages that were entered into during territorial days, whose status and rights it was proper to fix and protect by state laws. All plural marriages were necessarily void in law, and hence the children born as the fruit of that relation were, in the eyes of the law, illegitimate. Comp. Laws 1907,

§ 1184, also makes such marriages void. It is there provided that all marriages are void "when there is a husband or wife living from whom the person marrying has not been divorced." The section following (1185), however, provides that the issue of all marriages that are made void by the preceding section, if contracted in good faith, are the legitimate issue of both parents if born or begotten before it was discovered that the marriage was void. This ostensibly does not refer to Mormon plural marriages. Section 2833, among other things, provides: "The issue of all marriages null in law * * * are legitimate." This identical provision was also a part of the territorial laws, and was in force until modified by Congress in what are commonly called the "Edmunds" and "Edmunds-Tucker" laws. It may be asked, however—and the question is pertinent—in what way do any or all of the foregoing provisions, except those found in section 2850, make the children of void marriages legitimate so as to escape the consequences of that condition? The answer is obvious. Neither one nor all of those provisions have, or were intended to have, such effect, and a child which is the issue of a so-called plural or Mormon marriage is no doubt an illegitimate child, and, if it were not for the provisions of section 2850, would have to suffer all the legal, if not all the social, consequences of that status. The only object in view in referring to the foregoing provisions was to show that, so far as illegitimate children generally were concerned, the law covered the subject when section 2850 was passed in 1896. In view of that, it was not necessary to adopt the latter section unless it was intended to confer upon the issue mentioned therein larger rights than those conferred upon illegitimate children generally. Neither in the eyes of the law nor in the eyes of society were the children mentioned in section 2850 born as the result of mere lust or meretricious relations, although the relation of their parents was prohibited by law. The social standing of such children was practically the same as that of other children born in lawful wedlock, at least when born of parents embracing the same creed or faith. Moreover, such a child was not *filius nullius*; but his parentage was and is quite as well known as was and is the parentage of legitimate children. Such a child bore his father's name, and he regarded the child of his father, if such child was one by a different mother, whether of a legal or a plural wife, as his half-brother. Besides, every Latter Day Saint, or so-called "Mormon," who believed in plural marriages, regarded that relation as sacred and as binding as we who believe in monogamy hold that relation sacred and binding. Moreover, history attests that, in many of the countries where the law concerning bastardy was rigorously applied, even in those countries there was a distinction between the child that

was the fruit of a sexual relation that had some social recognition, although illegal; and a child which was the result of a purely meretricious relation. Again, Congress, in passing the Edmunds (Act March 22, 1882, c. 47, 22 Stat. 30 [U. S. Comp. St. 1901, p. 3633]) and Edmunds-Tucker laws (Act March 3, 1887, c. 397, 24 Stat. 635 [U. S. Comp. St. 1901, p. 3635]), in which polygamous and plural marriages were prohibited and those who entered into that relation were required to be severely dealt with, also recognized the justness of not treating the children of such marriages as bastards, but as beings who were entitled to some legal recognition provided they were born in that relation prior to a certain day fixed in the act. It is for that reason that in those very acts children of polygamous marriages were legitimated. In view of the foregoing circumstances and conditions, the Legislature had ample grounds upon which to base a law which in some respects should make a distinction between a child that was the fruit of a plural marriage and one that was merely the offspring of a meretricious relation or of sexual intercourse the fruit of which at common law was denominated a bastard because he was *filius nullius*.

[8-7] The question for us to solve therefore is: What was the intention of the Legislature in adopting section 2850? It is seriously contended that all the Legislature intended to and did accomplish was to permit the children who were born before January 4, 1896, as the issue of plural marriages, to inherit from both parents. That is, while such children were legitimated, they, nevertheless, were not legitimated for all purposes, but such legitimation was limited to the right of inheriting from both parents; a right not existing at common law. But that is not what the statute says. The language there used is that such children are "hereby legitimated; and such issue are entitled to inherit from both parents, *and to have and enjoy all rights and privileges to the same extent and in the same manner as though born in lawful wedlock.*" If the construction contended for be applied, namely, that no further rights than to inherit from both parents were conferred, then the words given in italics are practically meaningless. The suggestion that they are intended to confer either family or social rights or privileges is entirely untenable, because such rights or privileges are already covered by the term "legitimate." Moreover, in view of what has already been said, and which was well known to the Legislature, such children were not in need of having their social or family rights protected; but they were sorely in need of being given the legal rights which were enjoyed by their half-brothers and half-sisters. These latter rights and privileges, therefore, were intended to be and were given by the section in question. And, so as to leave no lingering doubt in the mind

of any one what the rights and privileges were, the Legislature defined them by making them the same as those that are enjoyed by those who were born in lawful wedlock. Language could not have been selected which was better calculated to define what rights and privileges were given. The legal rights and privileges given were to be the exact equivalent of those enjoyed by all legitimate children.

What were those rights in contradistinction from those that, under the common law, are withheld from illegitimate children? Briefly stated, they are these: The right to inherit and the right or privilege to transmit property by descent or succession. Speaking upon this subject, Mr. Schouler says: "The most important disability of an illegitimate child at the common law is that he has no inheritable blood; that he is incapable of becoming heir either to his putative father or to his mother, or to any one else; that he can have no heirs but those of his own body." Schouler's Dom. Relations (4th Ed.) § 277.

In other words, under the inexorable logic of the common law, such a child could neither inherit nor transmit property except to the heirs of his body "because he is the son of nobody." This was the bar sinister that the common law placed upon every illegitimate child. Can any one reasonably contend that all that was intended by section 2850 was to remove this bar only so far as to permit the issue named in that section to inherit, but still leave the stigma upon them so that they are incapable of transmitting property except to the heirs of their own body, or to their mother as provided in section 2834? To so construe the language of section 2850, to our minds intensifies the rigorous and unjust doctrine of the common law instead of modifying it. Why leave the stigma of bastard upon the issue named in section 2850? If it be true that they had overcome every social inequality placed upon them as a consequence of their birth, why should the legal stigma be retained? It is intimated, however, that by the construction we have given to section 2850 the father of the illegitimate child is made the beneficiary of a relation he entered into in direct violation of the law, and thus he is permitted to profit by his own wrong. Such is merely a superficial view. In fact, it is not the father who is punished by refusing to give full force and effect to the provisions of the foregoing section, but it is the child who suffers, because to him still clings the stigma of being incapable of transmitting property because of his birth. What satisfaction can the community derive from the fact that the father cannot inherit, because his child is a bastard, and therefore cannot transmit property to him? Does such a result stigmatize the father or the child? We have no hesitancy in saying that the whole stigma of being a bastard still rests upon the child, and the

father escapes, as he always escaped under the common law, upon the theory that the child is "nobody's son." If the father is to be punished, and there is no reason why he should not be, make the law such that it will in fact punish him without being a lasting stigma resting upon the innocent child. The father is responsible for the child's condition, and his punishment should take some form other than that of preventing his child from enjoying all the fruits of legitimacy. If the child cannot transmit property, it is not a legitimate child, but still remains a bastard. It was this stigma that was sought to be removed by section 2850, and, if it has not accomplished its purpose, it is not because appropriate language was not used in that section. The question of what rights should be conferred upon the children mentioned in section 2850 was for the Legislature to determine as a matter of state policy, and, when that branch of the state government has by law fixed the legal status of the issue mentioned in that section, the courts have no alternative save to declare and enforce the law.

But reference is made to the following cases, which, it is claimed, hold to a different view, namely: *McCully v. Warrick*, 61 N. J. Eq. 606, 46 Atl. 949; *Keeler v. Dawson*, 73 Mich. 602, 41 N. W. 700; *Doe v. Bates*, 6 Blackf. (Ind.) 533; *McCormick v. Cantrell*, 15 Tenn. 615; *Bent v. St. Vrain*, 30 Mo. 268; *Miller v. Stewart*, 8 Gill (Md.) 128; *Croan v. Phelps*, 94 Ky. 213, 21 S. W. 874, 23 L. R. A. 753; *Lessee, etc., v. Lake*, 8 Ohio, 290; and *Blair v. Adams* (C. C.) 59 Fed. 243. In all of those cases the courts did no more than pass upon the rules of succession that were applicable to bastards under the common law. In most of the cases the common law is either enforced, or statutes in derogation thereof are strictly construed and applied. But such is not the rule of construction required in this state. Comp. Laws 1907, § 2489, expressly requires a liberal construction to be given to all statutes so as to effect their purposes. The only case which seems in point is the one cited from the Supreme Court of Tennessee. In that case the court passed on a private act in which it was provided that the illegitimate child referred to in the act "shall in all respects, both in law and equity, be upon an equal footing with the other children" of the parents. This, it was held, "is too general to create in an illegitimate child an inheritable quality," or to enable the parent or his legitimate children to inherit the estate of an illegitimate child. In that case, and in all others that are cited, the courts dealt only with what under the common law were termed bastards, and they so denominated them in the opinions. There were no such conditions to be met as was the case in this state, and it is very clear, both from the decisions and the language of the statutes passed on in those decisions, that it was not intended to pass

upon any such or similar conditions. While we do not mean to intimate that the law as declared by those decisions is not good law when applied to the conditions there disclosed, yet, in our judgment, we would be far from administering the law of this state as it is written if we held, in the case at bar, that in adopting section 2850 it was not intended to confer all the rights and privileges enjoyed by legitimate children upon those mentioned in that section, including the right of transmitting property. Neither the language nor spirit of that section authorizes the conclusion that any part of the stigma which by the common law is cast upon bastards shall continue to be visited upon those who are provided for therein.

The record in this case also discloses that said Joseph T. Anderson was publicly acknowledged by Nephi Anderson as his own child, was received into and cared for in Mr. Anderson's family, and treated as his own. In view of this, we think that under the provisions of section 10, which we have hereinbefore set forth in full, said Joseph T. Anderson must be "deemed for all purposes legitimate from the time of his birth." The language there used is that such a child is legitimated for *all*, and not only for *some*, purposes. "All purposes" mean that the child may transmit property as well as inherit it. Courts have no right to place limitations on plain and unambiguous language, unless under peculiar circumstances limitations are required for the purpose of preserving or making effective other provisions upon the same subject.

[8] It is, however, suggested—not by any of the defendants, but by a member of this court—that the writ should be quashed upon the ground that an appeal lies from the order of the court which we have reviewed herein, and that the plaintiff therefore had a plain, speedy, and adequate remedy. The application for a writ has been pending in this court for many months, and, even though it were conceded that when the application in this case (in which the jurisdiction of the district court is denied) was presented the right to an appeal existed, the time has now fully elapsed within which an appeal is permitted, and hence no appeal is now permissible. If there was any error committed by this court, it was in permitting the application to be filed, and in issuing the alternative writ—for which the writer hereof assumes his full share of responsibility. If we desire to insist upon the strict rule that we will not hear applications of this kind where an appeal was possible, we, in all fairness to the plaintiff, should have made such an order when the application was presented. As we view it, the question, in view of the whole record, is not jurisdictional. This court, in common with all courts having the power to issue writs of certiorari, may exercise a reasonable discretion in granting or refusing a writ. The majority of this court

is of the opinion that in this case the discretion aforesaid was properly exercised. We are of the opinion, therefore, that for the reasons herein stated the district court had full power and jurisdiction to make and enter the judgment or decree of distribution which is assailed in this application.

The writ heretofore issued, therefore, should be quashed, which is accordingly done, and the application is dismissed, at plaintiff's costs.

MCCARTY, J., concurs.

STRAUP, J. I concur in the result dismissing the proceeding for the reason that it is not made to appear that the district court acted beyond or in excess of jurisdiction, or did not regularly pursue its authority; and for the further reason that there was a plain, speedy, and adequate remedy by appeal. Our statute provides that the writ of certiorari may be granted "when the inferior tribunal, etc., exercising judicial functions has exceeded the jurisdiction of such tribunal, etc., and there is no appeal, nor, in the judgment of the court or judge, any plain, speedy, or adequate remedy." It further provides that "the review upon this writ cannot be extended further than to determine whether the inferior tribunal, etc., has regularly pursued the authority of such tribunal, etc."

Stripped of unnecessary complications, the case is this: Joseph T. Anderson, issue of a polygamous or plural marriage, died intestate without issue. He owned real estate which he had obtained by deed from his mother. The real estate was her separate property. She died before his decease. An administrator was appointed to administer his estate. His only alleged heirs are Annie C. Rohwer, the plaintiff, who is his grandmother, his mother's mother, and Nephi P. Anderson, his father. Both claim the property as the sole surviving heir of Joseph T. Anderson, deceased. Such proceedings, in the course of the administration of the estate, were had whereby the court distributed the property to Nephi P. Anderson. Motions for a new trial and to vacate the order, and to dismiss the proceedings for want of jurisdiction, and applications for the appointment of another and different administrator, were made and denied. Then this application was here made for a writ of certiorari. In the petition for the writ it is alleged that the distribution was made without notice; that the plaintiff was deprived of her right to be heard; that there was no trial or hearing; that the decree of distribution was not supported by findings or pleadings; that the court acted without jurisdiction and due process of law; and that there was no appeal nor plain, speedy, and adequate remedy at law.

The record, as certified to us, shows the filing of a proper petition for distribution,

a judgment or order of final distribution in which are recited all jurisdictional facts with respect to notice, trial, and a hearing, and which contains, among others, a finding that Nephi P. Anderson was the sole surviving heir of the deceased, and which adjudicates and distributes the property accordingly. There is nothing aliunde made to appear disputing these recitals of jurisdictional facts as to notice, hearing, and a trial. I therefore think the allegations of the petition that the distribution was made without notice and a hearing are not sustained by the record, or by proof dehors the record, and hence concur with my Associates that nothing is made to appear wherein the district court exceeded jurisdiction or had not regularly pursued its authority.

The principal things argued by plaintiff involve questions of whether the deceased left an estate, and whether Annie C. Rohwer or Nephi P. Anderson was entitled to it, and it is chiefly the determination of the latter that is sought by this proceeding. I think the court had undoubted jurisdiction to hear and determine such questions and to make a distribution accordingly. Moreover, our statute expressly provides for an appeal from all final orders and judgments of distribution. I cannot see wherein the remedy by appeal is not plain, speedy, and adequate to correct whatever error may be or has been committed by the court in such particulars. The statute prescribes within what time an appeal may be taken, and to have proceedings reviewed on appeal the appeal must be taken within that time. Whether the plaintiff now has, or had, the right of an appeal when she applied for this writ, is not the question. The pertinent question is: Did she have the right of an appeal on merits from the final order or judgment of distribution, and on such a proceeding to have corrected whatever erroneous rulings may have been committed by the district court? Having such right, she cannot be permitted to resort to certiorari and to have the functions of that writ converted into a writ of mere review because she, by her own neglect or inattention, may have forfeited or abandoned her right to appeal, or voluntarily may have failed to exercise it by pursuing an unavailing and inappropriate remedy. Our right to review a proceeding on certiorari is conferred when it is made to appear that the inferior tribunal exceeded jurisdiction and there is no appeal nor any plain, speedy, and adequate remedy, and the statute forbids a review on such a writ to be extended further than to determine whether the inferior tribunal regularly pursued its authority. The plaintiff in her petition alleged that the district court had exceeded jurisdiction, and that there was no appeal nor any plain, speedy, or adequate remedy at law. When the certified record of the court below is examined, it is found that these allegations have no support ei-

ther in law or fact. I therefore think the only proper disposition of the case is a dismissal of the proceedings. When my Associates reached the conclusion, with which I concur, that it is not made to appear that the district court exceeded jurisdiction or had not regularly pursued its authority, the functions of this writ were spent. To proceed further, as have my Associates, to a review of a ruling involving a matter confessedly and undoubtedly within the jurisdiction of the lower court and to a determination of whether the court correctly or erroneously distributed the property to Nephi P. Anderson or to Annie C. Rohwer, further than to inquire and determine whether the district court in such particular regularly pursued its authority, is, it seems to me, to convert this writ into one to review mere error, to offend against the statute forbidding the writ to be so extended, and to violate the familiar rule that what is not juridically presented cannot be judicially decided. And in this respect it is wholly immaterial whether the deceased left an estate acquired by him by deed from his mother, or whether such estate was acquired by him under the law of succession and by inheritance from his mother. In either event the deceased died leaving an estate consisting of the real estate, and the question of whether Nephi P. Anderson or the plaintiff, Annie C. Rohwer, is entitled to it is the same.

Moreover, the correctness of the conclusion reached by my Associates on the merits that Nephi P. Anderson, and not the plaintiff, is entitled to the property, may well be doubted. But, as such matter is not judicially presented and not properly before us in this proceeding, I express no opinion on it, and refer to it only to show the importance of the question and that the determination of it should be withheld until it is judicially presented. The deceased was issue of a polygamous or plural marriage. It is not now the question whether such marriage, and like marriages in this state, was entered into in good faith, or as to whether the parties to such marriages regarded the issue thereof as did those of monogamous marriages. Let that be conceded. Nevertheless, such marriages, under the law, were unlawful, and the issue thereof illegitimate. That is conceded. At common law an illegitimate child had no inheritable blood and was incapable of inheriting from his father or mother, and was also incapable of transmitting an inheritance to either. He could transmit property to the heirs of his body only. The common law is in force in this state except as modified by statute. In many of the states the rule at common law respecting inheritance and transmission of estates by illegitimate children has been changed by statute. It has been changed by our statute. Under statutes to remove such disabilities at common law, it has generally been held by the courts that the extent of

the statutory change from the rules of the common law must be clearly defined. *McCully v. Warrick*, 81 N. J. Eq. 606, 46 Atl. 949. And it has been held by all the courts that it belongs to the Legislature, and not the courts, "to define and establish the transmission of estates." *Keeler v. Dawson*, 73 Mich. 600, 41 N. W. 700. It has also been quite generally held that statutes which legitimated an illegitimate child or children and gave them the right and capacity to inherit from the mother or father or both, as though born in lawful wedlock, did not, however, give the mother or father the right to inherit from such child or children. *Doe v. Bates* (Ind.) 6 Blackf. 533; *McCormick v. Cantrell*, 15 Tenn. 615; *Bent v. St. Vrain*, 30 Mo. 268; *Miller v. Stewart*, 8 Gill (Md.) 128; *Croan, etc., v. Phelps' Adm'r*, 94 Ky. 213, 21 S. W. 874, 23 L. R. A. 753; *Lessee of Little v. Lake*, 8 Ohio, 290; *Blair v. Adams*, 59 Fed. 243. Statutes removing common-law disabilities of illegitimate children are for their benefit and not their parents. *Butler v. Elyton Land Co.*, 84 Ala. 390, 4 South. 675. And the cases above cited show that, in order that the parents or either of them may have the right to inherit from such a child or children, the statute must grant that right by apt and appropriate words and language which fairly conveys such an intention.

Now, looking at our statute to ascertain to what extent the common-law disabilities of illegitimate children have been removed, and as to their capacity to inherit and transmit an inheritance, and the right of the parents to inherit from them, we find that by Comp. Laws 1907, § 2833, it is provided that illegitimate children have the right and capacity to inherit from the father who had acknowledged himself to be the father, and in all cases from the mother in the same manner as if they had been born in lawful wedlock. Then the next section prescribes and defines the capacity of an illegitimate child to transmit an inheritance and expressly provides who may inherit from or through it. It reads: "If an illegitimate child dies intestate, without lawful issue, his estate goes to his mother, or in case of her death to her heirs at law." Under these statutes, which is a part of the Code prescribing and defining the law of succession and of transmitting property of decedents, the mother and her heirs, but not the father, have the right to inherit from such a child or children. That is very plain. And thereunder the plaintiff, the deceased's grandmother, his mother's mother, and not the father, is here entitled to the property, unless some other statute can be pointed to which modifies or abrogates these provisions and gives the father the right to inherit. The only statute so pointed to is a subsequent and special statute which legitimated the issue of certain polygamous or bigamous marriages born on or prior to the 4th day of January, 1896; and which provides that "such issue are entitled to inherit from

both parents, and to have and enjoy all rights and privileges to the same extent and in the same manner, as though born in lawful wedlock." Of course, the Legislature regarded such issue illegitimate, and as having no more or greater capacity to inherit or to transmit an inheritance than an illegitimate child at common law, and that no one except the heirs of his body had the right to inherit from such child, except as modified and provided by statute. It belonged to the Legislature to define and establish the transmission of estates and to prescribe who may inherit. The statute here must be looked at dispassionately and the will of the Legislature ascertained from the language employed by it. Undoubtedly the statute was passed for the benefit of such issue, not for their parents. Such issue by this statute were legitimated. That is clear. But under the authorities, to confer on another the right to inherit from such issue, that is not enough. The Legislature evidently thought that was not enough to even give such issue the right to inherit, and hence expressly provided that "such issue are entitled to inherit from both parents," but restricted the right to inherit from the parents only, and is silent as to any right of the parents or either of them to themselves inherit from such issue. Can this statute be construed to mean that such issue have the right to inherit as issue born in lawful wedlock, when the Legislature by express terms restricted the right to inherit from the parents only, and that the father is granted the right to inherit from such issue when the statute is silent as to the right of any one to inherit from such issue except as may be implied from the language that "such issue," not the parents, are entitled "to have and enjoy all rights and privileges to the same extent and in the same manner as though born in lawful wedlock"? That is the question. Courts generally holding that statutes which legitimated an illegitimate child or children and gave them the full right to inherit as children born in lawful wedlock, nevertheless did not give the parents a right to inherit from such child or children, in the absence of apt and appropriate language granting such right, can it fairly be said that this statute grants the father such a right, and thereby and in such particular modified the general laws of succession heretofore referred to? I confess the matter is not free of doubt; but I am clearly of the opinion that the determination of it ought to be reserved until it is properly and judicially before us.

HARDY et al. v. BEAVER CITY et al.
(Supreme Court of Utah. May 10, 1912.)

1. INTOXICATING LIQUORS (§ 37*)—ELECTIONS—CONTESTS—STATUTORY RIGHTS.

An election in a city to determine whether the sale of intoxicating liquors shall be au-

thorized or denied therein is an election, within Comp. Laws 1907, § 914, authorizing the contesting of the election on any proposition submitted to the vote of the people, the official ballot at the election being "For Sale" and "Against Sale," with a circle after each phrase to enable the voters to indicate their preference by placing a mark in either circle.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2336-2339.]

2. ELECTIONS (§ 218*)—NUMBERING BALLOTS—SECRECY OF BALLOTS.

The numbering of the ballots by election officers acting under the honest belief that the same is proper, and without any intention of destroying the secrecy of the ballot, or ascertaining how any elector voted, and without intimidating or influencing any voter, or preventing any one from voting, does not vitiate the election, because violating the secrecy of the ballot guaranteed by Const. art. 4, § 8, providing that all elections shall be by secret ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 188; Dec. Dig. § 218.*]

3. ELECTIONS (§ 28*)—SECRECY OF BALLOT—CONSTITUTIONAL GUARANTY.

The secrecy of the ballot guaranteed by Const. art. 4, § 8, declaring that all elections shall be by secret ballot, is intended to protect the voters from being unduly influenced or interfered with in the exercise of the franchise; but the guaranty is not intended to defeat the election by taking advantage of irregularities.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 18; Dec. Dig. § 28.*]

4. ELECTIONS (§ 228*)—INVALIDITY—FRAUD—INTIMIDATION.

Where an election is conducted in violation of a constitutional or statutory provision, or where, through an act prohibited by law on the part of the voters, or some of them, the result of an election is affected, or where fraud, intimidation, or other illegal methods are practiced, the election cannot stand.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 198; Dec. Dig. § 228.*]

5. ELECTIONS (§ 28*)—SECRECY OF BALLOT—CONSTITUTIONAL GUARANTY—CONSTRUCTION.

The secrecy of the ballot guaranteed by Const. art. 4, § 8, providing that all elections shall be by secret ballot, does not require perfect secrecy in case printed ballots are used; but only approximate secrecy is required.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 18; Dec. Dig. § 28.*]

6. ELECTIONS (§ 227*)—VALIDITY—SECRET BALLOTS.

Though ballots which were not secret were used and voted at an election, but the result was unaffected thereby, the ballots could not be adjudged void; for electors cannot be disfranchised by an act of election officers or others, unless such act violates a constitutional or statutory provision, or amounts to intimidation or fraud.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 197-200; Dec. Dig. § 227.*]

7. ELECTIONS (§ 194*)—MARKED BALLOTS—STATUTORY PROVISIONS.

The numbering of the ballots by election officers under the honest belief that the same is proper is not placing a distinguishing mark on the ballots, within Comp. Laws 1907, § 848, defining the circumstances under which ballots must be counted or rejected, providing that no ballot shall be rejected for any error in stamp-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Ritchie v. Richards, 14 Utah, 245, 47 Pac. 670.

ing or writing the indorsements thereon by the election officers.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

Appeal from District Court, Beaver County; Joshua Greenwood, Judge.

Action by J. W. Hardy and another against Beaver City and others to contest an election in the city. From a judgment adjudging the election valid, plaintiffs appeal. Affirmed.

E. A. Walton and M. E. Wilson, both of Salt Lake City, and O. A. Murdock, of Beaver, for appellants. William F. Knox, of Beaver, for appellees.

FRICK, C. J. Appellants instituted this proceeding for the purpose of contesting and annulling the result of an election held in Beaver city, Utah. Said election was held pursuant to chapter 106, Laws Utah, 1911, and the question submitted was whether the sale of intoxicating liquors as a beverage should be permitted within said city or not. Upon a hearing the district court entered judgment declaring the election valid, from which judgment this appeal is prosecuted.

[1] Before proceeding to a consideration of the questions presented by the record, it becomes necessary to dispose of a preliminary question raised by counsel for respondents. He contends that the provisions of Comp. Laws 1907, § 914, do not authorize a contest of the election in question; but, if such an election can be assailed, it must be done in some proceeding other than that contemplated by that section. We cannot assent to counsel's contention. Section 914, so far as material here, provides: "The election of any person to any public office, the location or relocation of a county seat, or *any proposition submitted to the vote of the people may be contested.*" (Italics ours.) The grounds for contest are then set forth; and the grounds stated in the complaint filed in this case are within these enumerated in said section.

The question submitted to the electors of Beaver city was whether the sale of intoxicating liquors as a beverage should be authorized or denied within the limits of said city. The form of the question on the official ballot was, "For Sale O" and "Against Sale O," and the voter indicated his preference by placing a voting mark, either in the circle placed after the words "For Sale," or in the one placed after the words "Against Sale." The election therefore was held to pass upon a "proposition submitted to the vote of the people," and thus comes within the purview of section 914, supra. The contention of counsel therefore cannot prevail.

Proceeding now to a consideration of the merits, we find that the controlling facts disclosed by the record, in substance, are: That on the 27th day of June, 1911, appellants were resident taxpayers of Beaver city, and on that day were engaged in the business of

selling intoxicating liquors to be used as a beverage. That on that day an election was duly held in said city pursuant to the provisions of chapter 106, Laws Utah, 1911, to determine whether intoxicating liquors should be sold within said city as a beverage. That said city was divided into three voting districts, numbered 1, 2, and 3, respectively, and official ballots were prepared by the city officials to be voted in each of said districts at said election, which in substance and form were as required by law, except in this: That on the back thereof were printed the letters "No. ———." That the printer who was employed to print said ballots placed said letters on the back thereof without any direction from any one, supposing it was necessary that some one should number the ballots consecutively, and that by placing the proper figures after the letters aforesaid each ballot would receive its proper number. That the ballots were delivered to the election officials in that form and condition, and in districts No. 1 and No. 2 the officers assumed that the ballots should be numbered as indicated; and in said district No. 1 all the ballots were numbered, while in district No. 2 only a portion thereof were numbered, when it was discovered that the ballots should not be numbered; and in district No. 3 none of the ballots were numbered. That in district No. 1 there were 112 votes cast for sale and 146 against sale, all of which ballots were numbered, as aforesaid. In district No. 2, there were 51 ballots cast for sale and 113 against sale, 112 of which were numbered, and 52 thereof were not numbered. In district No. 3, 152 ballots were cast, 81 of which were for and 71 against sale, none of which were numbered. The total number of votes cast in the city was 574, 339 of which were against sale, while 244 were for sale. There were thus a majority of 86 votes against sale upon the face of the returns. It thus appears that out of the whole number of ballots cast there were 370 that were numbered and 204 that were not numbered. Out of the 204, 97 were cast for and 107 against sale, or a majority of 10 against sale.

[2] Appellants contend that the numbering of the ballots, as aforesaid, vitiated the election; and hence the district court erred in declaring it valid. Counsel assert that in numbering the ballots, as aforesaid, their secrecy was destroyed; and, further, that they should not have been counted, because said numbers constitute a distinguishing mark placed on the ballots; and, further, that the proposition of "against sale" did not carry, because not a clear majority of all the votes cast at the election were against sale. Section 8 of article 4 of the Constitution provides: "All elections shall be by secret ballot."

In view of the facts presented by the record, the following questions arise: (1) Did

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the placing of the numbers upon the back of the ballots destroy their secrecy? (2) If it be assumed that such was the case, did the casting of said ballots vitiate the election? (3) Did the numbering of the ballots constitute a distinguishing mark, within the purview of the Australian ballot law in force in this state, and were the ballots thereby made illegal?

The record discloses that when the first voter appeared at the polls to cast his vote in districts No. 1 and No. 2 he was handed a ballot numbered 1; and his name was written in the poll book opposite No. 1. A similar record was made with respect to subsequent voters; the only difference being that the numbering was in the order in which they appeared and voted. It is contended, therefore, that the proof is conclusive that by comparing the number of any particular ballot with the name which was written opposite the same number on the poll book any one could ascertain who voted a particular ballot, and how he cast his vote on the proposition whether for sale or against sale. It is contended that the secrecy of the ballot guaranteed by the Constitution and statutes of this state was thus destroyed. It may be conceded that in comparing the ballots with the poll book, as suggested, it could be ascertained who cast a particular ballot, and from the ballot it necessarily was made to appear how such person voted upon the proposition, and that when these facts were ascertained the secrecy of the ballot was destroyed. The evidence, however, discloses that in placing the numbers on the back of the ballots the election officers acted honestly; and that they did so merely because they thought such a course was proper, and without any intention thereby of destroying the secrecy of the ballot, or to ascertain how any one voted upon the proposition. It also is made to appear that the voters accepted the ballots as proper in both substance and form; and there is not the slightest indication in the evidence that the numbering of the ballots intimidated or influenced any voter in any respect, or prevented any one from voting. Indeed, it seems that both the voters and the election officers regarded the ballots in question the same as ballots have always been regarded at other elections. This arose from the fact that we have a section similar to those in force in many states, which provides that there shall be stubs attached to all official ballots, which shall be numbered consecutively from 1 upward; and on this stub one of the election judges must write the initials of his name before handing the ballot to a voter, who then takes it to the voting booth and marks it to indicate his choice, and folds and returns the same to the judge who handed it to him. The judge then inspects the stub to see whether the ballot is the same one he handed to the voter, and if it is he removes the stub from the ballot and

returns the same back to the voter, who then deposits it in the ballot box, and the stub is destroyed. No such stub was either required or attached to the ballots in question; but, in view that the letters "No. _____" were found on the back of the ballots, the election officers no doubt had in mind the general law, and they, without thinking, proceeded to number the ballots in question as aforesaid. The evidence is without dispute that those who alone were responsible for the numbering of the ballots acted honestly; and, further, that the voters received the ballots and voted them as the official ballots, believing them to be proper in form, and paid no attention to the fact that by comparing the numbers of the ballots with the numbers on the poll book set opposite the names of the voters it could be ascertained how a particular voter cast his vote. Neither is it made to appear that any voter was aware of the fact that such comparison could be made until after the election.

Were the ballots void, or did the use thereof vitiate the election? These very questions very recently came before the Supreme Court of Idaho and are passed on in the case of *McGrane v. County of Nez Perce*, 18 Idaho, 714, 112 Pac. 312, 32 L. R. A. (N. S.) 730, Ann. Cas. 1912A, 165. The Idaho Constitution provides that "all elections by the people must be by ballot. An absolute secret ballot is hereby guaranteed, and it shall be the duty of the Legislature to enact such laws as shall carry this section into effect." At an election held in one of the counties of Idaho to determine the question whether intoxicating liquors shall be sold or not, ballots were used which were consecutively numbered, both on the face of the stub and the face of the ballot, so that it could be ascertained by comparing the ballots with the poll book who voted a particular ballot, and how such voter voted, just as in the case at bar. The Supreme Court of Idaho in effect held that, while such a ballot was not the secret ballot contemplated by the Constitution, yet, in view of the fact that the numbers were placed on the ballots innocently, without any purpose on the part of any one to intimidate any one, or to ascertain how the voters voted upon the question; and in view that the voters cast such ballots in good faith, believing them to be legal and in due form, without being influenced in any way in their votes by the use of such ballots, the election was valid. This decision is assailed by appellants' counsel as being unsound. We have carefully read the decision; and we feel constrained to say that, in our judgment, the reasoning of Mr. Justice Ailshie is sound, and that the conclusions reached by him are supported by the great weight of authority. The more recent decisions with respect to the legal effect of casting numbered ballots, from which it can be ascertained who voted them, and how

such voters voted, are reviewed by Mr. Justice Allshie; and we shall do no more than to refer to some of the cases reviewed by him.

[3] It is contended that Mr. Justice Allshie lays too much stress upon the claim that courts should not interfere with the will of the people as expressed through the ballot. In this regard, it is argued that, unless an election is in all respects called and conducted in accordance with both constitutional and statutory provisions, then, in the eye of the law, there is no expression of the people's will. In other words, if the will of the people is sought to be expressed by the means of an election, such election must be conducted in accordance with the forms of law. We may well concede this claim in the abstract; but the law must, nevertheless, be given a rational application. For instance, the right to a secret ballot was intended as a shield to protect the voters from being unduly influenced or interfered with in the exercise of the franchise, and the community from having incompetent and dishonest men elected to office by means of fraud or intimidation. The guaranty of a secret ballot was, however, not intended to be used as a sword by those who may be defeated or disappointed at an election, by being permitted to take advantage of irregularities, and by reason thereof have the election declared invalid and the result thereby obtained held for naught.

[4] Where an election takes place which is held or conducted in violation of some express constitutional or statutory provision, or where, through some act of commission or omission prohibited by law on the part of the voters, or some of them, the result of an election is affected, or if it be shown that fraud, intimidation, or other illegal methods were practiced, then an election cannot stand. In this case, it is not claimed that any of the foregoing conditions prevailed. All that is claimed is that, by reason of the numbering of the ballots, it was made possible to destroy their secrecy. Is this, when standing alone and under the circumstances detailed, sufficient to authorize a court to declare an election invalid, because such ballots were used? We think not.

[5] In the first place, as clearly pointed out by Mr. Justice Allshie in the Idaho case, perfect secrecy in case printed ballots are used is neither contemplated by nor attainable under the law. It is well known that under the Australian ballot law a blank column or ticket must be left on the ballot, on which the voter may write the name of any person of his choice for any office for which he is permitted to vote, in case he does not desire to vote for the persons named on any party ticket which is placed on the ballot. He may not only thus vote the name of some other person to fill any office on the ballot, but he may write his own name, and thus

vote for himself. What one voter may do, any number of voters may do. Any person, therefore, who is familiar with the handwriting of such a voter or voters may thus, by such writing, identify the ballot or ballots cast by him or them, as the case may be, and in doing so may ascertain for whom the vote or votes were cast. What is true of one voter who writes names upon the blank ticket may be true of all who may do so. It may also be that the judges of election are well acquainted with the handwriting of many of the voters in a voting district; and they may thus tell how some, if not all, of their neighbors voted. In this regard, what is true with respect to the election judges is also true of those who, under the law, are permitted to be present at the opening of the ballot boxes and the counting of the ballots. If comparisons are permissible, therefore, why could not the handwriting on the ballots be compared with other writings of the persons, which are known to be genuine? If it be said that such comparisons are not permitted by law, then it must also be said that no comparisons are permitted by the same law. It may also be said that, perhaps, no law or printed ballots can be devised upon which the voter may not write the name of the person or persons of his choice for any office. Any law which prevented the voter from expressing his choice of persons for any office would not give the free and untrammelled expression which is contemplated by the modern election laws. We do not say that a law which absolutely prohibited any voter from writing any name or names on any ballot would be void; but what we do say is that we know of no such law, and certainly no such law is in force in this state, and we think such a law is not contemplated by our constitutional provision referred to. Only approximate secrecy can be attained in any event. Why should the innocent numbering of ballots, from which no more can be ascertained than may ordinarily be ascertained from any number of ballots used at a general election, where the names of persons are written thereon, vitiate the election?

[6] If the mere use of ballots, the secrecy of which is or may be destroyed, vitiates an election, then it is immaterial whether a large or a small number of such ballots were used. We would thus have to declare an election void if it were shown that ballots were voted, the secrecy of which was destroyed, whether the number was large or small. Such, in our judgment, is not the law. We think the true doctrine is that, although it be shown that ballots which were not secret were used and voted, yet, unless the contestant goes farther and shows that the result of the election was in fact affected by voting such ballots, he cannot prevail in contesting an election so held. The electors cannot be disfranchised by declaring their

votes void for an act or omission of some election officer, or some one else, unless such act or omission violates some express constitutional or statutory provision, or amounts to intimidation or fraud. To this effect is the great weight of authority. See, among other cases, *McGrane v. County of Nez Perce*, 18 Idaho, 714, 112 Pac. 312, 32 L. R. A. (N. S.) 730, Ann. Cas. 1912A, 165; *Farnham v. Boland*, 134 Cal. 151, 66 Pac. 200, 366; *Freshour v. Howard*, 142 Cal. 501, 77 Pac. 1101; *In re Town of Groton*, 63 Misc. Rep. 370, 118 N. Y. Supp. 417; *Hirsh v. Wood*, 148 N. Y. 142, 42 N. E. 536; *Eufaula v. Gibson*, 22 Okl. 507, 98 Pac. 565. In the case last cited, it is said: "A voter ought not to be disfranchised and his ballot rejected where, as in this case, an election officer improperly marks or numbers it, when it is not shown when it was done, or that it was done with the connivance, consent, or knowledge of the voter, and for the purpose of distinguishing it." Similar, and in some instances even stronger, language is used in all of the cases we have cited above. In all of those cases, numbered or marked ballots were cast by at least some, if not all, of the voters; but, notwithstanding that fact, it was held that the ballots were properly counted, and that the elections at which they were cast were valid.

In principle, the case of *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670, is not distinguishable from the case at bar. In that case, the election was assailed upon the ground that numbered ballots were used and counted, the secrecy of which was destroyed; and hence such ballots were illegal. In other words, it was contended that, because such ballots were supplied to the voters and were voted at the election, therefore the election was void. While the majority of the court held that the ballots were illegal because of being numbered, yet the effect of the holding also is that the use thereof did not vitiate the election nor affect the result thereof, as shown by the return of the ballots that were cast. We are of the opinion, therefore, that, while the numbering of the ballots in question destroyed their secrecy, and for that reason were not such as the constitutional provision contemplates, and that the use of such ballots must be condemned, yet, in view that said ballots were numbered and cast under the circumstances hereinbefore stated, they were properly counted; and the election at which they were cast was also properly upheld by the district court.

[7] Neither did the court err in refusing to reject the marked ballots, upon the ground that the numbers placed thereon constituted distinguishing marks, within the purview of our statute. We have a special statute (Comp. Laws 1907, § 848) which defines when and under what circumstances ballots that

have been cast by the voters must be counted or rejected. After providing how the ballots must be marked by the voters in expressing their choice, and that ballots, not marked as indicated, must be rejected, the statute provides as follows: "No ballot furnished by the proper officer shall be rejected for any error in stamping or writing the endorsements thereon by the officers charged with such duties, nor because of any error on the part of the officer charged with such duty in delivering the wrong ballots at any polling place, but any ballot delivered by the proper official to any voter shall, if properly marked by the voter, be counted as cast for all candidates for whom the voter had the right to vote, and for whom he has voted." These provisions are in strict harmony with the doctrine announced by the courts that voters are not to be disfranchised, nor is the result, as the same is expressed by their ballots, when legally marked and cast, to be set aside, except for some substantial reason which affected the fairness or legality of the election. The numbers placed on the backs of the ballots in question did not constitute distinguishing marks, in view that they were not placed there by the voters, or with their knowledge, connivance, or consent; and hence the voters could not have been intimidated or influenced thereby, nor could they have intended the numbers as distinguishing marks. Moreover, the ballots in question here were the official ballots, and were, by the proper election officers, tendered to the voters as such. The voters therefore had the right to receive them and accept them as proper ballots to be cast by them.

In conclusion, we desire to state that we have carefully examined the cases cited and relied on by appellants. All of the cases cited by counsel, except, perhaps, two, to wit, *Swedney v. Hjul*, 23 Nev. 409, 48 Pac. 1036, and *Treat v. Morris*, 25 S. D. 615, 127 N. W. 554, are easily distinguishable, both in fact and law, from the case at bar. In the case of *Sweeney v. Hjul*, supra, a case from the same court, namely, *Lynip v. Buckner*, 22 Nev. 426, 41 Pac. 762, 80 L. R. A. 354, is referred to. In the latter case, the court held in accordance with the views herein expressed; while in *Sweeney v. Hjul*, apparently a different conclusion was reached. This, however, is more apparent than real, because the court seeks to distinguish *Sweeney v. Hjul* from the case of *Lynip v. Buckner*, supra.

We are of the opinion that the ruling of the district court was right, and that the judgment should be affirmed. Such is the order. Respondents to recover costs.

McCARTY, J., concurs. STRAUP, J., concurs in the result.

SMITH et al. v. ORPHEUM AMUSEMENT CO. et al.

(Supreme Court of Utah. July 23, 1912.)

CORPORATIONS (§ 432*)—OFFICERS—LIABILITY—EVIDENCE.

In an action for architects' services in remodeling a theater for a corporation, evidence held to require a finding that defendants, who were officers of the corporation, in employing plaintiffs, acted for the corporation and not individually, and were therefore not individually liable for plaintiffs' services.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by J. A. Smith and another against the Orpheum Amusement Company and others. Judgment for plaintiffs against defendant J. H. Garrett alone, and he appeals. Reversed and remanded for new trial.

Gustin, Gillette, & Brayton, of Salt Lake City, for appellant. C. R. Hollingsworth, of Ogden, for respondents.

STRAUP, J. The plaintiffs, partners in business, brought this action against the Orpheum Amusement Company, a corporation, and Scowcroft and Garrett, to recover a balance due for services rendered at the alleged instance and request of the defendants, in preparing plans and specifications for, and superintending the remodeling of, a theater building known as the Grand Opera House in Ogden, and thereafter known as the Orpheum Theater Building. The case was tried to the court without a jury. At the conclusion of plaintiffs' evidence the court granted a nonsuit as to the Orpheum Amusement Company, and overruled a similar motion as to the defendants Scowcroft and Garrett. Upon all the evidence, the court found that the services were rendered at the special instance and request of Garrett alone, and rendered a judgment against him alone. Garrett appeals.

He complains of the findings and the judgment. We think they are not supported by the evidence. The court granted the nonsuit as to the Orpheum Amusement Company partly because the motion apparently was not resisted, and partly upon the view entertained by the court that the services were not engaged by nor rendered for it. If the corporation was not itself liable, and if either of the defendants Garrett or Scowcroft were personally liable, it, upon the record, is difficult to understand on what theory the court found Garrett alone liable, for the evidence without dispute shows that the services were rendered equally at the request and direction of both. The material and pertinent question in the case is whether the services were rendered at the request and direction of Garrett and Scowcroft as man-

agers and officers of the corporation and for it, or for themselves in their individual capacity, or without a disclosure that they were acting for the corporation and not for themselves. We think the evidence, without substantial dispute, shows that the plaintiffs rendered the services for the corporation, and that they dealt with Garrett and Scowcroft as managers and officers of the corporation. The plaintiffs alleged, and the evidence shows, that the Orpheum Amusement Company was organized and created on the 19th day of April, 1909. On that day its articles of incorporation were filed. Scowcroft then, and at the time of the trial, was the president of the corporation, David C. Eccles vice president, Garrett the secretary, and John Pingree the treasurer. The remodeling of the theater building was done by the corporation, and for its use and benefit, and not for the individual use or benefit of Scowcroft and Garrett. There is not a scintilla of evidence to show the contrary. Scowcroft and Garrett engaged the services of the plaintiffs to draw plans and specifications for and to superintend the remodeling. They did that on behalf of the corporation and for its use and benefit, and not for the individual use or benefit of either Scowcroft or Garrett. That also is undisputed. But one of the plaintiffs, Hodgson, claims that when the plaintiffs were first employed, and when they began the preparation of the plans and specifications, he did not know that the remodeling was to be done by the corporation; that he understood it was for the benefit of Garrett and Scowcroft; and that Garrett first spoke to him about it, at two different times in March, the first time on the 12th, and the second about two weeks later, before the corporation was organized. He testified that Garrett then instructed him "to make measurements in regard to certain data relative to the desired results they wanted to accomplish in the opera house. No further work was done at that time, and the next meeting I had with Garrett was in company with Scowcroft (in June). At that time I was told to go ahead and remodel the opera house for an orpheum. I immediately returned to the office, and Mr. Smith (an employé of plaintiffs) and I proceeded forthwith to take the measurements of the opera house. Mr. Smith prepared the workings and drawings, after which they were blue printed." Thereafter the work was done and completed in October. Some of the plans and specifications bore the indorsements, made in plaintiffs' office, "For the managers of the Orpheum Company." Partial payments were made to the plaintiffs by check in the name, and signed by the treasurer of the Orpheum Amusement Company. Notwithstanding the indorsements, and the check which was received by Hodgson in July, he nevertheless

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

testified that he, in August, had no knowledge that the work was being done by the amusement company. But Smith, his partner, also a witness on behalf of the plaintiffs, testified that he had knowledge that the work was done by the Orpheum Amusement Company, and for its benefit, and not for Scowcroft and Garrett, and that Hodgson, his associate, so informed him. Both Hodgson and Smith testified that, until they commenced their suit, neither had looked to nor asked either Garrett or Scowcroft for payment. Hodgson further testified that "throughout the entire transaction I never asked Garrett or Scowcroft to pay this bill individually, and at first I charged it to the managers of the Orpheum Company, and afterwards to the Orpheum Amusement Company when we learned the official name" of the company.

Smith, the other plaintiff, testified that the principal plans and specifications were prepared June 8, 1909. He was asked and he answered: "Q. Did you know there was an Orpheum Company at that time? A. Well, I didn't make inquiry in regard what company—how the company was formed. I knew that Scowcroft and Garrett were behind it. Q. You knew there was a company though; did you? A. I knew they were in a company; yes, sir. Q. You knew that you were doing work for a company? A. Yes, sir. Q. And you knew that Garrett and Scowcroft were acting as managers of that company at that time? A. Yes, sir. Q. And you knew you were dealing with them as managers of the Orpheum Company at that time, didn't you? A. Yes. Q. How long before that time did you know about it? A. I couldn't say. Q. As a matter of fact, you knew about it all the time? A. I knew that there was a company, of course; that there was a company that was going to remodel it for the Orpheum circuit. Q. You knew there was a company organized for this when you were first approached on the subject? A. Yes, sir." He further testified that before the plaintiffs commenced work he knew that Eccles, Scowcroft, Garrett, Pingree, and Roy Eccles were connected with the company, and that Garrett and Scowcroft acted as the representatives of some company, and that he obtained this information from his associate Hodgson.

Thus, considering the matter upon the evidence alone of the plaintiffs, it clearly appears that they rendered the services for the corporation and not for Garrett or Scowcroft in their individual capacity. Nor is there any evidence to show that Scowcroft and Garrett, in their individual capacity, either by express promise, or impliedly, promised or agreed to pay for the services, or in any manner assumed liability for payment of them.

The judgment of the court below is therefore reversed, and the case remanded for a new trial. Costs to appellant.

FRICK, C. J., and McCARTY, J., concur.

GORMAN v. BIRRELL et al.

(Supreme Court of Utah, June 20, 1912.)

MECHANIC'S LIENS (§ 63*) — ENFORCEMENT — LIABILITY OF OWNER.

Where lessees, with the consent of the owner, employed a contractor to make alterations in the leased premises at their own expense, according to specifications furnished by the owner's architect, one performing work and furnishing materials for the alterations could not enforce a lien against the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 80; Dec. Dig. § 63*.]

Appeal from District Court, Salt Lake County. George G. Armstrong, Judge.

Action by Patrick W. Gorman against A. H. Birrell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Goodwin & Van Pelt and E. B. Scott, all of Salt Lake City, for appellant. Edwards & Ashton, Pierce, Critchlow & Barrette, Weber & Olson, Ed. McGurrin, and James Ingebretsen, all of Salt Lake City, for respondents.

STRAUP, J. This is an action to foreclose a mechanic's lien. The appeal involves only the issues between the plaintiff and the defendant Swallow. The case was tried to the court. The findings show: Swallow, in April, 1908, was the owner of the real estate in question, situate in Salt Lake City. On the 22d of that month he entered into a written contract with the Salt Lake Security & Trust Company to construct a three-story apartment house on the real estate at an agreed price of \$31,500. The contract provided that no alterations should be made in the work except upon the written order of the architect. On the same day Swallow leased the real estate, together with the building to be erected thereon, to the defendants Birrell, Pratt, and Whittemore for a term of 12 years. The trust company subcontracted the construction of the building to the defendant Engdahl, who constructed the building in accordance with the contract. On the 1st day of October, when about all the exterior and much of the interior had been constructed, the lessees, then in possession of the land and premises, for their own benefit, and to improve the value of their leasehold, requested alterations to be made on the second floor of the building by subdividing and increasing the number of suites. That involved additional bathrooms, toilets, plumbing, and other work. Swallow consented to the making of the changes, but upon the understanding and upon an agreement that the alterations were to be made at the cost and expense of the lessees, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Not. Series & Rep'r Indexes

without any liability on his part, or any charge against the property. He agreed to rebate \$150 from the rentals due under the lease, which was thereafter allowed. Thereupon the lessees, upon their own account and for their own interest under the lease, procured the architect of the building to prepare for them separate plans, blueprints, and specifications for the alterations, and upon their own responsibility as lessees contracted for, and made the alterations. Swallow did not make them nor cause them to be made; nor did he enter into any agreement, verbally or otherwise, with the plaintiff, who alleged that he did the plumbing for the alterations under an agreement entered into with Swallow and the lessees, according to the plans and specifications prepared by the architect, to do the plumbing, or to perform any service or furnish any material at the instance or request of Swallow or any agent authorized by him. Upon these findings judgment was entered in favor of Swallow.

The plaintiff appeals. He contends that the findings are not supported by and are against the evidence. The evidence, without conflict, shows that the plaintiff rendered services and furnished material for the plumbing of the building in pursuance of the original contract entered into between Swallow and the trust company and the subcontract between Engdahl and the trust company. He was paid for that. The evidence also shows, without dispute, that the plaintiff rendered services and furnished material in doing the plumbing for the alterations referred to in the findings. His evidence, however, leaves the question much in doubt and uncertain at whose instance and request, and the circumstances under which, he rendered the services and furnished the material. It seems he had considerable difficulty in alleging what the facts were, or what his theory was, in that regard. In his filed notice of lien he averred "that the said indebtedness accrued," and that he "furnished said material to and was employed by A. H. Birrell," one of the lessees, "and C. B. Onderdonk et al., who were the agents of George Swallow, the owner" of the premises, "under a verbal contract made between the said A. H. Birrell, C. B. Onderdonk et al., and the plaintiff." Who were meant by "et al." is not made to appear. In the original complaint filed in the cause he alleged that Swallow let a contract to the trust company to construct the building according to the original plans and specifications "upon premises leased to Birrell, Pratt, and Whittemore"; that the trust company sublet to Engdahl, who constructed the building; that during the construction of it "Swallow made and entered into a contract with the said lessees for the construction of additional parts of said premises; that said lessees thereupon let said contract" to Engdahl, who "sublet said contract to the plaintiff in so far as the plumbing was concerned" for \$400;

and "that the contract price agreed upon to be paid by said lessees to the said defendant O. M. Engdahl was \$590, including the said plumbing." In his amended complaint he alleged the same facts, except that Swallow made a contract with the lessees for the construction "of the addition to the building, by the terms of which said lessees were to construct such addition and said Swallow was to pay for same by allowances on the rent to be paid by said lessees, and that the lessees entered into a contract with Engdahl for the construction of the addition, and that Engdahl sublet the plumbing" to the plaintiff. In his second amended complaint he alleged that it was mutually agreed between Swallow and the lessees, that the original plans and specifications of the building should be modified and changed, and that the proposed changes were approved by the architect and superintendent on the building and the agent of Swallow; that thereafter the plaintiff "entered into a verbal contract with the defendant Swallow" and the lessees "to do the plumbing required by the proposed changes, according to the plans, blueprints, and specifications prepared by" the architect "for the sum of \$400."

The evidence, without substantial conflict, shows that after the original contract was let by Swallow, and while the apartments were in the process of construction, the alterations were made at the instance and request of the lessees and for their benefit. Of course, before they were made Swallow was consulted, who, in turn, consulted the architect to ascertain if the alterations could be made without injury to the building. Finding that to be so, he consented. If then was agreed that the lessees, and not Swallow, should make the alterations at their own expense; Swallow agreeing, however, to allow them \$200 on the rent. Thereupon the lessees entered into a written agreement with Engdahl to make the alterations according to prepared plans and specifications, and by the terms of which the lessees agreed "to stand the expense of such change and Engdahl to hold" the lessees "for all costs in connection with said change"; the price agreed upon being \$590. There is much evidence in the record to show that, while Swallow consented to the alterations and was about the premises and saw the changes being made, still the evidence, without substantial conflict, shows that the lessees, and not he, agreed to make and pay for them, and that they, and not he, let the contract for that purpose. As before observed, the plaintiff by his evidence left it very uncertain whether he did the work and furnished the material in the making of the alterations at the instance and request of Engdahl or the lessees, or both. His evidence, however, does not show that he did so at the instance and request of Swallow, or under any agreement with him or any authorized agent. In his original and first amended complaints he

alleged that he did the work under a contract with Engdahl, and in the second amended complaint, the complaint presenting the triable issues, under a verbal contract with Swallow and the lessees. Finally, in his brief, we are told that "the evidence makes a clear case of a contract for the plumbing made by the plaintiff with the agent of the defendant Swallow authorized and ratified by Swallow, and an implied promise of Swallow to pay plaintiff for the same when completed." We are then told that "the agent" referred to, was Onderdonk, the architect, and that it was he who asked plaintiff's foreman "to bid on the plans"; that the foreman did so, and submitted to Onderdonk a bid of \$400; and "that Swallow approved the bid and authorized the foreman to do the work." There is evidence to show that the architect prepared plans and specifications for the alterations, not for Swallow, but for the lessees. We have not been referred to any evidence that Swallow requested or authorized him to procure bids, or that the architect did so, nor, in our judgment, is there any substantial evidence to justify the conclusion that "Swallow approved the bid or authorized" the plaintiff or his foreman "to do the work." Such approval and authorization are largely deduced from the facts that Swallow permitted the alterations to be made and was present and about the apartments and saw them being made.

We think that the findings are justified by the evidence, and that the judgment should be affirmed, with costs. Such is the order.

FRICK, C. J., and McCARTY, J., concur.

OGDEN VALLEY TROUT & RESORT CO. v. LEWIS.

(Supreme Court of Utah, June 10, 1912.)

1. APPEAL AND ERROR (§ 748*)—ASSIGNMENT OF ERRORS—AMENDMENT.

Assignments of error not included in the original assignments filed and served under Supreme Court rule 26 (97 Pac. x), but made a part of the original assignment by an amendment in the regular way and in due time by permission of a justice of the Supreme Court, will be considered where respondent does not claim that he did not have ample time to meet them in his brief and argument.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3058-3064; Dec. Dig. § 748.*]

2. JURY (§ 25*)—WAIVER OF RIGHT—OPERATION AND EFFECT.

Const. art. 1, § 10; providing that a jury in a civil case is waived unless demanded, does not prevent the court from calling a jury on its own motion, although both parties waive a jury trial.†

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154-173; Dec. Dig. § 25.*]

3. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.

In an action on a note where the defendant by his answer and by an admission in open

court conceded the execution and delivery of the note and its nonpayment, but defended on the ground of false representations, he was properly permitted to open and close.‡

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

4. CORPORATIONS (§ 117*)—SALE OF STOCK—FALSE REPRESENTATIONS—RESCISSON.

Representations by a seller of corporate stock that the corporation's business affairs were on a paying basis, that the stock offered for sale was treasury stock and not a personal stock of the seller, and that a prominent business man and his business associates were heavily interested in the corporation, and representations as to the value of the property owned by the corporation, were material, and, if false and relied on by the buyer, entitled him to rescind.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

5. APPEAL AND ERROR (§ 1056*)—PREJUDICIAL ERROR—EXCLUSION OF EVIDENCE.

In an action involving the falsity of a representation by a seller of corporate stock that a prominent business man and his business associates were interested in the corporation, the exclusion of cross-examination of the buyer as to whether he knew who these business associates were was not prejudicial to the seller.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

6. CORPORATIONS (§ 121*)—SALE OF STOCK—FRAUD—EVIDENCE.

In an action involving the falsity of representations by a seller of corporate stock as to the value of the corporation's property, evidence of its actual value, net offered for the purpose of showing the value of the stock, but to show the falsity of the representations, was properly admitted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

7. WITNESSES (§ 406*)—CONTRADICTION—COMPETENCY.

Where a witness testified to alleged statements of a party to an action, the exclusion of the testimony of another witness that such statements were not made was proper where such witness did not show to the satisfaction of the trial court that he was referring to the same conversation with the party.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.*]

8. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

The exclusion of testimony which could not have affected the result arrived at by the jury was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

9. EVIDENCE (§ 135*)—RELEVANCY—SIMILAR TRANSACTIONS.

A party seeking to recover for false representations cannot prove the making of such representations by other similar representations in his absence made by the same person.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405; Dec. Dig. § 135.*]

10. EVIDENCE (§ 135*)—RELEVANCY—SIMILAR TRANSACTIONS.

False representations, similar to the ones involved in an action, are admissible where the intent, motive, or knowledge of their falsity by the party making them are material, or where

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes

† Whipple v. Proce, 24 Utah, 276, 67 Pac. 1072; Wood v. Railroad, 28 Utah, 371, 79 Pac. 182.

it is sought to prove a system or general plan or scheme to defraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405; Dec. Dig. § 135.*]

11. EVIDENCE (§ 135*)—RELEVANCY—SIMILAR TRANSACTIONS.

Where an action involving the right of a party to rescind a contract for false representations was tried on the theory that it was necessary to prove that the party making the representations knew that they were false, and the court so charged, evidence of similar false representations by him was admissible to show that they were made with intent to deceive and with knowledge of their falsity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 392, 394, 404, 405; Dec. Dig. § 135.*]

12. CONTRACTS (§ 94*)—RESCISSION—GROUNDS.

A party seeking the rescission of a contract for false representations need not prove that the party making the representations knew they were false.²

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.*]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action would by the Ogden Valley Trout & Report Company against T. J. Lewis. From a judgment for defendant, plaintiff appeals. Affirmed.

J. D. Skeen & Bros., of Ogden and Salt Lake City, for appellant. Snyder & Snyder, of Salt Lake City, and P. H. Neeley, of Coalville, for appellee.

FRICK, O. J. Appellant brought this action to recover upon a promissory note given for the sum of \$2,000, which, it is alleged, was made and delivered by respondent to one Joseph Barker who assigned it to appellant. The respondent admitted the execution and delivery of the note to Barker, and, as affirmative defense, averred that respondent was induced to execute and deliver the same to Barker by means of false and fraudulent representations. In this regard it is in substance averred that Barker did falsely and fraudulently represent to respondent that the appellant had authorized the sale of its treasury stock, amounting to the sum of \$150,000, to be sold at par; that he was the duly authorized agent of appellant to obtain subscribers therefor; that the proceeds derived from the sale of said stock would all go into the treasury of appellant, and would be devoted to enlarging its facilities for producing marketable fish, and to create a pleasure resort to be used by all who pay an entrance fee; that David Eccles, a prominent business man of Ogden, Utah, was "behind the company" (appellant) and was heavily interested therein, as were also several of his business associates in other enterprises, all of whom were strong financially and prominent business men, and that they would use their efforts and business experience to make the

company a successful business concern, and that said business of said corporation was then upon a paying basis;" that treasury stock of appellant had been sold to several other persons in the town or neighborhood where respondent resided; that respondent, at the time the representations were made, was well acquainted with said David Eccles and knew him to be a man of high standing in the business world; and that his reputation was such that respondent believed that he would not be connected with an enterprise which he did not believe to be meritorious, and respondent further believed that, owing to said Eccles' financial standing, he was able to place and maintain any meritorious business enterprise upon a paying basis.

Respondent further alleged that, believing and relying upon the foregoing and other statements and representations made by said Barker, he subscribed for 200 shares of said alleged treasury stock of the par value of \$10 each, which amounted to the sum of \$2,000, for which he made and delivered to said Barker the note in suit; that respondent would not have subscribed for said stock or any part thereof had he not been induced to do so by the statements and representations aforesaid; and that said representations were false and untrue, and said Barker, at the time he made them, knew them to be false and untrue. Respondent also averred that the stock subscribed for by him was not treasury stock, and that the money to be derived therefrom was not intended to be paid into the treasury of appellant, but that said stock was owned by said Barker, and that the money derived therefrom he intended to retain and did retain for his own use. Respondent also alleged that, when appellant was incorporated, it issued stock of the par value of \$140,000 to the incorporators, which stock was pretended to have been paid in full by the transfer of certain property from certain incorporators to appellant, which property was not worth \$140,000 nor any other sum in excess of \$25,000, and that all stock issued for said property in excess of said last sum was without consideration and void; that said Barker was at all times an officer and director of appellant; and that, before this action was brought, he had commenced an action in his own name to recover on the note in suit, which action was dismissed before this action was commenced. Respondent also alleged that he tendered back the stock, and, the same being refused by both appellant and Barker, he left it at the bank where the note in suit was left for collection.

Upon substantially the foregoing issues a trial to a jury resulted in a verdict in favor of respondent. The court entered judgment on the verdict, and appellant has appealed from said judgment, and, for the reasons

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

²Smith v. Columbus Buggy Co., et al., 125 Pac. 580.

hereinafter stated, asks that the same be reversed. We shall state such facts as are deemed material in connection with the several assignments hereafter passed on.

[1] Before proceeding to a consideration of the assignments of error, it becomes necessary for us to pass upon an objection interposed by respondent, namely, that there are a number of assignments that cannot be considered by us because they were not included in the original assignments of error filed and served under rule 26 (97 Pac. x) of this court. The record shows that some of the errors now urged were not included in the original assignments of error, but all of such newly-assigned errors were made a part of the original assignment by filing an amendment thereto in the regular way and in due time by permission of one of the justices of this court. The additional assignments were therefore made a part of the record, and in view that respondent does not claim that he is prejudiced in any way by the additional assignments, or that he has not had ample time and opportunity to meet them in his brief and argument, his objection cannot prevail.

[2] Proceeding now to a consideration of appellant's assignments, the first one to be noticed is that the court erred in submitting the case to a jury. It appears from the record that both parties expressly waived a jury and asked the court to try and determine the case. The court declined to do so, and, on his own motion, directed that a jury be impaneled, which was done, and the case was submitted to them in the usual way. This court has twice held that such a course is permissible. *Whipple v. Preece*, 24 Utah, 376, 67 Pac. 1072; *Wood v. Railroad*, 28 Utah, 371, 79 Pac. 182. Appellant's counsel, however, insist that in those two decisions this court overlooked section 10 of article 1 of the Constitution of this state, which, so far as material here reads: "A jury in a civil case will be waived unless demanded." This provision, however, does not prevent the trial court from calling a jury on his own motion to try a case. We think that the whole force and effect of the constitutional provision just referred to amounts to this: That, by not demanding a jury, either party to a civil action loses the right to demand a trial by jury because that right is effectively waived by a failure to demand. It was not intended by that provision to prevent the court from calling a jury to try a case, and, in case this is done, that the legal effect will be different than if a jury had been demanded by either of the parties. Where both parties, as in this case, request the court to hear the evidence and try the case without a jury, the court should do so, but we cannot see how the mere fact of calling a jury by the court to try the case can constitute reversible error.

[3] It is also contended that the court erred in permitting the respondent to open and close the argument to the jury. After the jury had been impaneled, respondent's counsel, in addition to the admissions contained in the answer, made and had entered of record the formal admission that respondent had executed and delivered the note in suit, and that no part thereof had been paid, and, upon such admission, demanded the right to open and close the case to the jury. Appellant's counsel resisted the right of respondent to do so, and the court did not then rule on the question. Appellant's counsel then proceeded to and did offer the note in evidence, and after doing so rested. Respondent's counsel thereupon again demanded the right to open and close for the reason that it was then made apparent by reason of respondent's admissions that appellant was not required to prove anything to entitle it to a judgment, and that, by merely introducing the note in evidence, it had proved nothing except what had been admitted by respondent. In other words, appellant would have been entitled to a judgment upon respondent's admissions, and thus the burden, not only of going forward, but the burden of proof, was cast on respondent. While appellant cites some authorities, yet all that are cited by it are to the effect that, under the circumstances disclosed by the record, the right to open and close was with respondent. There is therefore no escape from the conclusion that, in permitting the respondent to open and close, the court did no more than to follow the law.

[4] It is also insisted that the court erred in refusing appellant's request to direct the jury to return a verdict for it upon the ground that the alleged misrepresentations had not been established by the evidence. Without taking time and space to set forth the evidence in detail, we feel constrained to say that, from a careful examination of the evidence contained in the bill of exceptions, it is made to appear that the respondent produced evidence which tended to prove, and from which the jury were authorized to find: (1) That appellant's business affairs were not on a paying basis when the stock was offered for sale, nor at any time, which was directly contrary to Barker's representations; (2) that the stock for which the note in suit was given was not treasury stock as stated by Mr. Barker, but was his own stock; (3) that David Eccles was not "behind the company," and was not "heavily interested therein," as represented by Mr. Barker, but, on the contrary, he had no interest in the corporation whatever, and had no connection therewith, and, when requested by Mr. Barker and another to take stock, had peremptorily refused to do so some time before Mr. Barker made the foregoing representation; (4) that the alleged business associates of Mr. Eccles were not largely interested in the appellant corporation as repre-

separated by Mr. Barker, but, as disclosed from the articles of incorporation, each had only one share of stock therein; (5) that the property owned by the company was not worth what Mr. Barker represented it was, and as disclosed from the prospectus of the company, which Mr. Barker represented to be correct, but was worth only about one-sixth of the amount represented; and (6) that respondent believed and relied on the foregoing representations and statements, and would not have subscribed for the stock, nor executed the note in suit, had they not been made and relied on as aforesaid. We think that, under all the authorities, the foregoing representations were what in law are termed material, and, if false and relied on and thus had induced the respondent to subscribe for the stock, and to execute the note, he, upon learning the truth, had the right to rescind the contract of subscription, and, upon returning or tendering back the stock, demand that the note, given for the stock be canceled.

The foregoing doctrine is clearly sustained by the following authorities, namely: 1 Cook on Corporations (5th Ed.) § 143; 2 Clark & Marshall on Private Corporations, § 471; Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 503; Talmadge v. Sanitary Sec. Co., 31 App. Div. 498, 52 N. Y. Supp. 139; and West End Real Estate Co. v. Nash, 51 W. Va. 341, 41 S. E. 183.

In view, therefore, of the foregoing authorities, the court was right in refusing to direct a verdict for the appellant.

[5] Appellant also asserts that the court erred in not permitting its counsel to cross-examine respondent with regard to his knowledge of who were some of the business associates of Mr. David Eccles. Assuming that, the cross-examination desired, would have been proper, yet appellant was in no way prejudiced by the ruling of the court in refusing to permit it. The question to be established was that Mr. Eccles and his business associates referred to by Mr. Barker were stockholders, and were thus interested in and were "behind" the business affairs of appellant as represented by him, and not that respondent knew some of the business associates of Mr. Eccles and that some of them were interested in the company. The latter is all that appellant's counsel could have established, if respondent had answered all of the questions propounded to him as counsel desired them to be answered. This assignment, therefore, cannot prevail.

[6] It is also assigned that the court erred in admitting evidence of the actual value of the real estate and other property owned by appellant. It is urged that the value of the capital stock of a corporation cannot ordinarily be proved in that way. The evidence was not offered nor admitted for the purpose of proving the value of the stock, but it was offered and admitted to show that the representations that it was alleged Mr.

Barker had made with regard to the value of property owned by the appellant were not true. There was no other way to show that these particular representations were untrue, and, in our opinion, the court's ruling was right.

[7] It is further contended that the court erred in excluding the testimony of a certain witness produced by appellant in rebuttal. Respondent had proved by a certain witness that such witness had heard Mr. Barker make certain representations respecting who were stockholders of and interested in the appellant company. Appellant's counsel produced the witness referred to for the purpose of contradicting the statement made by respondent's witness. The court, however, seemed to be of the opinion that appellant's evidence had left in doubt the identity of the conversation at which the alleged statements were made to which respondent's witness had testified, and for that reason the court excluded the testimony of the witness. Assuming, without deciding, that it was proper to permit appellant to contradict the statements made by respondent's witness, without first asking him whether or not the statements testified to by him were made at a time and place when and where appellant's witness was present, yet, in view that appellant failed to identify the conversation to the satisfaction of the judge, he cannot be charged with error unless he erred in holding that the cross-examination was not properly identified. It goes without saying that, if the conversation testified to by respondent's witness was not the one appellant's witness had in mind at which the statements were made that he sought to contradict, then the offered testimony was not rebuttal, and, if it was not, then the ruling was correct. We have carefully read that portion of the bill of exceptions relating to the question now under consideration, and we are not prepared to say that the trial judge erred in excluding the testimony for the reasons stated.

[8] Another assignment relates to the exclusion of certain testimony which appellant's counsel sought to elicit from Mr. Barker. There are a number of questions that were propounded to the witness to which respondent's objections were sustained. There was considerable documentary evidence introduced at the trial, much of which, for reasons not disclosed, was not incorporated in the bill of exceptions and thus not certified to this court. Just what effect, if any, the excluded evidence may have had upon the ruling of the court we are unable to say. Some testimony, which was offered and excluded as aforesaid, directly contradicted the statements contained in the articles of incorporation upon a matter where such testimony was not proper. Some was clearly hearsay, while others of the statements offered were not relevant to any issue in the case. While it is true that it would

perhaps have been proper enough to have permitted the witness to answer a few of the questions propounded to him, yet all of the answers to such questions, even if answered as counsel desired them to be, could not have had the slightest effect upon the result arrived at by the jury. Any error that may have been committed in this regard could not have prejudiced the appellant, and, for that reason if no other, this assignment cannot be sustained.

Appellant also complains that the court erred in its charge to the jury and in refusing a certain request to charge offered by its counsel. We have carefully examined the whole charge given by the court, as well as the particular instruction that is excepted to, together with the request which was refused. Keeping in view the evidence and the whole charge as given by the court, we are clearly of the opinion that the appellant has no cause for complaint. It is also clear that the particular proposition contained in the request was sufficiently covered in the court's general charge. Upon the other hand, the particular proposition of law to which appellant excepted, which, under certain circumstances, might have been improper, yet, in view of all of the evidence in this case, we think it was a correct statement of the law.

This brings us to the last and only assignment which, in our judgment, is not free from difficulty. At the trial respondent, over appellant's objection, was permitted to show that, at about the time that the representations testified to by respondent were made to him by Mr. Barker in order to induce some of respondent's townsmen or neighbors to subscribe for some of the alleged treasury stock, he made the same or similar representations to them. The record discloses that respondent produced a witness by whom he sought to show that Mr. Barker had induced such witness to subscribe for some of the alleged treasury stock by making similar representations to the witness that he about the same time made to respondent to induce him to subscribe for the stock in question. When this testimony was offered, appellant's counsel objected thereto as follows: "It is objected to on the ground that it is irrelevant and immaterial—an evident attempt to try another lawsuit within this lawsuit." Counsel for respondent, in stating the purpose for which the testimony was offered, said: "The purpose is to show a general plan as reflecting upon the motives of Mr. Barker at the time." The proposition, it seems, was argued to the court at length, and it admitted the evidence for the purpose suggested by respondent's counsel, and in their brief they now contend that it was relevant upon the question of knowledge, motive, and a general plan on the part of Mr. Barker to sell his individual stock by representing that it was company stock, and thereby showing his purpose to defraud.

[9] There is no doubt that the weight of authority is that similar independent statements or representations made to others, in the absence of the person to whom those in controversy were made, and of which such person had no knowledge at the time he acted, and hence could not have influenced him to act, are not admissible as evidence from which it may be inferred that the representations in issue were in fact made. In other words, the mere fact that a person has made certain statements on one day to a particular person is not evidence from which it may be inferred that he in fact made the same or similar statements to another person at another time and place.

[10] Statements or representations made to others are, however, relevant where the intent, motive, or knowledge of the falsity of the representations of the party making them, are material, or to prove a system or general plan or scheme to defraud.

In 6 Ency. Ev. p. 33, the doctrine followed by the courts upon this subject is fairly reflected in the following statement: "Where the fraudulent intent of a party in the performance of an act is in issue, proof of other similar fraudulent acts is relevant and admissible to establish his intent or motive in the performance of the act in question, when it appears that there is such a connection between such other acts and the act in question as to authorize the inference that both are parts of one scheme or plan, in which the same motive is operative, and it is immaterial whether such other fraudulent acts occurred before or after the act in question, as remoteness in point of time affects only their weight. Evidence of such other fraudulent acts is usually offered upon the issue of motive or intent, and some of the decisions limit its competency to the proof of these issues. Such evidence, however, has been held competent to establish the party's knowledge of the falsity of his representations, to prove a system of fraud or a fraudulent conspiracy, and to identify the person charged as the fraudulent actor. By the great weight of authority, such evidence is not admissible to prove the fact of the making or utterance of the particular representations in suit, although some of the decisions hold it competent as affording a ground of presumption to prove the main charge."

The cases of Johnson v. Gulick, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629, J. H. Clark & Co. v. Rice, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505, and Levy v. Lee, 13 Tex. Civ. App. 510, 36 S. W. 309, are fair examples of that class of cases in which it is held that other similar but independent representations are not admissible as evidence from which the uttering of the representations in issue may be inferred, and that they are not admissible for the purpose of proving knowledge of the falsity of the representations, because such knowledge on the part of the one who falsely makes material

representations, which are relied on by another to his detriment, is not material, at least not in actions for rescission. Upon the other hand, it is held by the Supreme Court of California in *Kelley v. Owens*, 30 Pac. 596,¹ by the Supreme Court of Iowa in *Zimmerman v. Brannon*, 103 Iowa, 144, 72 N. W. 439, and by the United States Circuit Court of Appeals in *Mudsill Min. Co. v. Watrous*, 61 Fed. 163, 9 C. C. A. 415, that, in case false representations are previously made to others as an inducement to sell the property concerning which the representations in issue are alleged to have been made, such former representations may be shown as evidence that the person who made the latter had knowledge of their falsity.

In *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731, after reviewing the authorities upon the question, the court says: "We think the true rule to be deduced from them (the authorities) is that another act of fraud is admissible only where there is evidence that the two are parts of one scheme or plan of fraud committed in pursuance of a common purpose."

The case of *Oudin v. Crossman*, 15 Wash. 519, 46 Pac. 1047, is one in which the Supreme Court of Washington applies the rule applicable to a scheme or general plan to defraud where a sale of a mine was in issue. In that case it was alleged that false representations were made to a number of prospective purchasers respecting the value and condition of the mine. The admission in evidence of the statements and representations that were made to such prospective purchasers was upheld by the court, although the person to whom subsequent similar statements were made concerning the mine, and who in relying on the latter purchased the same without knowing of the former statements. The statements were admitted for the purpose of showing a general plan or scheme to defraud.

[11] When all the evidence in this case is considered, including the inferences that the jury were authorized to deduce from certain facts, we cannot say that there is not some substantial evidence from which the jury were justified in finding that there was a scheme or general plan to defraud on the part of Mr. Barker. But, even though it be assumed that there is no evidence to support a finding of such a scheme or plan, or that this case in no event is one that can be brought within the class where a scheme or plan to defraud may be shown, yet there is still another reason why the court did not commit prejudicial error against appellant in admitting the evidence objected to for the following reasons: Appellant's counsel tried and submitted the case to the jury upon the theory that, although the representations alleged to have been made by Mr. Barker and

relied on by respondent were material and false, yet, if respondent had not established by a preponderance of the evidence that Mr. Barker made them with the intent to deceive, and with full knowledge of their falsity, respondent had not established his defense. Among the material elements which the court, at the request of appellant's counsel, charged the jury respondent must establish by a preponderance of the evidence before he could recover are the following: "(3) That said misrepresentations were knowingly and willfully made with intent on the part of the said Joseph Barker to induce the said defendant to enter into the contract and execute the note. (4) That said Joseph Barker must have known that the statements made to defendant were false, or must have represented them as true without a knowledge of their truth or falsity."

[12] The authorities cited by appellant's counsel on which they rely all hold that false representations made to others, not in the presence and hearing of the one who claims to have been deceived thereby, are not admissible (1) because such representations, being unknown to him, could not have deceived nor induced him to act; (2) because they are not evidence of the fact that the representations in question were actually made; and (3) because whether the party who makes them either knows or does not know that they are false is immaterial to the right of rescission if in fact the representations were material, false, and induced the act sought to be rescinded. The foregoing conclusions seem both reasonable and logical. In what way does it affect the party who is deceived or misled and thereby induced to enter into a contract or to assume an obligation by representations that in fact are untrue, whether he who makes them knew them to be so or not? If the action were based on deceit or were for damages which it is alleged were suffered by the plaintiff by reason of the false and fraudulent representations, then the plaintiff, in addition to proving the materiality and falsity of the representations and that he relied on them and was deceived and thereby induced to enter into the contract would have to go a step farther and prove that the defendant knew, when the representations were made, that they were false or that they were made recklessly and without any effort to learn of their truthfulness. In an action for a rescission, where the only consequence sought to be reached by the action is to rescind and to place the parties in statu quo, a different rule prevails. Why should he who makes false representations be permitted to profit by them, whether he knew they were false or not? Upon the other hand, why should the party who is deceived be bound by a contract based upon false representations simply because he cannot prove that the other party to the contract knew the statements

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 96 Cal. xviii.

when made were false? We have recently passed upon this identical question in the case of *Smith v. Columbus Buggy Co.* et al., 123 Pac. 580, and we there held that, in case of rescission, it is not necessary to prove that the party who made the false representations knew them to be false when he uttered them, if such representations were in fact material and false and induced the other party to enter into a contract that he would not have entered into otherwise.

The case at bar was submitted to the jury upon the theory that it was a material matter that Mr. Barker, at the time he made them, knew that the statements and representations alleged to have been made by him to respondent were false, and that, before respondent could recover, he was required to establish, by a preponderance of the evidence, that Barker knew their falsity. This theory, having been stated in the instruction referred to, therefore became the law of the case and must control whether right or wrong. Knowledge on the part of Mr. Barker that the statements and representations that it was alleged he made was therefore made a material issue. This being so, respondent could legally avail himself of any evidence that was relevant to that issue. Nearly all, if not quite all, authorities hold that, where knowledge is a material ingredient, similar acts or statements made by the party whose statements are in issue, and from which his knowledge of their falsity may be inferred, is relevant, although the evidence would not be admissible on other grounds. In view of the charge to which we have referred, which was given at the request of appellant's counsel, we are of the opinion that it cannot complain of the ruling of the court admitting the evidence to which reference has been made, although, under different circumstances, such evidence might not have been admissible. By referring to the cases cited by counsel for appellant, some of which we have referred to in this opinion, it will be seen that the trial courts in each case charged the jury that whether the party who made the representations knew they were false or not was not a material element in the case, and the appellate courts approved such charge. It is for this reason that those courts held that the evidence of other similar statements, not made in the presence of the party who claims to have been misled by subsequent statements, were irrelevant and should have been excluded. From what has been said, the case at bar does not come within the doctrine announced in those cases.

The judgment therefore should be affirmed. Such is the order. Respondent to recover costs.

MCCARTY, J., concurs. STRAUP, J., concurs in the result.

ELGAN v. FRANCES-MOHAWK MINING & LEASING CO. et al. (No. 1,965.)

(Supreme Court of Nevada. July 24, 1912.)

1. PLEADING (§ 237*)—AMENDMENT—CONFORMITY TO PROOF.

Plaintiff, in an action to compel the surrender of shares of stock, was properly permitted, after decision, but before judgment, to amend and supplement his complaint by setting forth undisputed facts shown on the trial to have existed at the time thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

2. PLEADING (§ 237*)—AMENDMENT—ESTOPPEL TO OBJECT.

Where, in an action to compel the surrender of shares of stock, a motion of the defendant for a nonsuit and consent thereto by the plaintiff were withdrawn by stipulation, and defendant given leave to amend its answer to show facts in evidence occurring subsequent to the institution of the suit, defendant could not object to the amendment of the plaintiff's complaint, after decision and before judgment, to conform to such facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

3. MARSHALING ASSETS AND SECURITIES (§ 5*)—SUBSTITUTION OF LIEN—RIGHTS AGAINST PRINCIPAL DEBTOR.

A bank, which held shares of stock in a mining company belonging to its president as collateral security for loans and advances to the company and such president, assigned the notes and indebtedness to another company and transferred the collateral. Upon the issuance of new notes, secured by the deed of trust of the mining company, the transferee delivered the stock held as collateral to the company, having previously refused to honor an assignment of a portion of the shares and an order for their delivery, executed by the owner of the shares. The mining company held the number of shares claimed by such assignee as security for the debt of its president, and released the remainder, which was about five times that of the number held, to such president. Held that, as assignee of the former creditors, the company had the right to hold the collateral transferred to it for the payment of the notes; but, as it was bound to first exhaust the security belonging to the principal debtor, which, being greater than that retained, must be considered to have been sufficient, the retention of the stock belonging to the person to whom it had been transferred was improper.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 10; Dec. Dig. § 5.*]

Appeal from District Court, Esmeraldo County; Theron Stevens, Judge.

Action by J. R. Elgan against the Frances-Mohawk Mining & Leasing Company and another. From a judgment for plaintiff, the Keane Wonder Mining Company appeals. Affirmed.

On or about the month of July, 1906, one Homer Wilson, by purchase from one John Keane and another, became the owner of something like 1,100,000 shares of the capital stock of the Keane Wonder Mining Company, and succeeded to the presidency of the corporation. The said Homer Wilson at that time made arrangements with the State Bank & Trust Company at Goldfield, where-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by the mining company and himself were to have, and did have, loans and advances from time to time, and all of said stock was by him then pledged to said bank as security for such loans and advances.

About the latter part of September, 1906, the said Homer Wilson entered into an arrangement with the said J. R. Elgan, respondent herein, whereby the latter was to assist in the sale of certain treasury stock of the company, and for his services was to receive a certain portion of the stock of the company then owned by the said Wilson and pledged as security, as aforesaid. On or prior to December 23, 1907, the said Homer Wilson was indebted to the said State Bank & Trust Company in the sum of about \$104,000; and the said Keane Wonder Mining Company was, at the said time, also indebted to the said bank in the sum of \$94,979. As security for the payment of the indebtedness of the said Wilson and the said Keane Wonder Mining Company, the said bank was then holding 975,000 shares of the said stock of the said Wilson. Between the 21st and 23d days of December, 1907, the said Keane Wonder Mining Company purchased certain property from the said Wilson for \$45,298.94, and by arrangement between them, and with the consent of said bank, said amount was credited by said bank to Wilson and charged to the Keane Wonder Mining Company. On said date, December 23, 1907, the Keane Wonder Mining Company gave to the said bank its four promissory notes, aggregating \$140,278.92, and the said Wilson executed two notes, covering the remaining portions of his indebtedness to the bank under the aforesaid arrangement, aggregating about \$59,000. The said 975,000 shares of stock remained with the said bank as collateral. On the same day, December 23, 1907, the respondent, J. R. Elgan, and the said Homer Wilson entered into a written agreement in settlement of their personal affairs, the material portion of which reads: "That the party of the first part hereby agrees to transfer to the party of the second part, or his assigns, one hundred and sixty thousand (160,000) shares of the capital stock of the Keane Wonder Mining Company, now held by the State Bank & Trust Company, as collateral security for the indebtedness of the Keane Wonder Mining Company, and the indebtedness of Homer Wilson, said stock to be delivered to said second party or his assigns at the time of its surrender and release by the State Bank & Trust Company to Homer Wilson." Plaintiff's Exhibit 1.

On or about February 12, 1908, said State Bank & Trust Company transferred and assigned the said notes and indebtedness of said Keane Wonder Mining Company and the said Wilson, together with all of said stock held as collateral security for the same, to the defendant Frances-Mohawk

Mining & Leasing Company, which latter company thereafter continued to be, and at the time of the commencement of this action was, the holder of all of said notes and indebtedness, together with all of said collateral. On May 22, 1908, the respondent, J. R. Elgan, obtained from the said Homer Wilson a written letter or order reading as follows: "Frances-Mohawk Mining and Leasing Co., Goldfield, Nevada. Gentlemen: You are hereby authorized to deliver to J. R. Elgan, one hundred and sixty thousand (160,000) shares of the capital stock of the Keane Wonder Mining Company referred to in the assignment to J. R. Elgan by me dated December 23, 1907, being a part of the nine hundred and seventy-five thousand (975,000) shares now held by you as collateral security for moneys advanced by you to the Keane Wonder Mining Company. Yours very truly, [Signed] Homer Wilson. Dated: Keane Wonder Mine, May 22, 1908." This letter or order was by the said respondent immediately thereafter presented to the said Frances-Mohawk Mining & Leasing Company; but the said company refused to deliver any of said stock in pursuance of said letter or order.

On June 23, 1908, the said J. R. Elgan brought this action to recover possession of the said 160,000 shares of stock. Upon the trial evidence was also admitted of the following facts as occurring subsequent to the institution of the action: On November 28, 1908, the Keane Wonder Mining Company executed new notes to the Frances-Mohawk Mining & Leasing Company, covering the amount then remaining unpaid on its said old notes and indebtedness, and including, also, the amount then remaining unpaid on said notes and indebtedness of Homer Wilson. To secure these new notes, the Keane Wonder Mining Company executed a deed of trust on its mining property and mill to one Wellington Gregg, Jr. Said Wilson at the same time paid the sum of \$17,400 on account of his said notes, leaving owing thereon a balance of about \$42,000. The Wilson notes and indebtedness were then transferred and assigned by the Frances-Mohawk Mining & Leasing Company to the Keane Wonder Mining Company, and taken over with said stock and held as collateral security therefor. By reason of the pendency of this action at that time, 160,000 shares of said stock was placed in escrow with said Gregg, with instructions to deliver the same to the Frances-Mohawk Mining & Leasing Company, if it be finally adjudged in said suit that said Elgan is entitled to recover said 160,000 shares of stock from the Frances-Mohawk Mining & Leasing Company, but in all other events to deliver said stock to the Keane Wonder Mining Company. Said stock placed in escrow was then, and ever since, and is now, claimed by the Keane Wonder Mining Com-

pany as collateral security for the unpaid balance of said Wilson notes and indebtedness, amounting to about \$42,000 and interest, and which has never been paid. Both of said companies and said Wilson signed said escrow instructions. At the same time the Keane Wonder Mining Company surrendered to the order of said Homer Wilson the remaining 815,000 shares.

The complaint alleged that on December 23, 1907, the Keane Wonder Mining Company owed the State Bank & Trust Company \$94,979, and that one Homer Wilson owed said bank on said day \$45,298.94, payment of which was then assumed by said Keane Wonder Mining Company; and that said last-mentioned company gave its several promissory notes to said bank on said December 23, 1907, to cover its own and said Wilson's indebtedness, aggregating the sum of \$140,278.92. Said complaint also alleged that the "plaintiff is, and at all times was, the owner of 160,000 shares of said stock," being part of a certain 975,000 shares "now, and at all of said times, standing in the name and owned (subject to plaintiff's ownership) by one Homer Wilson." It is also alleged that prior to May 22, 1908, the defendant Frances-Mohawk Mining & Leasing Company had come into possession of said 975,000 shares of stock, and that on the last-mentioned day said Wilson gave to the plaintiff a written order on said Frances-Mohawk Mining & Leasing Company for the delivery of 160,000 out of said 975,000 shares of said stock. Said complaint then alleges and proceeds upon the theory that on December 23, 1907, while plaintiff was the owner of said 160,000 shares of stock, he and said Homer Wilson pledged said 975,000 shares to said bank as an accommodation to the Keane Wonder Mining Company, as security for the payment of its said notes and indebtedness, amounting to \$140,278.92, as aforesaid; that all of said notes and indebtedness had been paid prior to said May 22, 1908; and that plaintiff was entitled to the possession of said stock.

The defendant Keane Wonder Mining Company answered, denying the general facts showing plaintiff's alleged right to the possession of said stock, and denying that he ever was or is the owner of said stock, or that he pledged it for said debt, or at all, or that he pledged it as an accommodation to said company, or that plaintiff is entitled to the possession of said stock.

The defendant Frances-Mohawk Mining & Leasing Company filed a demurrer, but later on withdrew its demurrer, and by stipulation in writing filed in the case waived time to answer, and consented that its default be taken and entered.

The plaintiff, J. R. Elgan, and the said Homer Wilson were the only witnesses for the plaintiff at the trial, and there is no

substantial conflict in their testimony as to material facts.

Upon the conclusion of plaintiff's evidence, the defendant Keane Wonder Mining Company moved for a nonsuit and for judgment in its favor. Thereupon plaintiff consented to the granting of the motion for a nonsuit; whereupon the defendant Keane Wonder Mining Company applied to the court for leave to withdraw its motion for a nonsuit, and to file amendments to its answer to conform to the proofs. It was thereupon stipulated by the plaintiff and the defendant Keane Wonder Mining Company that plaintiff should withdraw its consent to the granting of motion for nonsuit, and that defendant Keane Wonder Mining Company should be allowed to withdraw said motion for a nonsuit, and that said defendant should file said amendments to its answer, all of which was accordingly done.

Thereafter the defendant Keane Wonder Mining Company filed an amendment to its answer, setting up all of the material facts disclosed by the evidence occurring both before and after the filing of plaintiff's complaint, excepting the fact of the surrender by the defendant Keane Wonder Mining Company back to the said Homer Wilson of all of the said 975,000 shares of stock, other than the 160,000 shares deposited in escrow with the said Wellington Gregg, Jr. Thereafter it was stipulated and agreed by the attorneys for the plaintiff and defendant Keane Wonder Mining Company, in open court, that the transfer of said indebtedness and notes of Homer Wilson by the Frances-Mohawk Mining & Leasing Company to the Keane Wonder Mining Company, the execution of said escrow agreement and the delivery thereunder to Wellington Gregg, Jr., in escrow, of 160,000 shares of said stock; the surrender by the Keane Wonder Mining Company to the order of said Homer Wilson of the remaining 815,000 shares of the original 975,000 shares of said stock theretofore in the possession of the Frances-Mohawk Mining & Leasing Company, and the execution by the Keane Wonder Mining Company of said deed of trust to Wellington Gregg, Jr., to secure the payment of the balance of its own said indebtedness and also that of said Homer Wilson to the Frances-Mohawk Mining & Leasing Company, were, each and all of them, acts forming one transaction, and parts of one transaction, and that they all occurred and took place on the 23d or 24th day of November, 1908. And it was further admitted by counsel for the defendant Keane Wonder Mining Company, in open court, that the defendant Keane Wonder Mining Company had notice and knowledge of the existence and execution of the written agreement between plaintiff and Homer Wilson, marked "Plaintiff's Exhibit 1," and of all the rights and interests created thereby.

Thereupon said cause was argued by the respective counsel for the plaintiff and the defendant Keane Wonder Mining Company, and said defendant Keane Wonder Mining Company moved the court for judgment in its favor upon the merits, and for judgment that the plaintiff take nothing herein as against the defendant Frances-Mohawk Mining & Leasing Company.

Thereafter the court made its findings of fact and decision in writing, and directed that judgment be entered in favor of plaintiff, to the effect that the said Frances-Mohawk Mining & Leasing Company be required to deliver said stock to the plaintiff, and further ordering that plaintiff's application to file a supplemental complaint, setting up the facts which occurred after the commencement of the action as shown by the evidence, be allowed. Thereafter the plaintiff filed such an amendment and supplement to the original complaint.

James F. Peck, Frank J. Solinsky, and Paul C. Morf, for appellant. Augustus Tilden and J. F. Douglass, for respondent.

NORCROSS, J. (after stating the facts as above). This is an appeal from the judgment and from an order denying a motion for a new trial. The record contains about 40 assignments of error; but it will not, we think, be necessary to consider each separately, as the material questions presented will fall under a few main propositions.

[1, 2] It is contended that the court erred in permitting the plaintiff to file an amended and supplemental complaint, after the decision and before the entry of judgment, setting up the facts which occurred subsequent to the institution of the action. We think, under the facts of this case, no error was committed in such order. It is conceded that the plaintiff was in error as to certain facts alleged in the original complaint, and that at the time suit was instituted plaintiff was not entitled to recover on the actual facts of the case then existing. Plaintiff offered to consent that the motion for a nonsuit be granted. The defendant appellant then asked leave to withdraw such motion, and by stipulation of the parties the motion and consent were withdrawn, and defendant given leave to file amendments to its answer to conform to the proofs. The defendant filed amendments to its answer, relying upon facts occurring subsequent to the institution of the suit, and praying for the judgment of the court that it be adjudged entitled to the possession of the stock in question, to hold the same as security for the payment of the balance due on the Wilson notes. The case was finally presented to the court upon the facts as disclosed upon the trial, and upon those facts the defendant Keane Wonder Mining Company was asking for judgment in its favor. We think the court very properly permitted the plaintiff to amend and supplement his pleading, so that judgment

could be rendered in accordance with the undisputed facts shown to have existed at the time of the trial. We think, under the circumstances, defendant appellant, is not in position to object to the order permitting the filing of the amended and supplemental complaint.

[3] Upon the facts of this case, there is but one controlling question: Has the defendant Keane Wonder Mining Company the right to the possession of the stock in question, to be held by it as security for the payment of the balance due on the Wilson notes? If it has not the right to such possession for such purpose, the stock ought to be delivered to the plaintiff; for it is clearly shown to be his stock, and there does not seem to be any controversy over plaintiff's allegation that a judgment for damages would not be an adequate remedy in this case.

It is conceded that the Keane Wonder Mining Company, on the 23d or 24th day of November, 1908, the date of the assignment of the Wilson notes to the latter company and the surrender by said company of the said 815,000 shares of its stock, theretofore held as pledge, back to said Wilson, and the deposit in escrow of the remaining 160,000 shares of stock to abide the result of this suit, had knowledge of the existence and execution of the written agreement between respondent and the said Homer Wilson, of date December 23, 1907. Plaintiff's Exhibit 1, supra. By the terms of that agreement, respondent became the owner of 160,000 shares of the stock of the appellant corporation, subject to the conditions of the pledge of such stock and the remaining stock of Homer Wilson as security for the payment of the indebtedness of said Wilson and appellant. When the appellant became the assignee of the Wilson notes, it had the undoubted right to hold the security previously held by the State Bank & Trust Company and the Frances-Mohawk Mining & Leasing Company for the payment of such notes. However, having knowledge that the respondent was the owner of 160,000 shares of the 975,000 shares so pledged as security, the appellant was bound to exhaust the security of the principal debtor, Wilson, before resorting to that of the respondent. The appellant could not, by arrangement with Wilson, without the knowledge or consent of respondent, segregate the stock to which respondent was entitled and hold that alone as security for the Wilson notes, and surrender the remaining stock to Wilson, freed from the conditions of the pledge. This transaction cut off entirely respondent's right to ever become subrogated to all the rights of the owner and holder of the Wilson notes. The courts are justified in accepting it as a fact established that the appellant considered the 160,000 shares retained as ample security for the payment of the balance due on the Wilson notes, and that the stock surrendered to Wilson, being about five times

greater than the stock retained as security, was more than sufficient to have secured the payment of the notes, so that the respondent would have been ultimately entitled to have recovered his stock in full. We think the appellant should be held to have surrendered its right to hold any part of the respondent's stock as security for the payment of the Wilson notes.

In *Le Marchant v. Moore*, 150 N. Y. 209, 44 N. E. 770, one question, similar in principle to that presented here, was considered by the Court of Appeals of New York. We quote from the opinion in that case by Haight, J., the following excerpt: "Treating the plaintiffs as the owners, with the stock in possession of the defendants, as pledgees of Evans & Co. for the payment of their indebtedness to the defendants, the plaintiffs had the right to demand, and a court of equity would require, the defendants to first satisfy their claim out of the other securities in their hands belonging to Evans & Co. before resorting to the property of the plaintiffs. The defendants, as pledgees, were entitled to regard Evans & Co. as the owners, until they were notified of the plaintiffs' rights. Thereafter they were bound to recognize the plaintiffs' claim, and deal with the stock accordingly. The plaintiffs, as owners, had the right to have timely notice of any sale of their stock, and to have the other stocks or security in the hands of the defendants belonging to the pledgor first applied. *Smith v. Savin*, 141 N. Y. 315 [36 N. E. 338]; *Hazard v. Fiske*, 83 N. Y. 287." See, also, *Union Pacific Ry. Co. v. Schiff* (C. C.) 78 Fed. 218; *Brown v. Bank*, 112 Fed. 901, 50 C. C. A. 602, 58 L. R. A. 876; *Keel v. Leby*, 19 Or. 450, 24 Pac. 253; *Colebroke on Collateral Securities*, § 239; *Jones on Pledges*, § 711.

The judgment and order appealed from are affirmed.

(24 Nev. 493)

Ex parte SIMMONS et al. (No. 2,034.)

(Supreme Court of Nevada. Aug. 10, 1912.)

1. HABEAS CORPUS (§ 27*)—RIGHT TO RELIEF—DE FACTO JUSTICES OF THE PEACE.

Under Rev. Laws, § 4926, which provides that when any justice of the peace, through ill health or other cause, is prevented from discharging his duties, he may invite another justice of the same county to attend to such duties, where a justice deemed himself disqualified to try a criminal case and called in another justice, and all parties assumed the request was lawfully made, the latter justice was at least a de facto officer, rendering a judgment of conviction valid and not subject to collateral attack on habeas corpus.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 22; Dec. Dig. § 27.*]

2. CRIMINAL LAW (§ 167*)—FORMER JEOPARDY.

An acquittal in such case would have barred a subsequent prosecution.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 304, 308, 310, 311; Dec. Dig. § 167.*]

Application of Earl Simmons and others for a writ of habeas corpus. Proceedings dismissed.

Salter & Robins, for petitioners. Cleveland H. Baker, Atty. Gen., for respondent.

NORCROSS, J. This is an original proceeding in habeas corpus. Prior to the hearing on the writ before this court, application for a writ was made to the Chief Justice and a writ issued returnable before Hon. T. F. Moran, District Judge. Hearing was had upon that writ, and the discharge of the petitioners denied, whereupon the application was made to this court. The facts were stipulated and the presence of petitioners waived by respective counsel.

The following are the agreed facts upon which the petitioners rely for their discharge: "That on the 26th day of July, 1912, a complaint under oath was duly filed in the justice court of Mazuma township, in and for the county of Humboldt, state of Nevada, charging the said petitioners with the crime of riot, and that such complaint charged the offense of riot. That thereafter the defendants were brought into court, by virtue of a sufficient warrant, issued upon said complaint, and were arraigned and pleaded not guilty to said offense, and that thereafter the said defendants made an affidavit and motion for a change of venue from said court on the ground that the justice thereof, namely, R. H. Young, was so prejudiced against them that thereafter, and on the same date, the said Justice Young, being then and there a material witness on behalf of the state in the trial of the cause then pending, and feeling disqualified for said reasons to try said cause, invited B. L. Hood, justice of the peace of Lake township, in and for said county, to hear and try said cause, under the provision of section 4926, Revised Laws of the state of Nevada. That thereafter said defendants were tried in said court before B. L. Hood, acting as such justice of the peace, as aforesaid, and were thereafter convicted of the crime of rioting, and were by said court duly sentenced to serve the term of 30 days in the county jail of Humboldt county at Winnemucca, state of Nevada, and that a commitment, due in form, was by the said B. L. Hood thereupon issued, and that under and by virtue of said commitment the said defendants were on the 27th day of July, 1912, delivered to me and ever since have been; and now are, in my custody as the sheriff of Humboldt county, state of Nevada, and that the term of their sentence has not expired. That thereafter, and within the time allowed by law, the said defendant duly perfected an appeal from the said judgment to the Sixth judicial district court of the state of Nevada, and said appeal is now pending in said court, but no bond on said appeal has

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ever been approved, although the same was fixed by said Justice R. H. Young at the sum of \$300 each."

[1] It is the contention of counsel for petitioner that the justice of the peace of Mazuma township had no authority, under the provisions of section 4926 of Revised Laws, to call in another justice of the county to preside in his court and try petitioners, for the reason that the facts did not present a situation authorizing the calling of another justice within the meaning of that section. In addition to taking a contrary view as to the construction of the statute, the Attorney General contends that the justice of the peace of Lake township, while presiding in the justice's court of Mazuma township in the trial of petitioners, was at least the de facto justice of that court for the time being, and his authority therefore not open to collateral attack in this proceeding.

Section 4926 of Revised Laws provides: "Whenever any justice of the peace, in consequence of ill health, absence from his township, or other cause, shall be prevented from attending to his official duties, it shall be lawful for him to invite any other duly qualified justice of the peace of the same county to attend to his official duties, including that of registry agent, instead of such absent or disqualified justice of the peace; provided, such temporary vacancy, resulting from absence or disqualification, shall not be filled for more than thirty days at any one time."

Counsel for petitioners rely solely upon the proposition that the fact that the justice of the peace of Mazuma township was a material witness for the state against petitioners and deemed himself prejudiced against them was not a disqualification within the meaning of the words "or other cause," used in the section of the statute supra, and therefore he was without authority to call in another justice to preside, and, for that reason, such other justice was without power to try petitioners upon the complaint against them, and the judgment of guilty and sentence thereon was coram non iudice and void.

If, as contended by the Attorney General, the justice of Lake township, while presiding in Mazuma township upon the trial of petitioners, was the justice de facto for the time being of said Mazuma township, the judgment against petitioners was valid, and the authority of such de facto justice is not open to collateral attack upon a proceeding in habeas corpus. *Walcott v. Wells*, 21 Nev. 47, 24 Pac. 367, 9 L. R. A. 50, 37 Am. St. Rep. 478; *Ex parte Fedderwitz*, 62 Pac. (Cal.) 935; *In re Corrigan*, 37 Mich. 66; *Ex parte Parks*, 8 Mont. 426; *In re Johnson*, 15 Neb. 512, 19 N. W. 594; *In re Radl*,

86 Wis. 645, 57 N. W. 1106, 39 Am. St. Rep. 918; 24 Cyc. 416.

This court in a number of cases has had occasion to consider what constitutes a de facto officer. In *Walcott v. Wells*, supra, it was said: "What constitutes a de facto officer? This court, in *Mallett v. Uncle Sam G. & S. M. Co.*, 1 Nev. 197 [90 Am. Dec. 484], said that an officer de facto is on the one hand distinguished from a mere usurper of the office, and on the other hand from an officer de jure. In *Meagher v. Storey Co.*, 5 Nev. 245, it was said that acts performed by a city recorder as a committing magistrate, though the statute authorizing him to so act is unconstitutional and void, are to be regarded as the acts of a de facto officer, and valid as to third persons and the public. In *State ex rel. Corey v. Curtis*, 9 Nev. 338, we had occasion to examine and discuss, to a limited extent, the question as to what constitutes an officer de facto. The rules taken from the authorities were there announced as follows: (1) One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. (2) One who actually performs the duties of an office, with apparent right, and under claim and color of an appointment or election. (3) One who has the color of right or title to the office he exercises. (4) One who has the apparent title of an officer de jure. In *State v. Carroll*, Chief Justice Butler gave the following complete definition of a de facto officer: 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: First. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. Third. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise; such ineligibility, want of power, or defect being unknown to the public. Fourth. Under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.' 38 Conn. 471 [9 Am. Rep. 409]. This definition has been accepted, approved, and followed, in its entirety, in all the numerous subsequent cases where the question has been discussed, and was referred to with ap-

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 130 Cal. xviii.

probation by this court in *State ex rel. Harris v. Blossom*, 19 Nev. 317 [10 Pac. 430]."

"A de facto justice of the peace is one who colore officii claims and assumes to exercise the authority of the office, is reputed to have it, and in whose acts the community acquiesces." 24 Cyc. 405.

The only question that could have arisen upon a direct attack upon the authority of Justice Hood to act in Mazuma township in the case against petitioners "was as to whether the words "or other cause," in section 4926, supra, should be given a broad or restricted construction. It is, we think, quite manifest that there is room for a difference of opinion and argument as to whether the words in question are broad enough to permit the facts stated in this case to constitute a disqualification of the justice within the meaning of the section so as to authorize his calling another justice of the county to preside. The justice of the peace of Mazuma township deemed that the circumstances were such as to authorize him, under the statute, to call in another justice to act in the case. The justice called considered that he was legally authorized to preside over the court and try petitioners, and upon such assumed authority did preside over the court, try and convict petitioners. His authority to preside was not questioned upon the trial either by the state or the petitioners, but all acquiesced in his assumed authority to so preside.

In *Vanderberg v. Connolly*, 18 Utah, 112, 54 Pac. 1097, supra, the court said: "But the view we take of this case does not render it necessary to decide whether the law, under which Blazer, the justice, was appointed, should have been held valid had his authority been questioned by a direct proceeding by the territory. In this case a collateral attack is made upon his authority to act as such, and the question is: Can he be regarded as a de facto officer? If he can be held an officer de facto, it is unnecessary to decide that he was or was not a justice of the peace de jure. Whether Blazer's appointment, qualification, and assumption to act as justice of the peace was in pursuance of a valid law presents a question as to which there must be a doubt, without the judgment of a competent court affirming or denying its validity—a question as to which lawyers and courts might differ. A law might be so palpably unconstitutional as to be so clearly void as to leave no room to doubt its invalidity. In the latter case courts have held that appointments to judicial office should not give color of right to exercise the powers purported by such unconstitutional law. But as to this proposition there is a conflict in the authorities. But when the unconstitutionality or invalidity of the law is doubtful, and the officer has been

appointed and qualified, and has discharged the duties pertaining to it without question, as it appears from the record Blazer had, litigants in his courts should be protected—that as to the public he should be held a de facto officer."

The justice of Lake township was qualified, upon proper request from the justice of Mazuma township, to preside over and conduct the business in the court of the latter township. Request was made by the latter justice for the former justice to preside, which request was complied with; all parties, assuming the request to have been lawfully made. There being some reasonable basis for such assumption of regularity, we think the justice of Lake township while presiding in the case against petitioners in Mazuma township was at least the de facto justice of that court for the time being and his acts in question valid.

[2] Had petitioners been acquitted instead of having been convicted upon the trial, such acquittal would have been a good defense to any further prosecution on the same charge.

The proceedings are dismissed.

STATE ex rel. ALLEN v. BRODIGAN, Secretary of State. (No. 2,029.)

(Supreme Court of Nevada. Aug. 1, 1912.)

1. ELECTIONS (§ 120*)—NOMINATIONS—PRIMARY ELECTIONS—NOMINATION BY PARTY CONVENTION—STATUTORY PROVISIONS.

Original Primary Election Law (St. 1909, c. 198) § 2, which declared that the act should "not apply to special elections to fill vacancies, to the nomination of party candidates for Presidential Electors," and that it should not be construed as affecting the right of political parties to hold conventions for the selection of delegates to national conventions, was amended by St. 1911, c. 165, to provide that the act should "not apply to special elections to fill vacancies to the nomination of party candidates for Presidential Electors," thus omitting the comma after the word "vacancies" as shown in the original act. Section 27 of the original act provided that vacancies occurring after the holding of any primary election should be filled by the party committee of the city, county, or state as the case might be. The omission of the comma must be regarded as the result of a clerical error, otherwise two methods of selecting candidates to fill vacancies in the office of presidential electors, and hence electors chosen by a convention of a political party were the only names entitled to go upon the official ballot.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

2. STATUTES (§ 200*)—CONSTRUCTION—PUNCTUATION.

In construing statutes rendered uncertain by punctuation, the courts properly regard such marks only as an aid in arriving at the correct meaning of the words of a statute, not as having a controlling influence; and courts should not hesitate to repunctuate a statute where it is necessary to arrive at the true legislative intent or where punctuation or omission thereof is caused by clerical error or inadvertence, or where it is evident that the

punctuation gives to the statute an absurd or meaningless interpretation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 278; Dec. Dig. § 200.*]

3. STATUTES (§ 207*)—CONSTRUCTION—AVOIDANCE OF INCONSISTENCY.

In the construction of statutes, courts should harmonize inconsistent parts of acts bearing upon the same question when it is possible to arrive at the true legislative intent thereby, and should avoid a construction which creates inconsistent positions whenever it can possibly be done without doing violence to the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 284; Dec. Dig. § 207.*]

4. MANDAMUS (§ 143*)—PREMATURE APPLICATION FOR WRIT—DENIAL.

On application for mandamus to compel the Secretary of State to accept and file certificates of nomination of presidential electors chosen at a Democratic party convention, brought before the expiration of the time provided for filing with the Secretary of State certificates of nomination by convention, is premature and must be denied.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 282-285; Dec. Dig. § 143.*]

5. EVIDENCE (§ 83*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

It will be presumed that the Secretary of State will do his duty in filing and accepting certificates of nomination when presented at the proper time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

Original proceeding for writ of mandamus by the State of Nevada, on the relation of Lem Allen, against George Brodigan, Secretary of State of the State of Nevada. Writ denied.

James D. Finch, for petitioner. Cleveland H. Baker, Atty. Gen., for respondent. S. Summerfield, amicus curiæ.

SWEENEY, C. J. [1] This is an application for a writ of mandamus to compel the Secretary of State to accept and file the certificates of nomination of the three regularly nominated presidential electors of the Democratic party, chosen in regular convention assembled, as the exclusive nominees for said offices of the Democratic party to be voted for at the general election in November, 1912.

It appears the Secretary of State, in issuing his call for the primary election to be held in September, 1912, included in the offices to be voted for at the primary election "Three Presidential Electors." It further appears that the Democratic party, in a regular state convention, duly authorized, called, and convened, nominated three presidential electors who, it is contended by petitioner, are the only authorized persons legally privileged to appear on the official ballot in November to be voted for as the presidential electors of the Democratic party, and the law does not permit or authorize presidential electors to be selected at the primaries under the provisions of the primary law.

A disposal of the point in issue calls for an examination and construction of the statutes bearing upon the point in issue, wherein it appears there is a conflict of opinion by the respective parties as to the meaning of the statutes in question.

Section 2 of the original primary election law, passed by the Legislature of Nevada March 23, 1909 (Stats. 1909, p. 273), which pertains to the point in issue, reads as follows: "Sec. 2. All candidates for elective public offices shall be nominated as follows: (1) By direct vote at primary elections held in accordance with the provisions of this act; or (2) by nominating petitions signed and filed as provided by existing laws. Party candidates for the office of United States Senator shall be nominated in the manner provided herein for the nomination of candidates for state offices. This act shall not apply to special elections to fill vacancies, to the nomination of party candidates for Presidential Electors; nor to the nomination of officers of the municipalities, whose charters provide a system for nominating candidates for such offices; nor to the nomination of officers for reclamation and irrigation districts; nor to school district officers or school trustees; nor shall it be construed as restricting or affecting the right of political parties to hold, under existing laws, which are hereby continued in force for all such purposes, primaries and conventions for the selection of delegates to national conventions."

A simple reading of this section in question makes it manifest that the Legislature did not intend that presidential electors should be included in the primary system then adopted for the purpose of electing nominees, because it is especially provided in said section, after designating that all candidates elected for public offices shall be nominated, as follows: That "this act shall not apply * * * to the nomination of party candidates for Presidential Electors." Prior to the enactment of the new primary law the mode of selecting presidential electors was by convention with the usual exceptions providing for their election, and the law pertaining thereto has in no material respect been changed from the law now governing the election of presidential electors. The Legislature on March 23, 1911, passed an amendatory act to the primary law (Stats. 1911, p. 334), wherein, among other provisos, they amended the latter portion of section 2, above quoted, to read as follows: "This act shall not apply to special elections to fill vacancies to the nomination of party candidates for presidential electors, nor to the nomination of officers of the incorporated cities, whose charters or ordinances now or may hereafter provide a system of nominating candidates for such offices, nor to the nomination of officers for reclamation and irrigation districts; nor to school district officers or school trustees; nor shall it be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

construed as restricting or affecting the right of political parties to hold, under existing laws, which are hereby continued in force for all such purposes, primaries and conventions for the selection of delegates to national conventions."

In viewing section 2 of the original primary act of 1909 in the light of the amendment, it will be seen that section 2 of the original act was enlarged so as not to apply to the nomination of officers of "incorporated cities whose charters or ordinances now or may hereafter provide a system for nominating candidates for such offices"; the word "municipal" having been stricken out and the words "incorporated cities" inserted, and the words "or ordinances now or may hereafter" added to section 2 by the amendatory act. Otherwise than as here pointed out, the entire language of the original act remained practically unchanged. An examination of the original enrolled bills, as filed in the office of the Secretary of State, of the original primary act of 1909 and of the amendment of 1911, shows that in the original act a comma is placed after the word "vacancies" which in the amendatory act is omitted. The query arises as to whether the omission of the comma, as indicated, was intentional, or whether omitted by a mistake or by inadvertence, changes the original act by intent or otherwise to the extent of providing that presidential electors must be selected at the primaries rather than by convention as heretofore provided.

A close examination and reading of the statutes in question and the entire primary election law convinces us that the Legislature when it passed the original primary election act never intended to preclude any political party from holding a state convention as they had done theretofore, for selecting candidates for the various offices, but when so selected for certain offices the nominations as made were only recommendatory, and the nominees as selected by the convention could be rejected or accepted at the primaries as the people chose. *Riter v. Douglass*, 32 Nev. 420, 109 Pac. 444. It is equally apparent that the Legislature contemplated that political conventions would be held in the future for the purpose of selecting delegates to the national convention, and for other political purposes and matters, and they especially excepted the nomination of presidential electors from the primary act and left them to be nominated by convention as of old.

[2] In construing statutes which are rendered in doubt or uncertain by punctuation marks, courts should and do properly regard punctuation marks only as an aid in arriving at the correct meaning of the words of the statutes, and in gleaning the true legislative intent, and for this reason, punctuation marks cannot be given a controlling influence. Courts should not hesitate to repunctuate a statute where it is necessary to

arrive at the true legislative intent, or where it is manifest that the punctuation or omission thereof is caused by clerical error, inadvertence, or mistake, or where it is evident that the punctuation gives to the statute an absurd or meaningless interpretation. *Howe v. Coldren*, 4 Nev. 171; *Holmes v. Phoenix Insurance Co.*, 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308; *Cook v. State*, 110 Ala. 40, 46, 20 South. 360; *Cyc.* vol. 36, 117, 118a.

In the present act the omission of the comma after the word "vacancies" we believe to be either a clerical error, omission, or mistake of the enrolling clerk, and not expressive of the legislative intent, particularly in view of the fact that the section with the comma omitted as appears in the amended section of the act of 1911 creates an absurd and meaningless expression and contemplates an anomaly in our political system unheard of, to wit, in that there can be no such thing "as a special election to fill vacancies to the nominations." Again, it might be observed that the omission of the comma after the word "vacancies" as it appears in section 2 of the amendatory act of 1911 is not in keeping with the rules of good syntax and grammar, because the use of the preposition "to" following the word "vacancies" is inconsistent with good grammar, and we believe that if such an amendment had been intended the preposition "to" would have been stricken out and the word "in" inserted in its place.

A careful reading of the primary act will reveal that section 27 of said act provided, among other things, as follows: "Vacancies occurring after the holding of any primary election shall be filled by the party committee of the city, county, city and county, district or state, as the case may be"—and would cover any emergency which would arise making it necessary to fill any vacancies which may occur in the presidential electors who might have been selected by a state convention. In view of this section there was no necessity of the Legislature to make provision to fill vacancies which might occur in the list of presidential electors.

Construing the statutes as we have, section 2 as amended in the act of 1911 becomes in thorough harmony with section 27 of the primary act. To hold otherwise would render an inconsistency in the law applicable to elections for the filling of vacancies which may occur in nominees for presidential electors, because, if we adopt any other view as contended for by the petitioner, we would have two methods of selecting candidates to fill the vacancies which might occur in the presidential electors, to wit, by special election, "and by appointment by the party committee," etc.

[3] It is a fundamental rule of construction that courts should harmonize, wherever possible, inconsistent parts of acts bearing upon the same question when it is possible

to arrive at the true legislative intent by so doing, and to avoid a construction which creates inconsistent positions wherever it is possible to do so without doing violence to the legislative intent.

We think the names of the presidential electors as selected at the Democratic convention of the Democratic party held in Fallon in May, 1912, are, under the law, the only entitled presidential electors to go upon the official ballot as representing the Democratic party for the general election in November, 1912.

[4] We come now to the prayer of the petitioner wherein it is asked that a writ of mandamus issue against the Secretary of State to compel him to accept and file the certificates of nomination of the said presidential electors chosen at the said Democratic convention.

The following part of section 1839, Revised Laws of Nevada, which reads as follows, seems to have escaped the attention of all counsel in the present proceeding: "Certificates of nomination required to be filed with the Secretary of State shall be filed not more than sixty days nor less than fifty days before the day of election when the nomination is made by convention, and not more than sixty days and not less than forty-five days before the day of election when the nomination is made under the provisions of section 4 of this act."

In view of the fact that a specific time is designated by statute when these certificates of nomination must be filed, and that time not having arrived, the application for the writ is premature and must be denied.

[5] There is nothing, however, to prevent the petitioner filing the certificates of the presidential electors in question at the proper time, and it is presumed that the Secretary of State will do his duty in filing and accepting them when so presented at the proper time.

For the foregoing reasons the application for the writ will be denied. Let such be the order.

TALBOT and NORCROSS, JJ., concur.

(14 Ariz. 120)

TERRITORY v. GOMEZ.

(Supreme Court of Arizona. July 6, 1912.)

1. ASSAULT AND BATTERY (§ 56*)—CRIMINAL OFFENSES—ELEMENTS—"DEADLY WEAPON."

Whether a person pointing a cocked pistol at another in an angry and threatening manner is guilty of assault with a "deadly weapon" depends on whether or not the pistol was loaded, where accused was not within striking distance of the other party.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 80, 81; Dec. Dig. § 56.*

For other definitions, see Words and Phrases, vol. 2, pp. 1853-1856; vol. 8, p. 7627.]

2. ASSAULT AND BATTERY (§ 95*)—CRIMINAL OFFENSES—QUESTIONS FOR JURY.

Where the evidence showed that accused pointed a cocked pistol at the prosecuting witness in an angry and threatening manner, whether or not the pistol was loaded so as to make accused guilty of assault with a deadly weapon was a question for the jury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 141; Dec. Dig. § 95.*]

Duffy, J., dissenting.

Appeal from District Court, Yavapai County; before Justice Edward M. Doe.

Victor Gomez was acquitted of assault with a deadly weapon, and the Territory appeals on questions of law. Reversed.

Attorney General Bullard, for the Territory.

FRANKLIN, C. J. The defendant was indicted for assault with a deadly weapon. From a judgment of acquittal the territory appeals on the questions of law.

In criminal actions the territory (now state) may appeal to the Supreme Court on questions of law alone. It is so provided by paragraph 1038 of the Penal Code of Arizona of 1901. This is such an appeal. The determination of this appeal can, of course, have no effect on the acquittal of the defendant, which is a bar to any further prosecution.

[1, 2] The appeal is predicated upon the following state of facts, recited in the brief of the Attorney General, to wit: "The defendant was indicted for an assault with a deadly weapon committed upon one J. E. Mahurin on July 9, 1910, in Yavapai county, Ariz. Mahurin and his wife were driving from their home to Del Rio, when they saw defendant herding a band of sheep upon Mahurin's homestead, whereupon the Mahurins drove off the road and in the direction of defendant some 50 to 70 feet. Mahurin then asked defendant whose sheep he had, and the defendant said, 'I no sabe.' Mahurin then said, 'Yes, you do. Aren't they Ben Yeager's?' and at the same time got out of his buggy, saying to defendant, 'Here is my corner post,' and asked defendant to keep the sheep off his land. At this time defendant drew his pistol, cocked it, and pointed it at Mahurin, and advanced toward Mahurin from a distance of about 16 feet to within 6 feet, saying, 'Qui dado, qui dado.' Mrs. Mahurin, discovering the imminent danger in which her husband was, said to him, 'Come and get in the buggy, quick, he is going to shoot you.' Mahurin, looking at defendant, who was then pointing a pistol at him and advancing toward him, said, 'Don't shoot, I am not going to hurt you,' and retreated into his buggy. As the Mahurins drove away, the defendant returned the pistol to his scabbard. Both Mr. and Mrs. Mahurin say that defendant cocked the pistol, and held it on Mahurin

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

until he got into his buggy, saying all the time "Qui dado, qui dado!" The exclamation "Qui dado, qui dado," being interpreted, means "Look out! look out!"

At the close of the evidence, the defendant's counsel moved for an instructed verdict of acquittal on the ground that "there had been no assault with a deadly weapon proved." The motion was granted, the court observing: "It is a somewhat interesting case, but, under the evidence of the case, I am convinced that a conviction could not be sustained on a technical ground"—this observation on the part of the court evidently referring to the failure of the evidence to disclose any direct or visual proof that the pistol used at the time of the alleged assault was, in fact, loaded.

The territory assigns error: "(1) The court erred in holding that the pointing of a cocked pistol within six feet of the prosecuting witness in an angry and threatening manner and until the latter returned to his seat in his buggy, advancing on the prosecuting witness all the time, saying, 'Qui dado, qui dado!' (Look out, look out), was not an assault with a deadly weapon. (2) The court erred in directing the jury to return a verdict of not guilty under the evidence in this case."

In the adjudicated cases there is a sharp conflict of opinion as to whether the pointing of a firearm at another within shooting distance, in an angry and threatening manner, constitutes an assault with a deadly weapon, if there is no proof in the case that at the time of the alleged assault the firearm was in fact loaded. In *State v. Godfrey*, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830, the evidence of the assault tended to prove that the defendant, when not less than 30 yards nor more than 70 yards, pointed a Winchester rifle at a man, and threatened to kill him if he did not turn back. There was no direct evidence that the rifle was loaded, or that the defendant cocked the trigger, or did anything except to point the rifle and express the threat. The court held that under such circumstances it was for the jury to determine the character of the weapon under appropriate instructions, saying: "Some weapons under particular circumstances are so clearly lethal that the court may declare them to be such as a matter of law. Of this class are guns, swords, knives, pistols, and the like, when used within striking distance from the victim. All others are lethal or not according to their capacity to produce death or great bodily harm in the manner in which they are used; and of this the jury must always be the judges. It is a matter of fact the termination of which belongs to them. In the case under consideration the gun was a lethal weapon if it was loaded, otherwise it was harmless. It was there-

fore the peculiar and exclusive province of the jury to say whether this was so or not, and the court erred in so refusing to instruct them." In the case of *State v. Heron*, 12 Mont. 230, 29 Pac. 819, 83 Am. St. Rep. 576, the Supreme Court of Montana, after reviewing many of the authorities, say: "Although there is a division of views in the decided cases, we think that the better opinion is that, if a firearm is the alleged deadly weapon—a weapon the only ordinary use of which is by its being loaded—if it be pointed at the complainant in a threatening manner, if defendant makes threats to shoot, if the circumstances are such as would exist if one were using a loaded gun—in short, that if all the elements of the offense be made out, as required by the criminal laws and procedure, except the direct, we may say visual, proof that the weapon is loaded—under these circumstances, a direction to the jury to acquit is error, and the fact that the gun was unloaded (if such be the fact) is a matter of defense. Such view seems to be held by the weight of authority, and such is the only practical view in the enforcement of the statute in reference to assaults with deadly weapons of this character." We approve the doctrine as quoted from the Montana court. If the pistol was unloaded, unless it was used within striking distance of the person of another, it was harmless; if loaded, or, if used within striking distance, it was of a deadly character. In either view, however, the court, with appropriate instructions, should have submitted the matter to the jury to determine under all the evidence of the case. A verdict of guilty, as charged in the indictment if returned by the jury under the facts of this case would not be disturbed as unsupported by the evidence. Any other rule would practically prohibit the enforcement of the statute provided for punishing an assault with a deadly weapon, under such a state of facts and circumstances as here presented.

It is not the purpose of this court to draw nice distinctions and announce a technical rule when such a technicality could only have the effect of encouraging the bully to intimidate whom he pleases with a show of apparent deadly force and escape a merited punishment for his unlawful act, thus embarrassing the due administration of justice.

We are of the opinion that the court erred as a matter of law in not submitting the case to the jury under appropriate instructions.

CUNNINGHAM, J., concurs. ROSS, J., being disqualified and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. FRANK J. DUFFY, judge of the superior court of the state of Arizona in and for the county of Santa

Cruz, to sit with them in the hearing of this cause.

DUFFY, J. (dissenting). I do not approve the doctrine laid down by the Supreme Court of Montana in the case above cited. To hold, as in that case, that "the fact that the gun was unloaded (if such be the fact) is a matter of defense," is to put upon the defendant the burden of proving his innocence, because it compels him to prove the nonexistence of one of the material elements of the offense, viz., the present ability to carry into effect the unlawful attempt to injure. As defined by our statute, assault "is an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another." To constitute the crime of assault, there must be the unlawful attempt to commit a violent injury upon the person of another, and with the making of such attempt there must be coexistent the ability to carry such attempt into execution; i. e., to commit the injury. Each is a necessary element of the crime, and both must concur. If either one is missing, the accusation fails. Each then is a necessary allegation of the indictment. Both must be alleged, and the existence of each must be established by competent evidence beyond a reasonable doubt. When the weapon used is a pistol, to presume, or infer, or take for granted that the pistol is loaded is to presume the existence of one of the material elements of the offense, and to assume the truth of a material allegation of the indictment; in other words, it presumes the guilt of the defendant, and compels him to prove his innocence by proving the nonexistence of one of the material elements of the offense, to wit, the ability to inflict the injury.

In the case at bar there is no evidence whatever to prove that the weapon in the manner in which it was used was capable of producing death or great bodily injury. There is no evidence whatever, except the mere naked fact of the existence of the weapon, that at the time of the alleged assault the defendant possessed the ability to commit the violent injury essential to constitute the offense. The weapon may or may not have been loaded, and therefore the present ability essential to complete the commission of the crime may or may not have existed, but this court is not warranted, and neither was the lower court nor the jury warranted, in presuming such ability to exist. To do so is to presume the existence of one of the material elements of the offense, and therefore to presume the truth of a material allegation of the indictment.

Under the evidence submitted in this case, the jury would not have been warranted in finding a verdict of guilty, and the trial court was therefore justified in directing a verdict of acquittal.

(14 Ariz. 133)

VALLEY BANK OF PHOENIX v. JOHNSON,
State Treasurer.

(Supreme Court of Arizona. July 5, 1912.)

1. STATES (§ 142*) — FISCAL MANAGEMENT—GENERAL AND SPECIAL FUNDS.

Senate Bill No. 29 of the special session, sections 7 and 8, provides for a general fund and special funds in the state treasury. Section 9 provides that no transfers from one fund to another shall be made unless expressly authorized by law. Section 10 provides that no sum in excess of the sum appropriated for any purpose, or credited to any specific fund, shall be paid out from any money in the custody of the State Treasurer. Sections 11, 12, and 13 provide a method of bookkeeping by the treasurer, in effect, requiring all money to be carried in a cash fund or account on which all warrants are to be drawn and from which they are to be paid. *Held*, that sections 11, 12, and 13 are inconsistent with the previous sections expressly keeping the different funds separate and distinct, and, since they merely provide a method of bookkeeping, will be regarded as advisory only and disregarded, and hence state road fund warrants cannot be paid by the Treasurer unless he has money in his hands belonging to the state road fund, or the general fund, with which to make such payments.

[Ed. Note.—For other cases, see States, Cent. Dig. § 188; Dec. Dig. § 142.*]

2. STATES (§ 138*) — FISCAL MANAGEMENT—WARRANTS.

Senate Bill No. 8 of the special session, section 7, provides that there shall be annually raised by taxation for the state road tax fund a specified sum, and that 25 per cent. thereof for the year ending June 30, 1913, shall be used in paying the deficit in that fund for the year ending June 30, 1912, and that no obligation shall be assumed or expenses incurred under that act within any fiscal year, in excess of the levy therein provided for, and the money actually collected under such levy. Senate Bill No. 29 of the special session, section 13, provides that state warrants for the payment of which the Treasurer has no funds on hand shall be indorsed by him when presented for payment and shall thereafter draw interest. *Held*, that the provision of Senate Bill No. 8 against obligations in excess of the levy had no reference to the deficit already existing, and that warrants for obligations incurred prior to June 30, 1912, should be indorsed by the Treasurer when presented for payment, but that warrants for obligations incurred after that date should not be so indorsed, because it cannot be known what money will be actually collected during the fiscal year ending June 30, 1913.

[Ed. Note.—For other cases, see States, Cent. Dig. § 185; Dec. Dig. § 138.*]

Original application by the Valley Bank of Phoenix for a writ of mandamus against David F. Johnson, State Treasurer. Writ issued.

C. F. Ainsworth, of Phoenix, for applicant.
G. P. Bullard, Atty. Gen., for respondent.

ROSS, J. The petitioner alleges: That it is the owner and holder of two state road fund warrants, one for \$74.75, and one for \$2,779.20, both dated June 12, 1912; also, one general fund warrant of same date for \$70. That it presented said warrants to respondent, Johnson, as Treasurer of the State, for payment, and that payment was refused. That, after payment was refused, demand

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was made of the Treasurer to register and indorse warrants not paid for want of funds, and that this demand was likewise refused. Petitioner further alleges that the Treasurer has in his hands public funds belonging to the state aggregating in amount more than sufficient to pay the warrants presented and all outstanding warrants issued prior to the date of said warrants, and that the refusal of the Treasurer to pay or register and indorse warrants was arbitrary, illegal, and a breach of duty. Then follows prayer for alternative writ of mandamus, which was issued.

The Treasurer's answer is: (1) That he has no money in the state road fund, or in the general fund of the state. (2) That the road fund warrants constitute a part of a deficit in the state road fund for the fiscal year ending June 30, 1912. That the first Legislature of the state at the special session passed an act known as Senate Bill No. 8, "relating to the construction, maintenance and improvement of state roads and bridges; creating the office of State Engineer, prescribing the duties thereof and compensation therefor; fixing a tax levy and making appropriation to carry out the provisions of this act, and authorizing and directing the expenditure of such appropriation"—which act, among other things, provided as follows: "Provided, that twenty-five per cent. (25%) of the 'State Road Tax Fund,' herein provided for, for the fiscal year beginning July 1, 1912, and ending July 1, 1913, shall be subject to ~~the~~ [be] paid out, upon the authority and under the direction of the State Board of Control, upon claims approved by the State Engineer and the Board of Control and audited by the State Auditor, for any work done under the authority of the territory of Arizona or the state of Arizona, in the construction, reconstruction, repairing, improving, and maintaining of public highways, roads, and bridges prior to July 1, 1912." He further states that none of the taxes mentioned above has been collected. He further states that the only authority he has to pay said warrants is by virtue of sections 12 and 13 of an act passed at the special session of the Legislature, known as Senate Bill No. 29, entitled "An act defining and providing the powers and duties of the State Treasurer, permitting him to appoint a deputy and stenographer and prescribing their duties and compensation; defining what shall constitute the general fund; providing how other funds in the state treasury shall be carried and credited by the State Treasurer and directing the manner and method of payment by the State Treasurer of state warrants out of public moneys in his custody or possession and the manner of meeting outstanding warrants; and providing the manner in which the receipts and expenditures of the public moneys shall be published by the State Treasurer." The Treasurer, in his answer, questions the validity of this last

mentioned act for the reason, as he says, that it treats of a subject not related to or included in the Governor's call of the special session.

For the reasons given below, we do not deem it necessary to pass on the question as to whether the subject-matter contained in Senate Bill No. 29 is germane to any topic of legislation mentioned in the Governor's proclamation calling the special session of the Legislature. The sections of that act that are important in determining the question before us are:

"Sec. 7. The general fund consists of money received into the treasury and not especially appropriated to any other fund, and out of such fund all salaries of state officers, and expenses incident to the offices thereof, as authorized by law shall be paid.

"Sec. 8. All funds of the state, other than a general fund, and all moneys received and credited to such funds shall be considered and carried as appropriations for the use and benefit of such purposes for which such funds were created.

"Sec. 9. No transfers of money or moneys, or credit, shall be made from one fund to another, or from one appropriated sum to another, unless such transfers shall be expressly authorized and directed by law.

"Sec. 10. No sum of money or moneys, in excess of the amount appropriated for any purpose, or credited to any specific fund or funds, shall be paid out of, or from, any of the public money or moneys in the custody or possession of the State Treasurer.

"Sec. 11. All sums appropriated, and each and every state fund, shall be considered and carried on the books of the State Treasurer as a debit against the public money or moneys in the custody or possession of the State Treasurer, and against the credit of the state of Arizona.

"Sec. 12. All public money or moneys in the custody or possession of the State Treasurer shall be debited against the State Treasurer under the head of one account entitled 'cash' or 'cash fund or account' in a suitable book for that purpose to be known as the cashbook; and all funds and appropriations of money shall be considered and carried as charges or debits against such 'cash' or 'cash fund or account,' and all warrants and payment of public money shall be met and paid from such 'cash' or 'cash fund or account' and as warrants and payments of public money or moneys are met and paid as authorized and directed by law, such 'cash' or 'cash fund or account' shall be credited to the amount of such warrants or payments.

"Sec. 13. All state warrants shall be paid by the Treasurer in the order in which they are issued upon presentation; provided, that they are drawn in accordance with the state laws. If upon presentation to the Treasurer of any warrant he has not the funds in hand to pay the same, he shall indorse the day of its presentation upon the back of the war-

rant, and whenever it is paid, interest, at the rate of five (5) per cent. per annum, in lawful money of the United States, shall be allowed from said day, and paid in addition to the principal thereof; provided, however, that the interest paid under and by the authority of this section shall be paid from the general fund."

[4] It will be seen that sections 7 and 8 keep intact all the different funds provided by the different revenue laws of the state; that section 9 prohibits the use of the money in one fund to pay warrants drawn on another and different fund; that section 10 prohibits the payment of warrants in excess of the sum appropriated or credited to any specific fund or funds.

The plain language of these sections forces the conclusion that each fund provided by law shall remain intact, without diminution except by warrants legally drawn on that fund; or, differently stated, that no money or credits of one fund shall be diverted to or used in the payment of a warrant drawn against another fund. Granting that the Legislature possessed the power to transfer to the general fund all of the moneys of the state of Arizona coming to it from the territory of Arizona, that had been assessed and collected for special uses and purposes and that had been left unexpended at the end of the fiscal year 1911 and 1912, no attempt of the kind is manifest in this act. On the contrary, if the intent of the lawmaking body is to be drawn from the language it used, separate funds are to be kept inviolate. This was probably done to meet that provision of the state Constitution (section 3, art. 9) as follows: " * * * No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the tax, to which object only it shall be applied."

If this provision is prospective and has relation to taxes laid by virtue of state legislation only, it does not change the situation, for, as above observed, act 29 does not purport or attempt to transfer the funds on hand to the general fund of the state, but does provide that "no transfer of money or moneys, or credit, shall be made from one fund to another, or from one appropriated sum to another, unless such transfers shall be expressly authorized and directed by law." Section 9.

Sections 11, 12, and 13 provide a method of bookkeeping by the Treasurer, which method, if followed, would have the effect of defeating or abrogating the provisions of the preceding sections 7, 8, 9, and 10, just analyzed. The scheme of bookkeeping is that all the moneys of the state shall be carried as "cash" or "cash fund or account," and that all warrants of whatever kind, when legally drawn, should be paid on presentation out of that fund. If this inconsistency was substantive law, it might be necessary to hold the law void; but, inasmuch as the

bookkeeping feature of it may be considered as only advisory to the Treasurer and not of the substance of the law, we hold that sections 11, 12, and 13, in so far as they conflict with the provisions of sections 7, 8, 9, and 10, are void and of no effect.

The imperative demand of the law is that the Treasurer safely keep the moneys of the state in separate funds, and any scheme or device of bookkeeping that has for its purpose the prevention of his doing that cannot be allowed.

We therefore conclude that it is not the duty of the Treasurer to pay said warrants unless he has funds in his hands, belonging to the state road fund and the general fund, sufficient with which to make such payments.

[2] It is, however, his duty to register and indorse said warrants, as provided by law, providing there has been an appropriation sufficient to pay them.

Senate Bill No. 8, in the proviso above quoted, has provided for a deficit that occurred in the state road fund for the fiscal year ending June 30, 1912, which it had the power to do under the Constitution. See section 4, art. 9, Constitution.

Section 7 of that act provides that there shall be raised annually by taxation for the state road tax fund the sum of \$250,000, and that 25 per cent. thereof, or so much thereof as may be necessary for the year ending June 30, 1913, shall be used in paying the deficit in that fund for the year ending June 30, 1912. There is in said section this further proviso: "That no obligation shall be assumed or expenses incurred under the provisions of this act within any fiscal year in the amount of any sum in excess of the levy herein provided for and the money actually collected under said levy."

We take it that the obligations that shall not be "assumed or expenses incurred * * * within any fiscal year * * * in excess of the levy herein provided for and the money actually collected under said levy" has reference to future obligations and not to the deficit already existing for the year ending June 30, 1912.

We conclude from this provision of that act that it was the plain intention of the Legislature not to permit any deficit to occur in any fiscal year in the future in the state road tax fund, by making the assumption of any obligation or the incurring of any expense in excess of the money actually collected under the levy for that purpose illegal.

We hold, therefore, that all warrants against the general fund, if there is no money with which to pay them but an appropriation therefor, when presented, to the extent of such appropriation only, should be registered and indorsed as provided by law; that all road fund warrants drawn for obligations existing against the state prior to June 30, 1912, should likewise be registered and indorsed as provided by law; that road fund

warrants for obligations contracted during the current fiscal year should not be registered and indorsed, as it cannot be known what money will be "actually collected," and therefore the appropriation is not for any definite or fixed sum.

Let the mandate issue in accordance with the views herein expressed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(14 Ariz. 126)

STATE ex rel. YOUNG et al. v. SUPERIOR COURT OF PIMA COUNTY.

(Supreme Court of Arizona. July 2, 1912.)

1. JUDGES (§ 49*)—DISQUALIFICATION—PROBATE MATTERS.

Const. art. 22, § 2, provides that all existing laws of the territory of Arizona not repugnant to the Constitution shall continue in force in the new state. Section 8 provides that the superior courts shall succeed to the jurisdiction of the probate courts. Civ. Code 1901, par. 1701, disqualifies a probate judge to act in a matter in which he is interested as next of kin, legatee, devisee, executor, witness, or is in any other manner interested or disqualified from acting. Paragraph 1702 provides for transfer of administration proceedings to an adjoining county, where the judge is disqualified. *Held*, that the general statutes regulating change of venue in district courts do not apply to superior courts sitting in probate matters, but that the right to have such matters transferred depends upon the judge being disqualified in some particular recited in paragraph 1701, regardless whether the superior court's jurisdiction attaches to the matter as one pending in the probate court at the admission of the territory to statehood, or whether the proceedings are initiated in the superior court after statehood, and hence the right to transfer a proceeding cannot be based on the theory that the judge is prevented from giving a fair and impartial opinion through rulings adverse to the parties moving for the transfer.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. § 49.*]

2. PLEADING (§ 310*)—STATEMENTS IN EXHIBIT—EFFECT.

A statement in an exhibit filed with and made a part of a petition cannot be taken as a substantive allegation, and supply omissions in the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 944, 948, 947; Dec. Dig. § 310.*]

3. MANDAMUS (§ 4*)—RIGHT TO RELIEF—PROBATE MATTERS.

A party's remedy against decisions, orders, etc., in a probate matter is by appeal, and not by mandamus to compel a transfer of the proceedings to another county, under Civ. Code 1901, par. 1702, though mandamus is appropriate to compel an inferior tribunal to perform an act which the law specifically enjoins as a duty resulting from an office, trust, or station.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-34; Dec. Dig. § 4.*]

Application by the State of Arizona, on the relation of Anna F. Young and others, for mandamus against the Superior Court of the County of Pima, William F. Cooper presiding. Petition dismissed.

Louis G. Hummel, of Tucson, for relators. S. L. Kingan and John B. Wright, of Tucson, for respondent.

FRANKLIN, C. J. Anna F. Young, George L. Young, and Mannierre E. Young, by their attorney Louis G. Hummel, served notice on the superior court of Pima county, Ariz., and W. F. Cooper, judge thereof, that on June 27, 1912, application would be made to this court for an alternative writ of mandamus, and a copy of the petition for the writ, served with the notice, is as follows: "Louis G. Hummel, being first duly sworn, says: That he is the attorney for Anna F. Young, George L. Young, and Mannierre E. Young, next of kin of George B. McAneny, deceased, and persons interested in said decedent's estate. That the facts herein alleged are within his personal knowledge. That said decedent's estate has been in course of administration since September 28, 1909, and petitions were filed in the superior court of Pima county, state of Arizona, for letters of administration (to fill vacancy) in said decedent's estate, and set for hearing by the judge thereof for June 24th, 1912 at 10 o'clock a. m. That said decedent's estate is in progress of settlement in said court. That Santa Cruz county, state of Arizona, adjoins the county of Pima, and said decedent's estate is situated in both counties and the superior courts of both said counties have concurrent jurisdiction of said estate. That on the 20th day of June, 1912, a motion to transfer the proceedings in said estate to the superior court of adjoining county and the superior court of Santa Cruz county be designated as such county to which such proceedings be transferred to was duly filed with the clerk of the said superior court of Pima county, Ariz., together with an affidavit in support thereof, an exact copy of all of which is as follows."

On the day noticed the relators made the application and the respondent appeared, and by way of answer to the petition for the writ demurred thereto upon the ground that it does not state facts sufficient to constitute a cause of action for the issuance of either an alternative or a permanent writ of mandamus, and prays that the petition be dismissed. It appears that the McAneny estate is in course of administration in the superior court of Pima county. The superior court acquired jurisdiction of the matter by operation of law, the estate being in course of settlement in the probate court of Pima county on the admission of the territory as a state. The relators moved the superior court of Pima county to transfer the proceedings to the superior court of Santa Cruz county, which motion was denied, and the refusal of the judge to make the order of transfer is the basis of this application for mandamus.

The motion to transfer filed in the lower

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court is as follows: "Now comes Louis G. Hummel, attorney for Anna F. Young, George L. Young, and Mannierre E. Young, persons interested in the estate of said decedent and owners of an undivided one-third interest of said estate and represents to the court: (1) That petitions have been filed in this court in the above estate for granting letters of administration. (2) That proceedings are pending in this court for the settlement of said estate. (3) That part of the estate of said decedent is in Santa Cruz county, Ariz., and part in Pima county, Ariz., and that the courts of both counties have therefore concurrent jurisdiction. (4) That Santa Cruz county, Ariz., adjoins the county of Pima. (5) That William F. Cooper, the presiding judge of the superior court of Pima county, state of Arizona, is disqualified to act in said estate and proceedings as more fully set forth in the affidavit hereto attached. That said parties by their attorney therefore move the court for an order transferring the entire estate and proceeding to the superior court of an adjoining county, and further move that the superior court of the county of Santa Cruz be designated as such court to which the estate and proceeding is ordered to be transferred."

It is not necessary to state what is set forth in the affidavit of the attorney for the relators referred to in the motion. Suffice it to say that the affidavit is a general grievance against the conduct of the Southern Arizona Bank & Trust Company, as administrator of said estate in the performance of its duties as such administrator, which the relators denounce as outrageous conduct, and because the judge of the superior court would not give to relators such relief from said alleged outrageous conduct on the part of the administrator as they felt themselves entitled to. The affidavit of the attorney says in closing: "That from the procedure and conduct and record of the proceedings of this estate, this affiant affirms and believes that said William F. Cooper is disqualified to hear the matters pending herein, and is prevented from giving a fair and impartial opinion."

[1] It is provided in article 22, § 2, of the State Constitution, that "all laws of the territory of Arizona now in force, not repugnant to this Constitution, shall remain in force as laws of the state of Arizona until they expire by their own limitations or are altered or repealed by law: Provided, that wherever the word 'territory,' meaning the territory of Arizona, appears in said laws, the word state shall be substituted." And in section 8 of said article that "when the state is admitted into the Union, and the superior courts, in their respective counties, are organized, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration pending therein, shall pass into the jurisdiction and possession of the superior

court of the same county created by this Constitution, and the said court shall proceed to final judgment or decree, order, or other determination, in the several matters and causes with like effect as the probate court might have done if this Constitution had not been adopted." These constitutional provisions in our opinion determine what law governs the superior court in an application for a change of venue in proceedings in probate pending in said court, which were in process of administration in the probate court when the Constitution went into effect. By virtue of the constitutional provisions, the superior court proceeds to final judgment or decree, order, or other determination in the several matters and causes with like effect as the probate court might have done, and the laws of the territory in force and not repugnant to the Constitution remain in force as laws of the state governing such procedure. The disqualifications of a judge to act in probate matters will be found in paragraph 1701, R. S. Ariz. (Civ. Code) 1901, as follows: "No probate court shall admit to probate any will, or grant letters testamentary or of administration, in any case where the judge thereof is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting." Paragraph 1702, R. S. Ariz. (Civ. Code) 1901, provides: "When a petition is filed in the probate court praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the probate court for the settlement of an estate, and the presiding judge of the court is disqualified to act from any cause, upon his own or the motion of any person interested in the estate, he must make an order transferring the proceeding to the probate court of an adjoining county. * * * Paragraph 1701 enumerates particulars wherein the judge is disqualified by reason of being interested: (1) Where the judge is next of kin to the decedent. (2) Is a legatee or devisee under the will. (3) When he is named as executor or trustee in the will. (4) When he is a witness to the will. (5) Or is in any other manner interested or disqualified from acting. An examination of this statute will readily disclose that the judge is disqualified from acting in matters of probate when he is interested, and the kinds or classes of interest are recited in the statute. The general words, "or is in any other manner interested or disqualified from acting," following the enumeration of particular classes of interest, are, by the familiar rule of construction known as ejusdem generis, construed as applicable only to the classes or things of the same general nature or class as those enumerated. In other words, the word "other" will generally be read as "other

such like." 36 Cyc. p. 1119; 21 Am. & Eng. Ency. Law, p. 1012; Sutherland Statutory Construction, §§ 423-430.

If the Legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes of interest which disqualifies the judge. So it is obvious when it is said in paragraph 1702 that, when the judge is disqualified to act from any cause he shall transfer the proceedings to another court, it means when he has an interest in the matter such as is specified in the statute, or has any other such like interest, and is not used in a different connection or sense from that apparent in the preceding paragraph of the statute. The very language of the two sections precludes any other idea. We hold that the general statutes regulating change of venue in district courts are not applicable to superior courts sitting in probate matters, but that the right to have the proceedings in probate matters transferred is dependent upon the judge being disqualified in some particular recited in the statute or other such like particular; and this regardless of whether the jurisdiction of the superior court over the estate attached by virtue of the Constitution, the matter then pending in the probate court of a county on the date of admission to statehood, or whether the proceedings in probate are initiated in the superior court as a court having original jurisdiction of all matters of probate.

[2] There is no substantive allegation in the petition for the writ of Judge Cooper's disqualification to act, and a statement in an exhibit filed with and made a part of the petition cannot be taken as a substantive allegation and supply omissions in the petition. *McPherson v. Hattich*, 10 Ariz. 104, 85 Pac. 731.

[3] But, waiving this, an inspection of the motion and the affidavit in support of the motion discloses no substantive allegation of statutory disqualification on the part of the judge. From the recitals therein it may be that the relators feel themselves aggrieved at the decisions, orders, etc., occurring in the course of the administration of the estate, but, if such be their condition, the remedy is by appeal, and not by mandamus; to compel a transfer of the proceedings to another county. Mandamus is appropriate to compel an inferior tribunal to perform an act which the law specifically enjoins, as a duty resulting from an office, trust, or station, but it may not be used as a balm to assuage disappointment or remedy grievances of a character set forth by the petitioner in this case.

The petition is wholly insufficient to authorize the issuance of the writ. The demurrer thereto is sustained, and the petition dismissed.

CUNNINGHAM and ROSS, JJ., concur.

(14 Ariz. 50)

WEBSTER BROS. MILLING CO. v. BINGHAM et al.

(Supreme Court of Arizona, June 14, 1912.
Rehearing Denied July 2, 1912.)

1. SALES (§ 53*)—ACTION FOR PRICE—EVIDENCE—SUFFICIENCY.

In an action against a milling company for price of wheat which was destroyed by fire, where plaintiff claimed that the wheat had been sold to the defendant, and defendant claimed that it was holding the wheat merely as bailor, held that, under the evidence, the question should have been submitted to the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 145-151; Dec. Dig. § 53.*]

2. SALES (§ 52*)—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

In an action for price of wheat, which, after being stored with a milling company, was destroyed by fire, evidence that the defendant was carrying insurance on the grain in its mill is not admissible to show its ownership of the wheat, for warehousemen and bailees have the right to insure bailments for their protection against loss which might occur through the negligence of their servants, agents, or themselves.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.*]

3. SALES (§ 358*)—ACTION FOR PRICE—EVIDENCE.

In an action against a milling company for the price of grain, which, after being stored at the mill, was destroyed by fire, where defendant claimed it was bailee only, proof that the company had sufficient grain at the time of the fire to return all grain in storage was properly refused, where there was no agreement that the grain in suit might be commingled with other grain, and no custom to that effect was shown.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1108; Dec. Dig. § 358.*]

Appeal from District Court, Graham County; before Justice E. W. Lewis.

Action by William R. Bingham, William Bingham, Wallace Bingham, and Oliver Bingham, copartners, doing business under the firm name of the Bingham Thresher Company, against the Webster Bros. Milling Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

This action grows out of the following facts:

The appellant, Webster Bros. Milling Company, an Arizona corporation, was engaged in the business of general milling and the buying and selling of grain and hay at Thatcher, Ariz., during the month of June, 1910, and for some years prior thereto. W. R. Bingham, one of the partners of the appellees, about June 2, 1910, and Oscar Webster, an officer of appellant, had a conversation which Bingham says, as near as he can recall, was as follows: "I asked Mr. Oscar Webster what we would do with the grain, as there had been no price set on grain at that time. I had been in the habit for a good many years of always putting my grain in the mill, and he said: 'There has been no price set on grain.' I said: 'What are we going to do

about it?" He says: "You can put it in the mill, and I will give you the going price, or you can store it." This was the first conversation I had with him about the grain. About five days after that, I think it was, I had been putting some grain in the mill, and I told him that we had to have some money to pay our expenses, and that my grain would go at the going price, and that I had to have some money to pay my men, and he says, 'All right.' I said I would like to get some money now. He says: 'I have made arrangements. I am a little short of money, but I have made arrangements for money.' I think he said in regard to all moneys, and he wanted to know if I could get along for the present with \$50. I said 'Yes,' and he gave me \$50. About five days later after that, I went in again, I think it was on the next Saturday night, and asked him for some more money. I told him I needed some more money to pay off my men. He said, 'I didn't get my money,' so he paid me \$100 more." On cross-examination the same witness testified: "I asked him (Webster) if there had been any price set on grain, and he said, 'No,' and he asked what we were going to do with our grain. He says: 'You can put it in the mill, and I will pay you the going price, or you can store it.' Had no other conversation at this time other than I have stated. I commenced to haul grain right at that time, but cannot state whether or not I commenced to haul before we had any additional conversations. I had hauled some grain, though, prior to my second conversation. No one present at these conversations. He and I were alone. We had no more conversations, except I asked him for money."

The mill and its contents were destroyed by fire on the 23d day of June, 1910. Appellees took memorandum receipts of grain as it was stored in the mill, and these receipts were introduced as part of Bingham's testimony, and appended to the receipt was this writing: "This is not a final receipt only a memorandum of your sacks and the amount of grain received by us less screenings and shrinkage. Please retain this slip for final settlement." The above constitutes all of the evidence of appellees bearing on the contract or agreement between the parties.

'Webster, on behalf of appellant, testified as follows: "He (Bingham) says, 'Webster, what about this grain?' * * * I says, 'What about it?' He says, 'The price is pretty low, and I don't want to sell for that price.' He says, 'I have got a payment to make on my machine in September some time, and I don't have to sell until that time, and I would rather make some arrangements to store it.' I said, 'All right, you can store the grain here until threshing is all over with, and you can come then and we will settle up.' And I said, 'I will give you the price at the time we settle up. If the grain

raises, you can have the price of the grain.' He says, 'What about my running expenses?' I said, 'You can draw expenses for necessities and coal. As you draw this money, we will take the grain for that amount at the going price.'"

The 15,040 pounds of wheat disposed of by appellant was loaded on board cars by appellees from wagons and shipped to Globe by appellant. It was not stored in appellant's mill at any time. He further stated that appellees were given credit for grain shipped or disposed of, and that soon after the fire they demanded pay for all of the grain stored. It was in evidence that it was customary for the farmers to store wheat and barley with appellant; that at the time of the fire different people had grain stored with it for which no charge was made. He further testified: "When we gave the storage receipt, the receipt said we wasn't responsible for grain lost by fire. We gave them a memorandum receipt until the grain was screened, and, when they returned this receipt, we gave them a receipt for storage. Mr. Bingham's grain had not been screened."

J. J. Birdno testified for appellant to certain admissions of Wallace and Rube Bingham; Wallace saying on the day of the fire, "They would be the heaviest losers, that they had about \$2,000 worth of grain stored in the mill." Birdno testified he saw and asked Rube Bingham the next day if what Wallace told him was true, and he said "Yes," they would lose about \$2,000, but he did not believe the boys would let him lose it, or thought he was loser about \$2,000.

Tom Moody, witness for appellant, testified that before the fire he had a conversation with Rube Bingham, in which, in answer to the question, "What are you getting for your grain this year?" Mr. Bingham said: "I am just drawing money for expenses and storing the balance to pay expenses at the regular price." He says: "I am drawing money to pay my expenses and storing the balance for the regular price." Rube Bingham denied these conversations.

The foregoing is all of the evidence touching the agreement of the parties hereto. But bearing on the transaction, and as appellees contended for the purpose of showing that appellant exercised acts of ownership of the grain in question, the court permitted appellees to show that appellant had \$1,500 insurance on barley and \$1,500 insurance on wheat or flour, and that the same was collected after the fire. The evidence is not clear on this point, as to whether this insurance covered the grain of appellees. Prior to the fire appellant had disposed of 18,504 pounds of barley at \$1.10 per hundred weight, and 15,040 pounds of wheat at \$1.40 per hundred weight, and had entered credits to appellees for \$415.21, the amount realized. Appellant had paid thereon in cash and coal \$204.65 before the fire in July, and after the

fire had paid in coal \$73.46, leaving a balance due as admitted by appellant of \$187.10. Appellees had stored and delivered to appellant 20,885 pounds of wheat, and 57,735 pounds of barley. Appellant offered to show that it had enough wheat and barley on hand to pay all storage wheat and barley at the time of the fire, but, on objection of appellees, this offer was disallowed.

On motion of appellees, a directed verdict was rendered against appellant for \$649.87, which sum it is agreed is the correct amount, provided the above facts constituted a sale of the grain to the appellant.

Rawlins & Little, of Globe, for appellant. Frederick S. Nave, of Globe, for appellees.

ROSS, J. (after stating the facts as above). The appellant has made several assignments of error, most of which are too indefinite to call attention of this court to the errors assigned. We think that attorneys bringing cases to this court should be careful to observe that rule of the court which requires that "all assignments of error must distinctly specify each ground of error relied upon, and the particular ruling complained of." However, we think there is sufficient of substance in the assignments made by the appellant that we are able to examine the record in the following three respects: That the lower court committed errors (1) in instructing the jury to return a verdict for appellees; (2) in permitting appellees to prove that the appellant had insurance on wheat and barley in storage; and (3) in refusing the offer of evidence by appellant that it had on hand sufficient grain to return all storage grain.

[1] 1. It is the contention of appellees that the evidence conclusively shows that the transaction was a sale, and that the appellant was debtor to the appellees for the value of grain at the "going price," and the appellant insists that the transaction was a bailment. Whether it was one or the other depends upon the intention of the parties to the contract. Bingham, one of the appellees, testified that Webster, who was an officer of and represented the appellant in making the contract, said, "You can put it [the grain] in the mill, and I will give you the going price, or you can store it." From this language it cannot be said to be a sale. Appellees began at once to place their grain in appellant's mill, but did not announce then nor later whether they would take the "going price" or store the grain. Appellees did, however, a few days after ask for and were given \$50 and a little later \$100 by appellant "to pay expenses." At the time of the first of these payments Bingham said that he told Webster that his grain "would go at the going price," and that he had to have some money to pay his men, and that Webster said all right. This evidence standing

alone and uncontradicted might well be construed as an election on the part of Bingham to sell his grain at the "going price," and an acquiescence therein by appellant. But Webster, for appellant, testified that Bingham said to him in the first conversation: "The price is pretty low, and I don't want to sell for that price. I have got a payment to make on my machine in September some time, and don't have to sell it until that time, and I would rather make some arrangements to store it." I said: "All right, you can store the grain here until threshing is all over with, and can come then and we will settle up." If the grain rises you can have the price of the grain." He says: "What about my running expenses?" I said: "You can draw your expenses for necessities and coal. As you draw this money, we will take the grain for that amount at the going price."

The statements of the transaction and the conversations between the parties involve a sharp conflict. Appellant's evidence, if believed, would show that the grain was taken by it in storage with the agreement and understanding that it might ship and dispose of certain portions, accounting to the appellees for the same at the going price, for which the appellant was to pay the appellees cash for running and necessary expenses and to supply the appellees with coal. Whatever grain was left over after these deductions was to be kept in storage until after the threshing was all done. As the grain was delivered at appellant's mill, receipts were issued to appellees, and on them was this statement: "This is not a final receipt only a memorandum of your sacks and the amount of grain received by us less screenings and shrinkage. Please retain this slip for final settlement." This does not purport to be a warehouseman's receipt, but a mere memorandum evidencing that appellant had received from appellees some grain to be held for shrinkage and screening. Webster testified that, after the screening, the memorandum receipt was returned and storage receipts were issued which provide that appellant "was not responsible for grain lost by fire." It will be seen that the weight of the grain upon which it was agreed that a settlement should be made had not been ascertained. The "shrinkage" contemplated had not been determined, nor had the depreciation in weight. The memorandum receipt then does not sustain the contention that the transaction was a sale, but tends to show a bailment only. The evidence was that at the time of the fire other farmers had their grain stored with appellant and that it was customary for them to do so, and that appellees had stored their grain with it in previous years.

J. J. Birdno testified that Wallace and Rube Bingham told him after the fire that

they were heavy losers. Tom Moody testified that Rube Bingham told him before the fire that his grain was in storage with appellant. It will be seen that there is a striking conflict in the evidence as to what the contract was, and, inasmuch as contracts of this kind are subject to the same rule as other contracts, the meeting of the minds of the parties, we think the question of sale or bailment should have been submitted to the jury.

[2] 2. The fact that the appellant was carrying insurance on the grain in its mill is not necessarily evidence of ownership. Warehousemen and bailees have a right to insure bailments for their protection against loss that might occur through the negligence or carelessness of their servants or agents or themselves. 19 Cyc. 586, note 20; Dawson v. Waldhelm, 80 Mo. App. 52; Pelzer Mfg. Co. v. Sun Fire Office, 38 S. C. 213, 15 S. E. 562; Baxter v. Hartford F. Ins. Co. (C. C.) 12 Fed. 481. In a suit of this kind, brought and prosecuted upon a contract of sale, it is not competent as evidence of a sale to show that the defendant had insured the grain when the defendant denies the sale and alleges a contract of bailment, for, as above stated, he has a right to insure the bailed property.

[3] 3. The offer on the part of the appellant to show that it had in its mill grain sufficient to return all grain on storage at the time of fire was properly refused. Had the offer been to prove that appellant had all of the grain of appellees, except such as had been disposed of under agreement of the parties, it would have been error to refuse it. There is no evidence, however, of an agreement that the grain might be commingled with the grain of appellant and others with the right in the appellant to take from it at pleasure and appropriate it, on condition of its procuring other grain to supply the place of that taken, nor is any custom of that kind shown to exist in the community. If such had been the agreement or such a custom had been proved, the offer would have been proper. Fleet v. Hertz, 94 Am. St. Rep. 220, note B; Rice v. Nixon, 97 Ind. 97, 49 Am. Rep. 430; Bretz v. Diehl, 117 Pa. 589, 11 Atl. 893, 2 Am. St. Rep. 706; Dole v. Olmstead, 36 Ill. 150, 85 Am. Dec. 397; Hall v. Pillsbury, 43 Minn. 33, 44 N. W. 673, 7 L. R. A. 529, 19 Am. St. Rep. 209.

Under all of the facts, we believe the jury might reasonably have found the transaction detailed by the witnesses was a contract of bailment, and not of sale. The judgment of the lower court is reversed, and the case is remanded to the superior court of Graham county for a new trial.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(14 Ariz. 139)

DIAMOND v. JACQUITH.†

(Supreme Court of Arizona. June 29, 1912.)

1. FRAUDS, STATUTE OF (§ 44*)—EMPLOYMENT CONTRACTS.

A contract of employment to serve as manager of a mercantile business for one year at a salary of \$150 monthly and 2 per cent. on the gross sales made during such period falls within the statute of frauds. Civ. Code 1901, par. 2696.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 68, 92; Dec. Dig. § 44.*]

2. FRAUDS, STATUTE OF (§ 129*)—EMPLOYMENT CONTRACTS—PART PERFORMANCE.

A verbal contract of employment to serve as manager of a store for one year at a salary of \$150 monthly and 2 per cent. on the gross sales was taken out of the statute of frauds (Civ. Code 1901, par. 2696) by full performance on the employee's part and part performance by the employer by making the \$150 monthly payments.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. § 129.*]

Appeal from District Court, Maricopa County; before Justice Edward Kent.

Action by William Jacquith against Ike Diamond, doing business as N. Diamond & Brother. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee brought his action in the lower court against the appellant, alleging that, in the month of June, 1909, he entered into a verbal contract with the defendant to act as manager of defendant's mercantile business and general merchandising store in the city of Phoenix for the period between the 15th day of October, 1909, and the 15th of October, 1910; the appellant (defendant below) agreeing to pay as compensation \$150 per month and 2 per cent. on all gross sales made in said store under appellee's management over the sum of \$144,000. Appellee further alleged that the gross sales of said business amounted to \$273,107.79, and that his percentage at 2 per cent. on the gross sales, over the sum of \$144,000, was the sum of \$2,582.14. Appellee alleged the payment of the salary of \$150 a month, or \$1,800, on account, and alleged that there was still due, under his contract, \$2,582.14. He alleged that he performed each and every service required by him to be performed under the provisions of the contract. The appellant in his answer denied that he ever agreed to pay any percentage and alleged that, prior to October 18, 1909, in the city of New York, he hired appellee under a verbal contract to work from month to month as manager of the dry goods and notions department of his store at the agreed price of \$150 a month, and for no other compensation whatsoever. Appellant alleged payment in full of the stipulated salary. The defendant, by way of demurrer and answer, set up the provisions of the statute of frauds, requiring contracts and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
 †Rehearing denied July 15, 1912.

agreements not to be performed within one year to be in writing. It was stipulated in the trial of the case that the gross sales of appellant's business, from October 15, 1909, to October 15, 1910, amounted to \$273,107.79. Appellee testified: "There were no percentages to be paid until the expiration of the year. If I didn't stay my year out, I didn't get any percentage." The evidence shows that at the time the contract was entered into between the parties appellee was in Phoenix; that he was making arrangements to move himself and family to Connecticut with a view of entering business there; that he did in fact go to Connecticut, after the contract was concluded, on a visit, and remained there a couple of months; that he met appellant in New York and had several conversations with him concerning his employment, the details of which were discussed between them; that with his family he returned to Phoenix and entered upon the discharge of his labors for the appellant, continuing to work for him the entire year. The appellee also testified that he had received from the appellant \$450 in cash and \$107.10 in goods, amounting in all in cash and goods to \$557.10. The cause was tried to a jury, and the jury returned a verdict in favor of appellee for the sum of \$2,582.14, less the amount of the counterclaim for cash and goods paid and advanced to appellee by appellant, amounting to \$557.10. The judgment followed the verdict and was for \$2,025 and legal interest, and costs in the sum of \$105.30. From this judgment and the order overruling motion for a new trial an appeal is taken.

Kibbey, Bennett & Bennett and Barnett & Marks, all of Phoenix, for appellant. G. P. Bullard and Alexander & Christy, all of Phoenix, for appellee.

ROSS, J. (after stating the facts as above).

[1] The appellant relies upon paragraph 2696, Revised Statutes of Arizona (Civil Code) 1901, for a reversal of the judgment of the lower court. That paragraph is as follows: "(Section 1) No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the parties to be charged therewith, or by some person by him thereunto lawfully authorized: * * *

(5) Upon any agreement which is not to be performed within the space of one year from the making thereof."

Under similar statutes, it has been held that verbal contracts not to be performed within a year are not void, but voidable. The language forbids the bringing of an action, but does not declare the contract void. 20 Cyc. 279 A. 2.

Clearly the contract here sued on falls within the statute of frauds (20 Cyc. 198 B)

and is not enforceable, unless the acts of the parties to it take it out of the statute. The plaintiff (appellee) alleges that he was, to receive, under his agreement, "as compensation, * * * the sum of \$150 per month and 2 per cent. on all gross sales made in said store and business under the management of said plaintiff over and above the sum of \$144,000." This was the contract sued on. The percentage was as much a part of his salary as was the \$150 per month. It was not ascertainable at the date of the contract, nor at any time before the end of the year, but at the end of the year, by a simple process of arithmetical computation on the excess over \$144,000 the plaintiff's salary could be known. The fixed part of the plaintiff's salary, \$150 per month, and the percentage \$2,582.14 added, determined the year's compensation to be \$4,382.14.

The question as to whether the contract alleged by the appellee was, in fact, the contract of the parties or not, and as to whether appellee had performed all of its terms and conditions, was submitted to a jury, and that jury, by its verdict, found in favor of the appellee.

The item of \$150 per month was no more a part of the contract for salary, nor any less a part thereof, than the item of percentage.

[2] The question is, then, the appellant having partly performed the contract, by monthly payments, and the appellee having fully performed on his part, does this part performance by one of the parties and full performance by the other take the case out of the statute of frauds?

This is a case of first impression in this jurisdiction, and we are therefore not bound by any decision of this court; but we are at liberty to adopt that view of the law that appeals to us as most consonant with reason and justice. If it were an executory contract, we would not hesitate in holding it unenforceable; but the fact is that it has been executed by appellee and largely by appellant.

MacDonald v. Crosby, 192 Ill. 283, 289, 61 N. E. 505, 507, announced this rule: "It is insisted that the court erred in sustaining the demurrer to the pleas setting up the statute of frauds. The first plea is that the promise declared upon was not to be performed within one year; and, the second, that whatever promise was made by the defendants was a promise to answer for the debt of Mr. Crosby. As to the first, the demurrer was properly sustained, on the ground that the contract declared upon was fully and completely performed upon the part of the plaintiff, and nothing remained to be done by the defendants but to pay the money. Curtis v. Sage, 35 Ill. 22. We do not understand, under the rule of this state, that the statute of frauds can be interposed as a defense where the contract is fully per-

formed on the part of the plaintiff, in other words, the statute of frauds cannot be availed of for the purpose of perpetrating a fraud."

In *Lowman v. Sheets*, 124 Ind. 416-422, 24 N. E. 351, 353 (7 L. R. A. 734), the court said: "The sale and delivery of a one-half interest in the mines in controversy is not within the statute of frauds, because it was fully executed by Templeton. The statute prohibiting the making of contracts not to be performed within one year has no application to contracts which have been fully performed by one of the parties."

The Iowa court, in *Murphy v. De Haan*, 118 Iowa, 61, 62, 89 N. W. 100, in passing upon the right of an employe to recover on an oral contract, said: "It is contended that, while the petition states a valid cause of action, plaintiff proved a contract within the statute of frauds, in that, according to his evidence, he was not to commence work on the day the contract was entered into, but at some future time, and that the contract was made some three or four days before he actually began the service. Defendant moved to strike out this evidence, because within the statute, but the motion was overruled. He also challenges the instructions of the court, for the reason that they ignore the statute of frauds. Remembering that this is an action for work and labor performed at an agreed price per month, it is difficult to see how the statute of frauds affects the case. Contracts within the statute are not void, and, if performed or partly performed, they are, to the extent of such performance, taken out of the statute. When executed, or so far as executed, such contracts are valid, and as binding as if they had been in writing. This statute was not enacted for the purpose of aiding one in the perpetration of a fraud, but to secure him from the consequences thereof. It was intended as a shield, and not as a sword. According to the evidence, defendant had the benefit of plaintiff's services, and he cannot be heard to say that they were performed under a contract which would have been invalid had it remained executory in character."

In *Marks v. Davis*, 72 Mo. App. 557-568, the court, after reviewing the Missouri cases bearing on oral contracts for labor and services not to be performed within a year, said: "In view of this line of decisions, we think we can safely say that the rule is firmly established in this state that a full and complete performance of a contract by one of the contracting parties takes the contract out of the statute of frauds, and that the party so performing his contract may sue upon it in a court of law, and that he is not compelled to abandon the contract and sue in equity or upon a quantum meruit, as seems to be the law in some of the states."

In *Wehner v. Bauer* (C. C.) 160 Fed. 240, 244, it is said: "Nor do I think the objection well taken that the contract is void within

the statute of frauds because not in writing, and one which by its terms was not to be performed within a year. The statute of frauds has no application to a contract which has been fully performed or executed by one of the parties thereto; and here the evidence shows that complainant had immediately and before the parties left the mine fully performed the contract on his part by turning over and delivering to the defendant all the machinery, stock, material, and tools in accordance with its terms."

There is a line of cases that turns on the question of the election of remedies, holding that, when the contract is within the statute of frauds, the suit should be on quantum meruit, in which case the contract may be used as evidence of the value of the services.

The distinction drawn by this line of cases is technical rather than substantial. To say that a contract fully performed by one of the parties to it cannot be sued upon because the statute is evidentiary and the contract being within the statute of frauds cannot avail as evidence in a suit on the contract, but in a suit on quantum meruit the contract, if fully performed by one of the parties, can be used as evidence of the value of the services, is a technical distinction, it seems to us, in the matter of remedy, and is not a distinction on principle. It goes rather to the form than to the substance of the matter. If on full performance by one of the parties the contract is taken out of the statute, to the effect that it may be introduced as evidence in aid of a common count, we can perceive no reason why such performance will not take it out of the statute so that suit may be maintained on the contract.

That in a suit on the contract its terms determine the value of the services, while in a suit on one of the common counts the terms of the contract may only be evidence of the value of the services, does not militate against the reasoning that, if it can be held to be taken out of the statute in the one case, it should be so held in the other case.

Another aspect of the case is that appellee was closing out his business connections in Arizona, with a view of locating in Connecticut; but, having concluded his contract with appellant, he returned from the East, where he went on a visit, bringing his family. Relying upon his engagement with appellant, he made the trip to Arizona, and necessarily at considerable expense for himself and family. He made no effort, as was his intention until employed by appellant, to secure a business or employment in the East.

Having induced appellee by means of his oral contract to return to Arizona, to abandon his search for other business connections, we think it does not lie in the mouth of the appellant to deny the contract, especially after its full and complete performance by appellee.

In *Seymour v. Oelrichs*, 156 Cal. 782, 794,

106 Pac. 88-94 (134 Am. St. Rep. 154), it is said by the California court: "The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' 2 Pom. Eq. Jur. § 921. It was said in *Glass v. Hulbert*, 102 Mass. 24, 35, 3 Am. Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to, the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. * * * We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or, for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies 'in every transaction where the statute is invoked.'"

For the reasons given above, we think the judgment of the lower court was in accordance with law, and that no errors were committed in the trial.

The judgment of that court is therefore affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(14 Ariz. 57)

PARKER, Justice of the Peace, et al. v. UCHIDA.

(Supreme Court of Arizona. June 15, 1912.)

1. JUSTICES OF THE PEACE (§ 40*)—JURISDICTION—RESIDENCE OF PARTIES.

Although the law provides that no person shall be sued in a justice court out of the pre-

dict in which he resides under Civ. Code 1901, par. 2073, providing that an answer or other pleading setting up that a suit was not commenced in the proper precinct shall be in writing signed by the party or his attorney and verified by affidavit, a justice of the peace has jurisdiction of an action against a resident of another precinct until he appears, claims his privilege, and shows the fact of his residence, statutes fixing venue in general not affecting jurisdiction, but merely conferring a privilege; and hence, where a defendant did not appear, the judgment was not void because the action was not brought in the proper precinct.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 143-145; Dec. Dig. § 40.*]

2. JUSTICES OF THE PEACE (§ 39*)—JURISDICTION—SCOPE AND EXTENT.

Courts cannot hold that a justice of the peace did not acquire jurisdiction where he otherwise would have done so merely because the defendant was a foreigner, ignorant of the English language, and confined in jail at the time he was sued, since they must apply the law as it is and with equality to all alike.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 135-142; Dec. Dig. § 39.*]

3. COURTS (§ 87*)—JURISDICTION—WAIVER OF OBJECTIONS.

As a general rule, defects in the court's jurisdiction over the subject-matter of an action cannot be cured, but those going only to its jurisdiction over the person may be waived.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 147-149, 151, 156; Dec. Dig. § 87.*]

4. JUSTICES OF THE PEACE (§ 208*)—REVIEW—CERTIORARI—PRESUMPTIONS.

On certiorari to review a default judgment of a justice of the peace, where the party suing out the writ alleged that the justice did not hear any evidence before rendering judgment while the other party alleged that he did, the justice's transcript recited that he heard plaintiff's testimony, and no evidence was offered on this point in the district court, the transcript imported verity, and it should have been presumed that the evidence was heard by the justice.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 807-817; Dec. Dig. § 208.*]

Cunningham, J., dissenting in part.

Appeal from District Court, Maricopa County, before Justice Edward Kent.

Action by the Glendale State Bank against Ben Uchida, brought before P. P. Parker, Justice of the Peace for Phoenix Precinct, Maricopa County, and heard in the district court on certiorari. From a judgment vacating the judgment of the justice of the peace, plaintiff and the justice appeal. Reversed and remanded.

P. H. Hayes, of Phoenix, for appellants, Alexander & Christy, for appellee.

FRANKLIN, C. J. The Glendale State Bank, a corporation, sued Ben Uchida, before P. P. Parker, a justice of the peace for Phoenix precinct, Maricopa county, upon a claim for the payment of money in a sum less than \$300. Summons was personally served upon Uchida in Phoenix precinct, and, failing to appear, his default was entered.

The bank recovered judgment against him, Uchida took no appeal, made no effort to set aside his default, and, the time for taking an appeal having expired, he prosecuted a writ of certiorari, and the proceedings in the case before the justice of the peace were accordingly certified to the district court of Maricopa county.

An attack is made upon the jurisdiction of the justice of the peace, and is presented in two phases for the determination of this court:

(1) That the justice of the peace acquired no jurisdiction because Uchida was a resident of Glendale precinct at the time the suit was commenced.

(2) That the justice of the peace acted in excess of his jurisdiction, because, as Uchida alleged in his petition for the writ, on his information and belief, "that the judgment was rendered and entered without the justice of the peace receiving or hearing any evidence or testimony in support of said action."

It appears that at the time of the commencement of the action, and until after the judgment was rendered against him, Uchida, a Japanese person, was confined in the Maricopa county jail charged with a public offense, and, as alleged, ignorant of the English language. It is conceded that no evidence was submitted to the district court on the hearing of the writ of certiorari. The district court on the pleadings and the certified transcript of the justice vacated and annulled the judgment rendered by the justice of the peace. The transcript shows the commencement of the action on a claim in an amount less than three hundred dollars, a valid personal service of the summons upon Uchida, the failure of Uchida to appear in the action, the entry of his default, and also that the court before rendering its judgment heard the testimony of the plaintiff.

[1] With some exceptions, the law provides that no person shall be sued in a justice court out of the precinct in which he resides. Conceding as true that Uchida did not reside in Phoenix precinct, but resided in the precinct of Glendale, it is contended that the justice of Phoenix precinct had, or could acquire, no jurisdiction of the case for that reason. We do not so hold. Statutes fixing venue do not generally affect jurisdiction, in its proper sense, but confer a privilege which is waived if not claimed. Paragraph 2073 (section 865), R. S. of Arizona, provides that an answer or other pleadings setting up that the suit is not commenced in the proper precinct shall be in writing and signed by the party or his attorney, and verified by affidavit. If the law fixed the venue of the suit in Glendale precinct, Uchida had the privilege of being sued there. This was, however, a privilege which, to be made effectual, must have been asserted in the justice court and in the manner

provided by the statute. Not having asserted the privilege, Uchida cannot be heard to complain.

[2] That he was a Japanese person ignorant of the English language, and confined in the county jail charged with a violation of the law, does not make the court soft to the impression that the law should be tempered to his advantage, but applied untempered to those free of such accusations. Such considerations are more properly addressed to the lawmaking power than to the courts; the duty of the latter being to apply the law as it is, and with equality to all alike. The justice of the peace having jurisdiction of the subject-matter of the action and of the person of Uchida, the jurisdiction thus obtained continued until lost or divested by Uchida appearing and claiming his privilege of being sued in his residential precinct, and making a sufficient showing of the fact of such residence.

[3] As a general rule, defects which go to the jurisdiction over the subject-matter of the action cannot be cured, but those which go only to the jurisdiction over the person are subject to waiver by the party. 24 Cyc. 527. In the case of *Masterson v. Ashcom*, 54 Tex. 324, the Supreme Court of that state say: "There is a marked distinction between the question of mere personal privilege to be sued in the precinct or county of residence, and which privilege may be expressly or impliedly waived, and that of jurisdiction proper, which cannot be conferred, even by express consent. The justice court had jurisdiction over the subject-matter, and, if *Ashcom* was served with process, this would have given the court jurisdiction over the person also, even though the suit had been irregularly brought in a precinct or county other than that of his residence, if he failed to appear and plead in abatement his privilege to be sued elsewhere." Again, the Supreme Court of that state say in *Valdez v. Cohen*, 23 Tex. Civ. App. 475, 56 S. W. 375: "There can be no doubt that if appellee had appeared in the justice court, and had not pleaded his privilege to be sued in the county of his residence, the justice of the peace could have rendered a valid judgment against him, and it follows that a failure to appear was a failure to claim his privilege and was a virtual waiver of the same and a judgment by default against him was not void."

[4] The second phase of the matter is not difficult of solution. Uchida upon his information and belief having alleged that the judgment of the justice of the peace was not predicated upon any evidence or testimony and the bank alleging that it was, and it being conceded by both parties that on the issue thus attempted to be raised no evidence or testimony pro or con was submitted to the district court on the hearing of the writ, it should have been presumed by the district court, and is presumed by this court, that

the certified record of the justice imports verity, and that evidence was heard before the justice before giving judgment. It follows that the judgment of the district court vacating and annulling the judgment of the justice of the peace was wrong.

The judgment of the district court is reversed and set aside, and the case is remanded to the superior court of the state of Arizona in and for Maricopa county, with instructions to dismiss the writ of certiorari. Appellants recover costs in this court.

ROSS, J., concurs.

CUNNINGHAM, J. (specially concurring). I concur in the reasons given by Mr. Chief Justice FRANKLIN for his conclusion reached in deciding the first proposition stated, and I concur in the conclusion reached by him in deciding the second proposition. Paragraph 2062, Revised Statutes of Arizona 1901, requires the justice to enter in his docket, "(8) the judgment rendered by the justice, and the time of rendering the same." In most jurisdictions, including this, the justice's return to a writ of certiorari is conclusive as to all facts required by law to be kept of record (24 Cyc. 777, and cases cited in notes 38 and 39), and thus far the record imports verity, and the reverse of the proposition is equally true that when the record includes facts not required by law to be kept of record, as to such facts, the record does not import verity. I think the true reasons the judgment of the district court is wrong on the second proposition are: First. Because the petitioner had the onus of proof cast upon him to establish, by a preponderance of the evidence, the fact that the justice did not require, hear, or receive evidence in support of plaintiff's claim, and he produced no evidence of such fact before the district court. 24 Cyc. 781, and cases cited in notes 82 and 83. Second. Because, where the jurisdiction appears from the return and the certified record, and a judgment appears in such record, every reasonable intendment consistent with such record of the judgment will be made by the court in favor of the regularity of the justice's proceedings (24 Cyc. 781, and cases cited in note 80), and we cannot presume, nor could the district court presume, that a justice would arbitrarily render a judgment without requiring, hearing, and considering testimony in support of plaintiff's claim; but we must presume, where nothing appears in the record nor in the evidence to the contrary, that competent and sufficient evidence was required, received, and duly considered by the justice on the trial, upon which the judgment was rendered by him, as a reasonable intendment consistent with the judgment. If anything appeared in the return or in the record that any evidence was received and considered by the justice, the sufficiency of such evidence to

warrant the judgment could not be questioned in this proceeding, because the justice was acting within his jurisdiction, and for errors committed in its exercise this writ will not lie (Miles v. Justice Court, 13 Cal. App. 454, 110 Pac. 349), and this is another reason why the judgment of the district court was wrong, if we concede that the recital found in the justice's record, to the effect that plaintiff produced evidence at the trial, has any weight on the hearing. I do not, however, concede that a mere recital in the docket of the justice has any weight as evidence, where such recital is not required to be recorded by the justice. Otherwise, another exception to the hearsay rule would be announced which has not heretofore been recognized by any court to my knowledge.

For these reasons, I heartily concur in the order reversing the judgment of the district court, and remanding the cause to the proper superior court, with instructions to dismiss the writ of certiorari.

(14 Ariz. 190,

CAMPBELL v. TERRITORY.

(Supreme Court of Arizona. June 25, 1912.)

1. HOMICIDE (§ 189*)—EVIDENCE—ADMISSIBILITY.

Where accused was the aggressor and sought decedent to kill him, and, when in no danger from him, killed him, evidence of prior difficulties between the parties was inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 398; Dec. Dig. § 189.*]

2. HOMICIDE (§ 22*)—"MURDER IN THE FIRST DEGREE."

A murder committed on express malice is murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35-38; Dec. Dig. § 22.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4637-4641; vol. 8, p. 7727.]

3. HOMICIDE (§ 189*)—EVIDENCE—SELF-DEFENSE.

Where the claim of self-defense is supported by evidence justifying a charge thereon, accused may show hostile feelings of decedent toward him and prior difficulties, as affecting the reasonableness of accused's conduct.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 398; Dec. Dig. § 189.*]

4. HOMICIDE (§ 192*)—EVIDENCE—SELF-DEFENSE.

Where the evidence is conflicting as to whether accused or decedent was the aggressor, evidence of decedent's hostile feelings toward accused and prior difficulties between the parties is admissible to show who was the aggressor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 415; Dec. Dig. § 192.*]

5. HOMICIDE (§ 189*)—EVIDENCE—ADMISSIBILITY.

Where a killing was committed on express malice and accused was the sole aggressor, and in no danger from decedent at the time of the killing, evidence of prior difficulties between the parties and of decedent's feelings toward accused was inadmissible on the issue of the quantum of punishment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 424; Dec. Dig. § 189.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

6. HOMICIDE (§ 188*)—EVIDENCE—DANGEROUS CHARACTER OF DECEDENT.

The dangerous character of decedent is only admissible when there is testimony that accused acted in self-defense after some overt act on the part of decedent calculated to impress accused with a reasonable belief that he was in danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 391-397; Dec. Dig. § 188.*]

7. HOMICIDE (§ 199*)—MITIGATION—EVIDENCE—ADMISSIBILITY.

Evidence in mitigation to be admissible in a homicide case must throw some light on the guilt or innocence of accused, including the proper grading of the offense; should he be guilty of any, but, when not of such a character, it is not relevant to mitigate the punishment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 424; Dec. Dig. § 199.*]

8. HOMICIDE (§ 308*)—MURDER IN THE FIRST AND SECOND DEGREES—INSTRUCTIONS.

An instruction on murder in the second degree which fails to state that there must be no circumstances of mitigation, justification, or excuse is erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-648; Dec. Dig. § 308.*]

9. HOMICIDE (§ 340*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where a verdict of murder in the first degree is supported by evidence of guilt, of that degree only, error in instruction on murder in the second degree is technical, and must be disregarded as required by Const. art. 6, § 22.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.*]

10. CRIMINAL LAW (§ 1165*)—HARMLESS ERROR—TECHNICAL ERRORS—"MATERIAL."

To justify a reversal of a conviction on the ground of error, the error must have been of a material character, and must have deprived accused of a substantial right, the word "material" meaning something of weighty character, substantial, of consequence, not to be dispensed with.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3066, 3066, 3068, 3069; Dec. Dig. § 1165.*]

For other definitions, see Words and Phrases, vol. 5, p. 4404.]

Appeal from District Court, Yavapai County; Edward M. Doe, Judge.

William Campbell was convicted of murder in the first degree, and he appeals. Affirmed and remanded, with directions to carry out the judgment.

Le Roy Anderson and Richard Lamson, both of Prescott, for appellant. Attorney General Bullard, for the Territory.

FRANKLIN, C. J. This was an indictment for murder. There was a conviction of murder in the first degree with the death penalty affixed. Defendant appeals.

This melancholy tragedy was enacted in Prescott on the 9th day of May, 1911, and from the circumstances surrounding the case, as disclosed by the evidence, it is marked as one of peculiar atrocity. On the day of the homicide, Ernest Presti, otherwise known as Kid Kirby, about 3 o'clock in the afternoon, was walking leisurely along the sidewalk on

Montezuma street, going north on his way to the post office. On his way Presti had stopped at the store of a merchant about the purchase of some clothing. Presti was observed walking along the street leisurely, looking forwards, and presently the defendant, Campbell, was seen going in the direction of Presti on the run with a pistol in his hand; Presti being ahead of him quite a distance. When the defendant got within about 30 feet of Presti and unobserved by him, the defendant fired a shot at Presti which took effect in his back. At the first shot Presti screamed, and ran about 30 feet, and the defendant, still following fired a second shot from his pistol, and thereupon Presti fell mortally wounded. The defendant then walked up to where Presti lay, and, as one of the witnesses stated, "as though he was going to shoot him lying down." The defendant kept following Presti until he fell in the street, being then about 15 feet behind Presti, and still holding his pistol in readiness for further use. During all this time, according to the testimony for the prosecution, not a word had been uttered by Campbell or Presti, except Presti's exclamation at the first shot. When Presti fell, the defendant stopped and waited until he had tried to raise himself up and sink back; when he turned, and went down the street in the direction whence he came. Presti was unarmed. A crowd had collected by this time, and the defendant, leaving the prostrate form of his victim, crossed over the street on to the plaza, the people following him with indications of indignation for his act, when the defendant flourished his pistol as if to intimidate the crowd. A deputy sheriff thereupon covered the defendant with a weapon, and, disarming him, placed the defendant under arrest. Shortly after falling mortally wounded in the street, Presti was carried onto the plaza, where he died.

The defendant, being a witness, gave his version of the affair as follows: "I went back to my room on Granite street, and from there back up town on Montezuma street. I saw Kirby when I got near Birch Bros.' saloon. I saw him going down the street ahead of me. This was between 2 and 3 o'clock. I ran down to him, right to him, and we were right in front of Levy's store when I says to him: 'Kid Kirby, you have been running me long enough. Now it is time for you to run.' And he said, 'Out that out.' He happened to see my pistol, and he started to run and I shot him. I won't say whether I shot twice, three times, or what. After that, I came across the street and over here to the jail." It further appears from the testimony, so far as it was permitted to be introduced, that there was considerable ill feeling between the defendant and Presti, and that they had some difficulty or altercation on and previous to the day of the homicide.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

icide. Witnesses for the prosecution testified that on the morning of the homicide the defendant had stated that he would lay for Kid Kirby and fix him when he went up the street. The autopsy disclosed that the fatal bullet entered the back of the deceased just below the right shoulder blade, and was such a wound as would usually cause instant death.

The defendant attempted to introduce testimony of previous transactions, relations, and difficulties between himself and the deceased, and his mental condition at the time of the homicide. Except in a few particulars, the court restricted this character of proof to the circumstances surrounding the transaction at the time of the killing, on the ground that it was no part of the *res gestæ*, no self-defense appeared from the evidence, and the insanity of the defendant was expressly disclaimed. The foregoing salient facts in evidence have been recited as material to a clear understanding of the errors assigned.

The legal questions involved are presented in assignments of error, as follows: (1) The trial court erred in refusing to admit testimony of the transactions between the defendant and the deceased happening on the same or previous day to the killing. (2) That the trial court erred in arbitrarily limiting the *res gestæ* to the particular spot where the killing occurred. (3) That the trial court erred in instructing the jury with reference to murder of the first degree that there must be no circumstances of mitigation, justification or excuse and in not instructing the jury that the absence of the same circumstances characterizes second-degree murder. (4) The trial court erred in sustaining objections to evidence offered by defendant as to his mental condition at the time of the killing. The trial court erred in refusing to admit evidence of the previous relations of the defendant and the deceased and of the difficulties occurring between the two on the same and the previous days to the killing, and in refusing to admit evidence of these relations and difficulties and the facts and circumstances relating thereto offered for the purpose of mitigation, justification, extenuation, or excuse, and in excluding all of such evidence, and in ruling that such evidence is admissible only on the theory of self-defense.

[1,2] There is and can be no pretense that the facts of the present case bring it within any of the rules which govern the exercise of the right of self-defense. At the time of the homicide the accused was the sole aggressor. He was in no danger from the deceased, and could have had no apprehension of any danger. He sought out and followed up the deceased to effect his destruction. There was no necessity for any encounter, and none occurred. The defendant armed himself with a pistol, and watch-

ed his opportunity. Then, unobserved by the deceased, pursued him along the street for more than a city block, and, still unobserved, mortally wounded him by a shot in the back. The deceased had no opportunity to defend himself, or make good his retreat. No knowledge of his impending danger, no thought that his enemy was following him up to encompass his destruction, and, if he had any consciousness of the matter at all, it was only the momentary but bitter reflection that his enemy had accomplished his destruction. Under such a state of facts, there is no provocation which the law in this state will recognize to extenuate or reduce the degree of the crime. The attending circumstances surrounding the commission of the homicide gave it the character of a willful, deliberate, and premeditated murder, a murder committed upon express malice, and such is murder in the first degree in this state. There was, indeed, nothing attending or giving character to the act which the law regards as a matter of justification, excuse, or mitigation.

[3,4] Where there is a claim supported by some evidence of self-defense, where the proof justifies the giving of a charge on the law of self-defense, defendant may, for the purpose of showing deceased to have been the aggressor, and the killing to have been necessary in self-defense, show hostile feelings on the part of the deceased toward him, previous difficulties, quarrels, and the like. But, where the law of self-defense is not in the case, evidence of the hostile feelings, or acts of the deceased or of previous quarrels, is irrelevant and inadmissible on the part of the defendant. 21 Cyc. 962. Where self-defense is in the case, such evidence is admissible, not to excuse or justify an unlawful attack or killing, but for the purpose of throwing light upon the conduct of the deceased at the time of the encounter, and as affecting the reasonableness of defendant's own conduct, and where there is a conflict in the evidence as to who was the aggressor, as tending to show who was the aggressor. There was not an act done or a word spoken which, at the time of the tragedy, and illustrated by the character of the deceased, and the previous relations and difficulties of the parties, and construed by the defendant in the light of that character, as would in law be such a provocation sufficient to mitigate the offense to a lower degree. The evidence offered could not be on the ground that it would constitute what the law deems a sufficient provocation to extenuate the guilt of homicide. That can never be when the killing is deliberate or of cool purpose. For the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed. 1 Russ. Cr. 513, 514. The extenua-

tion admitted in cases of provocation is the indulgence which the law extends to the first transport of passion, in condescension to human infirmity, to the *furore brevis* which, while the frenzy lasts, renders a man deaf to the voice of reason. A sane man (and the plea of insanity is expressly disclaimed in this case) can be either the slave or master of his passions, and the criminal law, while indulging to a humane extent the mere infirmities of human nature, nevertheless requires the exercise of this mastery. The law upon the subject of provocation did not have the remotest application to the case before the court. The evidence offered by the defendant having no legal efficiency in reducing the crime of which he stood charged, or to justify or excuse the commission of the homicide, the action of the court in confining the *res gestæ* to within a few minutes of the killing was not error, and permitting evidence of what transpired within a few minutes of the killing was as liberal as the principles of the administration of criminal justice would authorize the court to grant.

[5] But it is contended that such matters ought to be heard as some evidence to weigh with the jury in fixing the quantum of the punishment, relying upon the doctrine announced in *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771, and *Fletcher v. People*, 117 Ill. 184, 7 N. E. 80. Palliating considerations, if there be any, might move the pardoning power to exercise its clemency, but it is the duty of the courts and juries to be governed by the law and evidence, and the evidence must be legal evidence, relevant, and material to the inquiry at hand. It is of great importance to the correct decision of controversies that no evidence shall be heard which is foreign to the issue; and the rule is no less applicable and useful in criminal than in civil cases. Upon this principle, and because, if received in the case at bar, evidence of the previous relations of the defendant and the deceased and the character of the deceased for temper and violence could not rationally and legally affect the degree of the homicide, but might mislead the jury, we hold the court was right in excluding it.

[6] The case of *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771, is strongly urged by defendant in support of his contention that, even if such evidence was inadmissible to mitigate the crime, it should have been received to mitigate the quantum of the punishment. Equality before the law is a maxim of universal justice, and the life of the most abandoned is equally entitled to the protection of the law, as that of the most elevated and refined. It is for no man to say which may be taken and which may be spared. Because a man has a character for turbulence and violence and previous quarrels and difficulties have taken place, there is no law which justifies an act of individual satisfaction or vengeance or permits the mod-

eration or ferocity of the injured party to determine what shall be the measure of his redress. It is just as serious in the eye of the law to murder a bad man as a good man. But in the *Fields* Case this principle is distinctly repudiated, and we are told that it is less a crime to kill a turbulent and violent man than it is to kill one who is peaceable and orderly. This novel doctrine of the *Fields* Case has met with much disapprobation, and has been many times condemned. In *Gardner v. State*, 90 Ga. 310, 17 S. E. 86, 35 Am. St. Rep. 202, the court says: "However desperate the character of the deceased for violence may have been, there was nothing to reduce the homicide to any grade of manslaughter, much less to justify it. There was consequently no evidentiary purpose for his bad character to subserve, and the evidence to establish it was properly rejected. When such evidence is admissible at all, the primary object must be to throw light upon the guilt or innocence of the accused, including, of course, the proper grading of the offense, should he be guilty of any. When the jury have it before them for this purpose, they may use it for a guide in recommending or forbearing to recommend as to the punishment, but we wholly repudiate the doctrine inculcated by *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771, that it may be received and used for the latter only, when inadmissible for the former. * * * The whole investigation to which the evidence is addressed relates to the fact of crime. None of it goes to the measure of punishment. * * *" The doctrine of the *Fields* Case has been condemned *eo nomine* by the Supreme Court of the state which announced it, and has been distinctly overruled by the Alabama court. The Supreme Court of Alabama in *Green v. State*, 143 Ala. 10, 39 South. 362, on rehearing, in observing that it is important to the administration of the criminal law that the doctrine laid down in the *Fields* Case be corrected, and after citing several cases from that court, say: "The principle deducible from these cases is that evidence of the turbulent, bloodthirsty, and dangerous character of the deceased is only admissible when there is testimony tending to establish that the accused acted in self-defense, where some overt act on the part of the deceased is shown, calculated to impress his slayer with the reasonable belief that he is in danger of suffering grievous bodily harm or death, and there is no reasonable mode of escape, and this for the purpose of determining who was the aggressor. In the absence of such an act on the part of the deceased, his character for turbulence and violence is wholly irrelevant. It has never been the law in this jurisdiction that, because a man has the reputation of being turbulent and violent, his life may be taken. On the contrary, it has been uniformly held that, whatever may be a man's character for desperation and recklessness, he is entitled to the protection

of the law; and it is as much a crime in the eye of the law to slay him as it is the most peaceable and law-abiding citizen in the community. Evidence, therefore, of the character of the deceased for violence and the like, when properly admitted, is limited in its consideration by the jury to determining solely the meaning of his overt act or demonstration." In another case the Supreme Court of Alabama, in the case of *Rhea v. State*, 100 Ala. 119, 14 South. 853, say that the character of the deceased for turbulence, violence, and quarrelsomeness furnishes no excuse or palliation for aggressive action, nor when the difficulty is brought on or sought by the accused. On doubtful questions as to who was the aggressor it should be taken into account, on the theory that more prompt and decisive measures of defense are justified when the assailant is of known violent and blood-thirsty nature. But that the principle is confined to defensive measures only.

[7] We have no hesitancy in adhering to and giving our approval of the doctrine that evidence in mitigation to be relevant must tend to throw some light upon the guilt or innocence of the accused, including the proper grading of his offense, should he be guilty of any, but, when not of such a character, it is not relevant simply for the purpose of mitigating the quantum of the punishment.

[8] Defendant complains that the court erred in instructing the jury with reference to murder in the first degree that there must be no circumstances of mitigation, justification, or excuse, and in not instructing the jury that the absence of the same circumstances characterizes second degree murder. The court did commit error in respect of the matter stated.

[9] But was it merely a technical error which does not affect any substantial right of the defendant, or is it material error which requires a reversal of the case. The evidence discloses murder in the first degree or nothing, no mitigation, excuse, or justification in the testimony. "When on a trial for murder the evidence proves murder in the first degree or nothing, the court need not instruct the jury, as to other grades of the offense." 21 Cyc. 1066. The instructions of the court should be in accord with some phase of the testimony, and should be so framed as to correctly state the law in the light of the testimony. The court should have submitted a charge on murder in the first degree without involving the question of mitigation, justification, or excuse, as no phase of the testimony required it, but, having done so, we cannot perceive why such an instruction is not more favorable to the defendant under the facts of the case than he was entitled to.

[10] If the law required absolute accuracy, but very few convictions could be sustained. Some technical error perhaps creeps

into most every trial. But when error has been committed, in the trial of a criminal case, it must further appear that such error was of a material character, and deprived the defendant of a substantial right before it will be ground for reversal. "Material" is defined as something of solid or weighty character; substantial; of consequence; not to be dispensed with. And in law such as does or would affect the determination of the case. Webster's Dictionary. Where there is a verdict of murder in the first degree, supported by evidence which shows that degree only, the verdict will not be reversed for error in instructing the jury as to murder in the second degree; there being no testimony whatever to prove that crime. No cause shall be reversed for technical error when upon the whole case it shall appear that substantial justice has been done is the mandate of our Constitution. Section 22, art. 6, Const. Arizona. It may be observed in passing that a defendant charged with crime will be protected in every material right given him under the law, but it must also be borne in mind that the command of the Constitution, that no cause will be reversed for technical error in the proceedings when upon the whole case it shall appear that substantial justice has been done, must be obeyed. Men must be taught that they cannot hope to escape the consequence of their wrongdoing in this state through a mere technicality not affecting any substantial right. We are satisfied from a careful examination of the record, and a consideration of each assignment of error, that this cause is free from prejudicial error, and that substantial justice has been done.

The cause is remanded to the superior court of the state of Arizona in and for Yavapai county, with directions to carry out the judgment of the district court of the fourth judicial district of the territory of Arizona, in and for the county of Yavapai, into execution.

CUNNINGHAM, J., and DUFFY, judge of the superior court, concur. ROSS, J., being disqualified and announcing his disqualification in open court; the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. F. J. DUFFY, judge of the superior court of the state of Arizona in and for Santa Cruz county, to sit with them in the hearing of this case.

(23 Okl. 371)

ATCHISON, T. & S. F. RY. CO. v. STATE
et al.,

(Supreme Court of Oklahoma, July 23, 1912.)

(Syllabus by the Court.)

CARRIERS (§ 20*)—REGULATIONS—ORDERS OF CORPORATION COMMISSION—EVIDENCE.

Where the railway company is charged with not having filed a tariff sheet within the

time prescribed by the Corporation Commission, and the evidence shows that such tariff sheet was not so filed, unless the evidence showing such failure to file also discloses that the act of omission was not willful, the presumption of law is that the act was willful.

(a) Such act of omission having been proved by evidence, which did not disclose that it was not willfully done, the burden shifted to the railway company to prove that such act of omission was not willful.

(b) Held that, under the facts in this record, the Corporation Commission was justified in finding that such act of omission was willful.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 33-49, 133, 927; Dec. Dig. § 20.*]

Appeal from the State Corporation Commission.

Appeal by the Atchison, Topeka & Santa Fe Railway Company from an order of the Corporation Commission. Order affirmed.

Cottingham & Bledsoe, of Oklahoma City, for appellant. Chas. West, Atty. Gen., Chas. L. Moore, Asst. Atty. Gen., and E. C. Patton, of Oklahoma City, for appellees.

WILLIAMS, J. The appellant by this appeal seeks to have reversed an order of the Corporation Commission, imposing a fine of \$25 on appellant for failure to comply with the Commission's order No. 198, in that it did not file a certain tariff, to wit, 8123-D, within the time prescribed in said order, which is in part as follows: "Each railroad and railway company named above shall, on or before the date this order becomes effective, file in the office of the Corporation Commission of the state of Oklahoma, in the city of Guthrie, state of Oklahoma, one copy of each of the following documents affecting the transportation of freight and passengers upon its line of railroad and railway in the state of Oklahoma: Rule No. 1. General freight and passenger tariffs, both state and interstate, local and joint, together with all effective amendments and supplements. Rule No. 8. Also at the time of their issuance and before effectiveness, copies of all documents named above that may hereafter be issued for application upon such line of road."

The tariff on account of which this prosecution was based was as to rates to be used on fruit or vegetables loaded in refrigerator cars, and covers the charge for refrigerator service. A party in El Reno complaining to the Commission of the rate assessed by the appellant on a car of cabbage from Topeka, Kan., an examination was made by the Commission, and it was ascertained that the previous tariff, to wit, tariff C, had been filed, but that D had not, and that there was no way to ascertain the rate. The complaint was then filed. After the filing of the complaint, the appellant filed the tariff with the Corporation Commission.

On the part of the appellant, the chief of the tariff bureau of the appellant testified that as to said tariff the railway company's

records showed "that a copy of it was sent to the Oklahoma Commission on May 6, 1910, or a month before the tariff became effective." He further testified as follows: "We have no intention whatever of not wanting to file the tariff, because we filed the previous tariff, or the tariff that it canceled; and the instructions are and have been in effect for quite a few years that tariff that in any way affects Oklahoma rates, whether intra or inter-state, a copy should be immediately filed with the Commission; and I don't know of any instances where a copy has not been forwarded to the Commission within one or two days after its receipt from the printers. We have a record up there showing all the tariffs we forward to the Commission, and this tariff, before I made the affidavit I looked it up, and our records show that it was forwarded. By Mr. Henshaw: Q. Well, what has been the system of forwarding tariffs? A. We forward by United States mail, unless the quantity is so large that we have to forward by express."

On this evidence the appellant was adjudged guilty of contempt and fined \$25. The judgment of the Commission is as follows: "The information alleges that the defendant violated order No. 198 by failing to file tariff 8123-D prior to the time the same became effective. The evidence shows this tariff, carrying rates to be applied on fruit or vegetables loaded in refrigerator cars, and covering the charges for refrigerator service, was not filed prior to the time the same became effective in the state of Oklahoma, and the Commission did not know of its existence until the shippers wrote to the Commission, complaining of the rate assessed thereunder. The rule covered by this tariff seems to be greatly out of line. All tariffs must be filed with the Interstate Commerce Commission thirty days prior to going into effect, unless special permission is given for them to go into effect upon a shorter notice. The defendant's evidence shows that their records show that a copy of this tariff was sent to the Oklahoma Commission on May 6, 1910, or a month before the same became effective. The defendant further denied any intention whatever of any desire on its part not to file these tariffs, whether the rates covered by such tariff are state or interstate. Tariffs are usually forwarded by United States mail. The Commission has had much trouble in having tariffs filed before they became effective. Railroad after railroad has been let off, without imposing any penalty, upon first one excuse and then another, the same as now offered. This can no longer be tolerated. These tariffs must be filed as provided in the order. The only evidence we have that the defendant made any effort to file the tariff was that their records show that the tariff was sent. Their records could show this and yet be in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

At any rate, the tariff was not filed with the Commission, and, inasmuch as the Commission acknowledges receipt of these tariffs, the defendant, not having any such receipt in its possession, should have seen that the tariff was on file. It is therefore ordered and adjudged that the defendant be fined the sum of \$25 and costs for the violation of order No. 198, failing to file the tariff mentioned in the complaint prior to the time it went into effect. For all of which cost and fine let execution issue."

It is insisted by the appellant that the evidence is not sufficient to support the judgment of the Commission. There was evidence reasonably tending to show that the tariff was not filed pursuant to the order of the Commission. In fact, the appellant does not seem to contend that the same was so filed.

In *St. Louis & S. F. R. Co. v. State et al.*, 26 Okl. 764, 116 Pac. 759, it was held that, "where the railway company admits the act of violation with which it is charged, but attempts to defend against the proceedings upon the ground that said act was committed through a misapprehension of the order, or as a result of a mistake, the burden is upon the company to establish by competent evidence that its act complained of resulted from such cause."

Though the appellant did not admit the act of violation with which it is charged, yet, if the evidence showed such violation (the Commission so found), then the burden would shift to the appellant; for the law presumes that the act was willfully done.

Section 2829, Comp. Laws 1909 (chapter 25, art. 62), provides: "The term 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." See, also, *Thurman et al. v. State*, 2 Okl. Cr. 718, 104 Pac. 67.

The tariff not having been filed, and the presumption of law following that it was willfully not filed, and the burden shifting to the appellant, the question arises as to whether, under this record, the appellant has discharged that burden.

In *A. T. & S. F. Ry. Co. v. State and A. Haber*, 122 Pac. 232, it is said: "In determining the guilt of a company or corporation charged with contempt in a proceeding like this, whilst it is necessary to find that the violation was willful or intentional, yet in making this determination the Commission is permitted to look at the good faith of the company. The company, through its superi-

or officers, must furnish the subordinate officers with reasonable instructions, in order that the subordinates may reasonably and in good faith and with proper diligence comply with the orders of the Commission. Whilst it may be that the subordinate employé may act in good faith and with reasonable diligence under the orders that he may have, yet, on account of the carelessness or neglect of the superior officers, there may be a dereliction."

In that case it was held that the railway company by proof discharged the burden. All the evidence in the record in appellant's favor is that its records show that on May 6, 1911, within the prescribed time, the tariff was mailed to the Commission. There is no evidence showing who made this entry, or under what circumstances it was made, whether by the party whose duty it was to mail such tariff sheets, or some other person. If the tariff sheet was sent by mail, it is to be assumed that when it was received by the Commission it would acknowledge receipt thereof. If such acknowledgment was not received within a reasonable time, diligence and good faith on the part of the appellant, having adopted the system of forwarding such matters by mail, would have required it to make inquiry as to whether same was received. Such seems not to have been done.

It is essential that these tariff sheets be filed at least before such rates go into effect; and, if the appellant is to be excused merely upon the excuse that an entry on its books shows that it was mailed, then it would be very difficult for any conviction for contempt in such matters to be sustained.

The appellant was not performing an act of courtesy in mailing this tariff. It was its duty under the law to file the same with the Commission within the prescribed time. Having availed itself of the convenience of sending the tariff sheet by mail, that did not discharge its duty, because the order was not that it should mail the tariff sheet, but that it should be filed in a certain time.

The Commission were justifiable in finding that there was not sufficient evidence to show that it was ever mailed, because this entry may have been made by some clerk upon whom no duty was imposed to mail the same, but, knowing that the tariff sheet was prepared, entered it on the assumption that the clerk upon whom such duty was imposed would mail it, but failed to discharge that duty.

We conclude that the judgment of the Commission must be sustained. All the Justices concur, except DUNN, J., who is absent, and not participating.

BANKS v. CLARK.

(Supreme Court of Oklahoma. July 23, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 773*)—DISMISSAL—FAILURE TO FILE BRIEF.**Same as that in *Leavitt et al. v. Commercial National Bank*, 26 Okl. 104, 109 Pac. 71.[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action between William Banks and A. D. Clark. From the judgment, Banks brings error. Dismissed.

Hainer & Martin, of Tulsa, for plaintiff in error. J. J. Henderson, of Tulsa, for defendant in error.

WILLIAMS, J. Petition in error, with case-made attached, was filed in this court on November 7, 1910. No briefs have been filed by plaintiff in error, as required by rule 7, 20 Okl. viii, 95 Pac. vi.

The appeal is dismissed.

LAWSON et al. v. ZEIGLER.

(Supreme Court of Oklahoma. July 23, 1912.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 564*)—RECORD—CASE-MADE—TIME FOR MAKING AND SERVING.**

An order extending the time for the making and serving a case-made, made after the expiration of the time theretofore fixed by order of the court or trial judge, is void.

(a) A "case-made" made and served within the time fixed by such void order is a nullity and cannot be considered as a case-made by this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2501-2503, 2555, 2558, 2559; Dec. Dig. § 564.*]

Error from District Court, McIntosh County; Preslie B. Cole, Judge.

Action between W. H. Lawson and others and Frederick Zeigler. From the judgment, Lawson and others bring error. Dismissed.

E. J. Van Court, of Eufaula, for plaintiffs in error. W. C. Reeves, of Oklahoma City, amicus curiae.

WILLIAMS, J. On December 14, 1910, the motion for a new trial was overruled. It was ordered that defendants (plaintiffs in error) be allowed 30 days to make and serve a case-made. This 30 days expired with the 13th day of January, 1911. The case-made was served on January 14, 1911, one day after the expiration of the time allowed for making and serving of the same. On February 6, 1911, 24 days after the expiration of the time allowed for making and serving the case-made, the attorneys for the respective parties stipulated that the plaintiffs in error should have 30 days after the 8th

day of February, 1911, in which to have the case-made settled and signed. On February 7, 1911, the court entered an order that an extension of time be granted, to wit, 30 days from February 8, 1911, in which to have the case-made served.

That an order made after the expiration of the time allowed for making and serving a case-made, extending the time for such purpose, is a nullity, and such case-made served out of such time cannot be considered on appeal, has been settled by this court. *Lovejoy, Russell & James v. Graham et al.*, 124 Pac. 25, decided May 14, 1912, but not yet officially reported, and authorities therein cited.

It follows that this proceeding in error must be dismissed. All the Justices concur.

BANK OF FAIRVIEW v. MARTIN et al.
(Supreme Court of Oklahoma. July 9, 1912.)*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1005*)—REVIEW—QUESTIONS OF FACT.**

Where there is evidence reasonably tending to support the verdict of the jury and the judgment entered thereon, the same will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.*]**2. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR.**

The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

Error from Major County Court; O. M. Evans, Judge.

Action by the Bank of Fairview against B. F. Martin and another. Judgment for defendants, and plaintiff brings error. Affirmed.

D. H. Denman and Tom E. Willis, of Fairview, and John V. Roberts, for plaintiff in error. S. B. Oberlander, of Cleo, for defendants in error.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, to recover damages for the conversion of certain live stock upon which the plaintiff held a chattel mortgage. Upon trial there was a verdict for the defendants, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

[1] One of the questions submitted to the jury is covered by an instruction to the effect that the burden of proof is upon the defendants to establish by a preponderance of the evidence that the cattle which the de-

fendants got from Mrs. Leach (the mortgagor) are the same cattle which the plaintiff had a prior mortgage on. This instruction covers the principal question of fact presented to the jury, and as they resolved it in favor of the defendants, and there is evidence reasonably tending to support their finding, this court is not at liberty to disturb the judgment of the court below upon the merits.

[2] We have examined the brief of counsel for plaintiff in error and the record with considerable care, and are satisfied that they present no contention that would authorize a reversal. Section 5680, Comp. Laws 1909, provides: "The court, at every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The judgment of the court below must therefore be affirmed. All the Justices concur, except WILLIAMS, J., absent, and not participating.

LYNCH et al. v. HALSELL

(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT.

This court will not disturb the findings of the trial court on the facts, where there is any material evidence reasonably tending to support such finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by C. B. Lynch and another, copartners as Lynch & Forsyth, against E. L. Halsell. Judgment for defendant, and plaintiffs bring error. Affirmed.

John B. Meserve, of Muskogee, for plaintiffs in error. Rodgers & Clapp, of Muskogee, for defendant in error.

BREWER, C. Suit on debt. This suit was tried in the superior court of Muskogee county October 21, 1909, by the court; a jury having been waived by the parties. The court found the issues in favor of the defendant, and that he go hence with his costs. From this judgment, the plaintiffs below, as plaintiffs in error here, appeal.

The plaintiffs for their cause of action alleged that in June, 1907, they had paid to the Tulsa Street Railway Company \$427.45 for the defendant, under an oral contract so to do, and that he would reimburse them therefor. The defendant filed general denial.

At the trial one of the plaintiffs and the defendant were the only witnesses who testified.

The only complaint made here is "that the finding and judgment of the court is not sustained by sufficient evidence."

The plaintiffs contend that, under all the evidence, when analyzed and fairly considered, they are entitled to recover; that there is no substantial conflict in the same. We have examined all the evidence, and cannot agree with this contention.

The plaintiffs owned and were selling an addition to the town of Tulsa, consisting of 60 acres. A number of lots had been sold, and the defendant was the owner of 8 lots. Plaintiffs wanted the street railway line extended through the addition, and spoke to the defendant about contributing to this end. One of the plaintiffs testified, in substance, that the defendant authorized him to deal with the railway company, to pay out whatever was necessary; and that defendant would repay them. Defendant testified that he had a conversation with one of the plaintiffs, in which he stated that he would be willing to contribute whatever was proper, and his just and reasonable share, towards getting the extension made, but that he never, at any time, authorized plaintiffs to make any agreement for him, or to pay out any moneys for him; and that he had sent plaintiffs \$150 as a voluntary subscription towards getting the railway.

Taking the evidence as a whole, it is very probable that after plaintiffs had a somewhat indefinite conversation with the defendant that they, being large owners of lots and vitally interested in the extension of the car line, went ahead, without any specific authority from defendant, and paid the necessary amount to the railway company, believing they could induce the defendant later to pay them what they figured would be a proper amount. The defendant did not understand it this way, and was not willing, and claims that he did not agree for them to exercise their judgment as to what he should pay, and then pay it for him.

The court saw and heard the witnesses and weighed their evidence, and we cannot say that there was no evidence to sustain its findings. This court has repeatedly held, in an unbroken line of cases, that it will not disturb the findings of the jury or of the court, when trying the facts, if there is any evidence reasonably tending to support such findings. *Hampton v. Culberson*, 29 Okl. 468, 118 Pac. 134; *American Well & Prospecting Co. v. Spear*, 119 Pac. 586; *First National Bank of Sallisaw v. Houston*, 119 Pac. 587; *McCann v. McCann*, 24 Okl. 264, 103 Pac. 694; *Kaufman v. Bolsmier*, 25 Okl. 252, 105 Pac. 326; *Armstrong Byrd & Co. v. Crump*, 25 Okl. 452, 106 Pac. 855; *Wade v. Cornish*, 23 Okl. 40, 99 Pac. 643; *C. R. I.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep. & Indexes.

& P. R. Co. v. Broe, 23 Okl. 396, 100 Pac. 523; Hussey v. Blaylock, 21 Okl. 220, 95 Pac. 773.

PER CURIAM. Adopted in whole.

STATE v. POOR.

(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 300*)—PRESENTING QUESTIONS IN TRIAL COURT—NECESSITY FOR MOTION FOR NEW TRIAL.

The ruling on a demurrer to the evidence is a decision occurring on the trial; and, in order to enable the Supreme Court to review such ruling, it is necessary that a motion for a new trial be filed within the time prescribed by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1740-1742; Dec. Dig. § 300.*]

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Proceedings by the State against D. W. Poor. From a judgment for defendant upon a demurrer to the evidence, the state brings error. Dismissed.

C. P. Holt, Co. Atty., of Shawnee, for the State. F. H. Riley, of Shawnee, and Geo. Jenkins and William Beatty, for defendant in error.

HAYES, J. This proceeding in error is brought to reverse a judgment rendered upon a demurrer to the evidence, and the errors complained of consist only of errors alleged to have occurred at the trial. Under this condition of the record, nothing is presented to this court by the petition in error that can be considered; and upon the authority of James v. Jackson et al., 120 Pac. 288, Stump v. Porter et al., 120 Pac. 639, and State of Oklahoma v. Adams, 128 Pac. 1127, not yet officially reported, the case must be dismissed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

DIAMOND v. SHAW.

(Supreme Court of Oklahoma. July 9, 1912.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977*)—REVIEW—RULING ON MOTION FOR NEW TRIAL.

An order sustaining a motion for a new trial will not be reversed by the Supreme Court, unless it can be seen beyond a reasonable doubt that the trial court has manifestly erred as to an unmixed question of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

Error from Grant County Court; Emery H. Braeden, Special Judge.

Action between August Diamond and Olan-

ton Shaw. From the judgment, Diamond brings error. Affirmed.

J. B. Drennan, of Medford, for plaintiff in error. A. C. Glenn and Mackey & Stephenson, all of Medford, for defendant in error.

KANE, J. This is an appeal from an order sustaining a motion for a new trial. The motion for new trial contains all the statutory grounds upon which a new trial may be granted. There is nothing to indicate upon which ground the motion was sustained. Counsel for plaintiff in error, in his brief, says that the second, third, and sixth reasons are not sworn to, as provided by the statutes of the state of Oklahoma, and then takes up the fifth ground for new trial, "The verdict of the jury was not sustained by sufficient evidence, and is contrary to law," and contends that the motion should not have been granted on that ground. We may grant all this; but, as was said by Mr. Chief Justice Brewer, in Ryan v. Topeka Bridge Company, 7 Kan. 266: "There may have been abundant reason in those other grounds for setting aside the verdict, and, for aught that appears in the record, the court acted on those grounds. Even if we should examine the question presented by counsel and find error, we would still be unable to say that such erroneous ruling was the ground of disturbing the verdict."

Moreover, an order sustaining a motion for a new trial will not be reversed by the Supreme Court, unless it can be seen beyond a reasonable doubt that the trial court has manifestly erred as to an unmixed question of law. Nat. Refrigerator & Butchers' Supply Company v. Elsing, 29 Okl. 334, 116 Pac. 790.

From what has been said, it is obvious that the case at bar does not fall within that rule. The judgment of the court below must therefore be affirmed. All the Justices concur, except WILLIAMS, J., absent, and not participating.

STATE v. RADER et al.

(Supreme Court of Oklahoma. July 9, 1912.)

(Syllabus by the Court.)

SHERIFFS AND CONSTABLES (§ 166*)—ACTION ON BOND—PARTIES.

The state is a proper party plaintiff in an action upon the official bond of a sheriff to recover the penalties prescribed by sections 3371, 3372, and 3373, Comp. Laws 1906.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 394-396; Dec. Dig. § 166.*]

Error from District Court, Ellis County; G. A. Brown, Judge.

Action by the State against Geo. M. Rader and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

C. B. Leedy, of Arnett, for the State. S. A. Miller, of Arnett, for defendants in error.

KANE, J. This was an action, commenced by the plaintiff in error, plaintiff below, against the defendant in error, George M. Rader, as sheriff of Custer county, and his bondsmen, to recover penalties accruing to the county by reason of alleged violations of sections 8371, 3372, and 3378, Comp. Laws 1909. A demurrer was sustained to the petition of the plaintiff, upon the ground that the action was not commenced in the name of the county. This was error. Section 3378 provides that: "Any sheriff who shall fail to make to the board of county commissioners a quarterly report under oath as herein required, shall forfeit to the county twenty-five dollars for each day that he shall willfully fail to do so, to be recovered from him or his bondsmen as in other cases." Sections 1747 and 1748, Comp. Laws 1909, provide that the sheriff shall execute bond to the state of Oklahoma, and prescribe the conditions of the same.

The contention of counsel for defendants in error is that, inasmuch as the county is the real party in interest, it, and not the state, must prosecute the action, notwithstanding the bond runs to the state. This exact question was passed upon by the Supreme Court of the territory in *McColgan et al. v. Territory of Oklahoma et al.*, 5 Okl. 567, 49 Pac. 1018. That was an action on a forfeited recognizance. Objection was made to the same being prosecuted in the name of the territory because the statute provides that the money recovered would not go to the territory, but to the county for the benefit of the school fund. Mr. Justice Bierer, who delivered the opinion of the court in that case, said: "Gen. St. § 3898, section 26 of the chapter on civil procedure (section 5558, Comp. Laws 1909), provides: 'Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 28; but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract.' Gen. St. § 3900, section 28 of the Code of Civil Procedure (section 5560, Comp. Laws 1909), provides that: 'An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted.' Section 5503, under which the recognizance sued on was given, provides for such undertakings being made in the name of the territory, and the territory, we think, should be held to be a person, and therefore authorized to sue as one in whose name a contract is made for the benefit of

another, within the meaning of this section 28."

The judgment of the court below must be reversed, and the cause remanded, with directions to proceed in conformity with this opinion. All the Justices concur.

SPAULDING MFG. CO. v. ROFF et al.
(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 159*)—REVIEW OF DECISIONS—APPEAL BOND.

Where an appeal from a justice of the peace court is pending in the county court, and the bond for appeal is in proper form, runs in the name of the proper parties, correctly describes the court and the judgment appealed from, is filed in time and approved by the justice, and is conditioned as required by statute, except as to the provision "to prosecute without delay," the court should, timely notice being made therefor, allow the mere insufficiency in form to be corrected by the filing of a corrected or new bond, in compliance with section 6394, Comp. Laws 1909.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.*]

Commissioner's Opinion, Division No. 2. Error from Coal County Court; R. H. Wells, Judge.

Action by the Spaulding Manufacturing Company against A. V. Roff and others. From a judgment of the county court dismissing an appeal from a justice of the peace, plaintiff brings error. Reversed, with instructions.

G. T. Ralls, of Coalgate, for plaintiff in error. Foshee & Brunson, of Coalgate, for defendants in error.

BREWER, C. This appeal is from the action of the county court in dismissing an appeal therein pending from a justice of the peace. The appeal was dismissed because of irregularities in the appeal bond. The bond, caption omitted, follows: "Know all men by these presents, that the Spaulding Manufacturing Company as principal and Paul Mayer and A. R. Whit as sureties are held and firmly bound unto A. V. Roff, R. E. Calloway, and J. F. Floyd in the sum of \$50.00, for the payment of which well and truly to be made we do bind ourselves, our heirs, executors and administrators firmly by these presents. The condition of the above obligation is such that, whereas, the said Spaulding Manufacturing Company, plaintiff, intends to appeal and has appealed to the county court of Coal county, state of Oklahoma, from a judgment rendered against it in favor of the defendants herein, A. V. Roff, R. E. Calloway, and J. F. Floyd, in the justice court of Coalgate township, Coalgate, Oklahoma, on the 20th day of September, 1909: Now, if the said Spaulding Manufacturing Company shall pay the amount of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the judgment and cost appealed from if said appeal be withdrawn or dismissed, or the amount of the judgment and all costs that may be recovered against it in said action in the county court, then this obligation to be void; otherwise to remain in full force and effect. Witness our hands this 22d day of September, 1909. Spaulding Manufacturing Company, by G. T. Ralls, Attorney. [Signed] Paul Mayer. A. R. Whitt. This appeal bond filed Sept. 22, 1909, and approved by me this 22d day of September, 1909. [Signed] J. M. Wilson, Justice of the Peace, Coalgate township, Coal County, Oklahoma."

Upon motion being made to dismiss, the appellant asked leave to amend the bond or substitute a new one. This request was denied, exceptions saved, and the court, over objections, dismissed the appeal, for the reason "that said appeal bond failed to provide that the plaintiff would prosecute the appeal to effect and without unnecessary delay."

That an appeal bond may be amended or a new one substituted is authorized by statute. Section 6394, Comp. L. 1909, provides: "In proceedings on appeal, when the surety in the undertaking shall be insufficient, or such undertaking may be insufficient in form or amount, it shall be lawful for the court, on motion, to order a change or renewal of such undertaking, and direct that the same be certified to the justice from whose judgment the appeal was taken, or that it be filed in said court." We think the court below erred in not permitting the irregularities in the bond to be corrected. It is true the court has a discretion to be exercised in this, as in many other matters, having due regard for the rights of the parties and in furtherance of justice; but the discretion to be exercised is a sound judicial one.

This bond is in the form prescribed by an Oklahoma form book; it is not in strict compliance with the statute, but it is merely *insufficient in form*. Except as to the one phrase, it was in literal compliance. The court, in the interest of justice, ought to have permitted the correction sought. We are fully aware of the holdings of this court and of the territorial Supreme Court that the filing of an appeal bond is jurisdictional. The case of Vowell v. Taylor, 8 Okl. 625, 58 Pac. 944, is often cited, but in that case no bond was given; there was nothing to correct or be amended. Also, in the late case of Washburn v. De Laney, 120 Pac. 621, it was held that the court properly refused an amendment or substitution; but that case carefully points out that the bond in the case was a mere nullity. The court in that case, after quoting the statute permitting the correction of such bonds, say: "But the relief provided for in the latter section cannot be invoked in the case at bar; for it is obvious that the defects in this bond are more than mere informalities as to form or sufficiency as to sureties. The defects go to the very

substance of the instrument; and it is of no more value than a blank piece of paper, and, being so, cannot be cured by amendment," etc.

The provision of our statute under discussion was adopted from and is identical with section 131 of the Kansas Justice's Code. In considering this provision, the Kansas Supreme Court, in C. K. & W. Ry. Co. v. Townsite Co., 42 Kan. 100, 21 Pac. 1112, 1113, after quoting the section, say: "Under this section, it does not make any difference how defective in form or amount, or how insufficient the surety of, the appeal bond may be, it can be changed or renewed, either by the justice, or by the district court, if complaint is made. This seems to be absolutely conclusive on the question of jurisdiction. If the bond is insufficient in form or amount, the party against whom the appeal is taken has the right to have it corrected in these particulars; or the appellant may strengthen his appeal bond to guard against such a motion by the opposite party. In either or any event contemplated by section 131, the district court retains the case, and has the power to hear and determine it, or to dismiss it for noncompliance with an order to file a better bond in form and amount."

That case quotes with approval from Lovitt v. W. & W. R. Co., 26 Kan. 297: "Doubtless where an appeal bond is simply irregular or defective, under sections 139 and 140 of the Code, and 131 of the justice's act, the appellant should be permitted to supply a new bond in place of the defective bond." And further, in considering the policy to be pursued, say: "But we are not to be technical in dealing with questions arising out of the sufficiency of appeal bonds, because this court has declared, in the case of Haas v. Lees, 18 Kan. 449, that 'appeals are favored, and mere technical defects or omissions are to be disregarded as far as possible, without obstructing the course of justice.'"

And in the case of St. L. & S. P. Ry. Co. v. Hurst, 52 Kan. 612, 35 Pac. 211, Chief Justice Horton, for the court, says: "Where an appeal bond, filed and approved by a justice of the peace, is insufficient in form or amount, the party appealing should be given an opportunity by the district court where the appeal is pending to change or renew the bond before the case is dismissed for a defect therein. * * * The trial court committed error in dismissing the appeal. Its order and judgment will be reversed. * * *"

The other questions discussed in the briefs, relative to amending plaintiff's petition in the county court, need not be considered, as they are not, at this time, involved here. Doubtless the trial court will consider and determine them according to their merits, in the interests of the rights of the litigants, when the case is considered again, as will be required.

For the reasons assigned, the cause should be reversed, the order of dismissal set aside, and appellant afforded an opportunity to correct the old or file a new bond. The case thereafter to be proceeded with according to law.

PER CURIAM. Adopted in whole.

SPAULDING MFG. CO. v. WITTER et al.
(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

FORMER DECISION FOLLOWED.

The syllabus in this case is the same as the syllabus in No. 2,053, Spaulding Manufacturing Co. v. Roff, 125 Pac. 727.

Commissioners' Opinion, Division No. 2. Error from Coal County Court; R. H. Wells, Judge.

Action by the Spaulding Manufacturing Company against C. M. Witter and others. From a judgment refusing to permit plaintiff to amend his petition, and refusing to permit him to amend an appeal bond and dismissing appeal, plaintiff brings error. Reversed and remanded.

G. T. Ralls, of Coalgate, for plaintiff in error. Fooshee & Brunson, of Coalgate, for defendants in error.

ROSSER, C. The record in this case is in all respects identical with the record in No. 2,053, Spaulding Manufacturing Co. v. Roff et al., 125 Pac. 727, decided by Commissioner Brewer, except as to the name of the defendants. Upon the authority of that case, this case must be reversed and remanded for further proceedings, not inconsistent with the opinion in that case.

PER CURIAM. Adopted in whole.

CONSOLIDATED SCHOOL DIST. NO. 1,
ALFALFA COUNTY, v. SCHOOL DIST.
NO. 24, ALFALFA COUNTY.
(Supreme Court of Oklahoma. July 9, 1912.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 41*)—ALTERATIONS—APPORTIONMENT OF LIABILITY.

Where part of the territory of one school district is annexed to another, unless some provision is made by law respecting the property and existing liabilities, the property within the detached territory belongs to the municipality to which it is attached; and each is responsible for the debts contracted by it prior to the change.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 71-80; Dec. Dig. § 41.*]

Error from Alfalfa County Court; F. M. Gustin, Judge.

Action by School District No. 24, Alfalfa County, against Consolidated School District No. 1, Alfalfa County. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Titus & Carpenter, of Cherokee, for plaintiff in error. A. C. Beeman, of Cherokee, for defendant in error.

KANE, J. This was an action, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover a certain sum alleged to be due the plaintiff from the defendant, according to a certain apportionment made by the county superintendent. Upon trial to the court, there was judgment for the plaintiff, to reverse which this proceeding in error was commenced.

The case was tried upon an agreed statement of facts, in effect, as follows: Prior to the 5th day of August, 1907, school districts Nos. 110 and 92 were regularly organized school districts situated in Woods county, Okl. On that day the county superintendent detached a portion of the territory of district No. 110 and attached it to school district No. 92. After statehood all the territory comprising the two districts became a part of Alfalfa county; whereupon the county superintendent of Alfalfa county renumbered the districts, changing No. 110 to No. 25 and No. 92 to No. 24. Afterwards the defendant, consolidated school district No. 1, was formed from the territory comprising school districts Nos. 25 and 12. At the time the territory was detached from district No. 110 and added to district No. 92, there was no attempt to adjust the assets and liabilities of the two districts to conform to the changed conditions; but after the creation of the consolidated school district No. 1 the county superintendent made such an adjustment, and found that there was due district No. 92 from district No. 110 the sum of \$63.40; and that "the school board of consolidated school district No. 1 should issue a warrant to treasurer of school district No. 24 for \$63.40 in full account to settle net indebtedness of consolidated district No. 1 to school district No. 24." The consolidated school district refused to comply with the findings of the county superintendent; whereupon this action ensued, and the trial court seems to have taken the same view as the county superintendent.

The county superintendent, and, no doubt, the trial court, proceeded upon the theory that section 8049, Comp. Laws 1909, authorized an adjustment by the county superintendent in cases like this. With this conclusion, we cannot agree. That section provides that, "when a new district is formed in whole or in part from one or more districts possessing a schoolhouse or entitled to other property, the county superintendent, at the time of forming such new district, shall

equitably determine the proportion of the present value of schoolhouse or other property justly due to said new district. Such proportion when ascertained shall be levied by the district board of the district retaining the schoolhouse or other property upon the taxable property of the district, and shall be collected in the same manner as if the same had been authorized by a vote of the district for building a schoolhouse, and when collected shall be paid to the treasurer of the new district, to be applied towards procuring a schoolhouse for such district."

It is obvious that that section has no application to the situation presented by the facts in this case. In the instant case there was no creation of a new district, but simply a transfer of part of the territory of one district to another. This is authorized by section 7975, Comp. Laws 1909. We find no provision of law for the adjustment of the assets and liabilities occasioned by such a change in the boundaries of a district by the county superintendent, or any other person, board, or court. After detaching the territory from one district and adding it to another, the two municipalities retained their legal status, as though no change had taken place. The rule seems to be that, where part of the territory of one school district is annexed to another, unless some provision is made by law respecting the property and existing liabilities, the property within the detached territory belongs to the municipality to which it is attached; and each is responsible for the debts contracted by it prior to the change. *Winslow v. France*, Treas., 20 Okl. 303, 94 Pac. 689; *Laramie County v. Albany County et al.*, 92 U. S. 307, 23 L. Ed. 552; *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *Wade et al. v. City of Richmond*, 59 Va. 583; *Higginbotham's Ex'rs v. Commonwealth*, 66 Va. 627; *Watson et al. v. Commissioners of Pamlico*, 82 N. C. 17.

In *Winslow v. France*, supra, Mr. Chief Justice Williams, in discussing this proposition in its application to counties, says: "If a portion of a territory is annexed to another county, unless some provision is made in the act respecting the property and existing liabilities of the old county, the territory or inhabitants detached from the original county lose all claim to share in the property belonging to the county from which it was taken. Whilst it is thus relieved from the indebtedness resting upon the latter, yet it incurs the liabilities and shares in the property of the county to which it is attached, and is equally subject to assessment and taxation for that purpose."

It follows that the judgment of the court below must be reversed and the cause remanded, with directions to dismiss the same, at the costs of the plaintiff. All the Justices concur.

TURNER v. TURNER.

(Supreme Court of Oklahoma. July 1, 1912.)

(Syllabus by the Court.)

1. TRUSTS (§§ 92½, 102*)—ESTABLISHMENT—CONSTRUCTIVE TRUST—VALIDITY OF ORAL TRUST.

One brother and joint heir to a certain tract of land entered into an agreement with another brother, who was the administrator selling the land, that he would bid in the land at the administrator's sale, he and the administrator advancing money necessary to pay claims against the estate, and to buy in an individual interest which a third party had purchased from other heirs, and that they would agree on a price and sell one to the other, or they would sell the land to some stranger, and after each had taken out of the proceeds the money advanced by him the balance should be divided equally between the brother bidding, the administrator, and an insane brother, who was also a joint heir of the land. The land was bid in, and an administrator's deed made to the brother bidding, which recited a consideration of \$1,600. The administrator made a sworn report to the court, showing that he had sold the land for \$1,600. No money was actually paid the administrator. Four years after the sale, during all of which time the administrator remained in possession, the brother, to whom the deed was made, brought suit, claiming title by virtue of the deed. Held, that the agreement between the bidder and the administrator constituted the bidder a constructive trustee of the land, and that it was not such a trust as was required, by section 7267, Snyder's Comp. Laws, to be in writing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 141, 153; Dec. Dig. §§ 92½, 102.*]

2. EXECUTORS AND ADMINISTRATORS (§ 365*)—SALES UNDER ORDER OF COURT—PURCHASE BY ADMINISTRATOR—"PURCHASER."

The administrator did not, by entering into the agreement, become a "purchaser," within the inhibition of section 5348, Snyder's Comp. Laws.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1498-1503; Dec. Dig. § 365.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5858-5860; vol. 8, p. 7775.]

3. ESTOPPEL (§ 80*)—PREJUDICE AS ELEMENT.

The administrator, as against the brother to whom the deed was made, was not estopped by his report of sale to show the real facts.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 214, 215; Dec. Dig. § 80.*]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Cleveland County; R. McMillan, Judge.

Action by Joseph T. Turner against Charles E. Turner. Judgment establishing a trust in favor of defendant, and plaintiff appeals. Affirmed.

J. B. Dudley, of Norman, and Jas. L. Brown, of Oklahoma City, for plaintiff in error. Ben F. Williams and C. M. Keiger, both of Norman, for defendant in error.

ROSSER, C. This was an ejectment suit by Joseph T. Turner against Charles E. Turner in the district court of Cleveland county. Joseph T. Turner and Charles E. Turner are brothers. William Turner, their

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

father died intestate, seised of the land in controversy, and left six children his sole heirs. It seems that he was indebted; but the record does not show to what extent. Three of his children, John Turner, William A. Turner, and James F. Turner, sold their interest in the land to one H. Cowan. The defendant, Charles H. Turner, was appointed administrator of the estate. He obtained an order to sell the land in controversy, for the purpose of paying the debts of the estate, and advertised the land for sale. He and the plaintiff had an understanding with one Dr. Nail that if the land did not bring beyond a certain price that Nail should buy the land at the sale with money to be furnished by plaintiff and defendant, and that he would then deed the land back to them and another brother, Andrew J. Turner, who, it seems, is not of sound mind. Just a short time before the sale, the plaintiff suggested to the defendant that they did not know whether Nail was reliable, and that it would be better for plaintiff to buy the land and hold it in the same way. The defendant then requested Nail not to bid in the land. The land was actually bid in by the plaintiff, and the deed was made to him by the defendant as administrator. The deed recited a consideration of \$1,600. No money was actually paid him. The plaintiff and defendant borrowed \$500, and that, or a greater part of it, was used in buying the interest of H. Cowan in the land. The agreement, as testified by the defendant and found to be true by the trial court, was that the plaintiff, defendant, and the insane brother, Andrew J. Turner, were each to hold a one-third interest in the land, after deducting the amounts advanced by plaintiff and defendant, and the plaintiff and defendant were to agree upon a valuation and sell out one to the other, or they were to sell out to some third party, and take out the money they had each invested and divide the surplus, if any, equally among the three, the plaintiff, defendant, and Andrew J. Turner. The administrator made a report of sale of the land, under oath, showing that he had sold the land to Joseph T. Turner for the sum of \$1,600. After the sale the defendant remained in possession of the land for several years. He had the deed recorded, and retained possession of the land. There was a judgment for defendant, establishing a trust, and the plaintiff appeals. The judgment expressly saves the rights of the plaintiff to have his equity in the land settled and adjusted by further proceedings.

The contentions of plaintiff are: First. That the contract between plaintiff and defendant was not enforceable, for the reason that it was not in writing, and was invalid within the statute of frauds and statute of uses and trusts. Second. That it was invalid, because it was an attempt by the administrator to purchase the property of the estate, in violation of the statute. Third.

That the defendant was estopped, by his recital in his deed and the proceedings in the probate case, from claiming any interest in the land.

[1] The first proposition is the difficult one. The provisions of the statute of frauds with reference to contracts to convey land are not applicable. The defendant does not allege there was a contract to convey lands. The allegations of the answer are that the land was conveyed to plaintiff in trust to reimburse himself and defendant for money they advanced, and to divide the amount the land was worth over what they had advanced into three parts, each of them to receive one and their insane brother, Andrew, to receive one.

Section 7267, Snyder's Comp. Laws, provides that "no trust in relation to real property is valid, unless created or declared: (1) By a written instrument, subscribed by the trustee or by his agent thereto authorized by writing, (2) By the instrument under which the trustee claims the estate affected; or (3) by operation of law." The facts as shown create a trust by operation of law. The trust is of the class known as constructive trusts.

An examination of the record shows that the two brothers wanted the land to bring what it was worth, and that they agreed, if it did not bring a certain price, they would have it bid in, and they would themselves advance the money necessary to pay off the claims against the estate. Three of the brothers had sold their interest, and the purchaser from them, Cowan, had to be repaid. The insane brother, Andrew, had an interest in the land, subject to the debts. The plaintiff proposed to buy it in, and to hold it in trust for all three, subject to his and defendant's right to have the money they advanced repaid to them. It is very clear that if plaintiff prevails in this action an injustice will be done the other two brothers. The statute of frauds cannot be used to effectuate a fraud. Hughes, *Datum Posts*, 182, L. C. 341.

In this case, if plaintiff is permitted to recover, he will gain an advantage from a statute that was intended to prevent fraud and perjury. Whenever a person conveys land to another under such circumstances as that the other cannot, in equity and good conscience, hold it, equity will consider him a constructive trustee for the persons rightfully entitled. *Perry on Trusts*, § 171.

The plaintiff and defendant, together with Andrew Turner, were joint tenants or co-partners in the land. The general rule is that a joint tenant cannot buy in an outstanding title and hold it adversely to his cotenants, but that he must hold it for their benefit, with the right to require them to contribute their proportion of whatever the outstanding title costs him. 38 Cyc. 40. In this case the defendant, as tenant in common, desiring to protect his own interest

and the interest of his insane brother, entered into the agreement that was made with plaintiff. If the plaintiff had not entered into this agreement, defendant might have made some other arrangements that would have protected their interest. To allow plaintiff to hold the land would be to allow him to profit by his breach of contract, and deprive defendant of the interest he thought he was protecting, and which he might have protected in some other way, had plaintiff not made the agreement he did. No cases exactly in point have been found; but a number of cases in which the same principle is involved can be cited as sustaining the conclusion that the plaintiff in the case held the land purchased by him as constructive trustee.

In the case of *Chadwick v. Arnold*, 34 Utah, 48, 95 Pac. 527, a mortgagor entered into an agreement with a person, by which he was to buy the mortgaged premises, taking title in his own name, and upon promise of a certain sum he was to reconvey the property to mortgagor. It was held that a trust *ex maleficio* arose, enforceable, though the contract was not in writing, as required by the statute of frauds. In the course of the opinion, the court said:

"The doctrine, however, is quite generally accepted that a trust *ex maleficio* arises whenever a person acquires the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own. The doctrine is well stated in volume 3, Pom. Eq. Jur. (3d Ed.) § 1055, as follows: 'A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false or fraudulent verbal promise to hold the same for a certain specified purpose, as, for example, a promise to convey the land to a designated individual, or to reconvey it to the grantor, and the like; and, having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfill the trust by conveying according to his engagement.'

"And in section 1056: 'The foregoing cases should be carefully distinguished from those in which there is a mere verbal promise to purchase and convey land. In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however un-equivocal; otherwise the statute of frauds would be virtually abrogated. There must

be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts.'

"And in a note to section 1055 it is said: 'The doctrine is often used with great efficacy to prevent the triumph of fraud, and to protect persons under necessities, in cases where, at execution sale or mortgage foreclosure, or other compulsory public sale, a party buys in the land under a prior fraudulent promise, made to the owner, that the purchaser will take the title, hold the property for the benefit of such owner, and will reconvey to him on being repaid the amount advanced for the purchase price; and, having thus by fraudulent contrivance cut off competition and prevented the owner from making other arrangements to protect his property, and having obtained the property, perhaps, for much less than its real value, he refuses to abide by his verbal promise, and retains the land or other property as absolutely his own. Equity will relieve the defrauded owner by impressing on the property a trust *ex maleficio*, and by treating the purchaser as a trustee in invitum.'

"Mr. Waterman, in his work on Specific Performance of Contracts, at section 252, says: 'A verbal agreement, entered into by A. and B. with an execution debtor whose land is about to be sold by the sheriff, to purchase it with their own funds and hold it for his benefit is equivalent to a loan of money and a taking of the title as security for its repayment, or an agreement by one person to purchase land for the benefit of another, under the circumstances which would amount to fraud upon the latter, if the former were allowed to repudiate his promise, and therefore is not within the statute of frauds.'

"And in section 253: 'Where it is verbally agreed between the vendor of land at a judicial sale and the purchaser that the purchaser's rights shall be only those of a mortgagee, and he fraudulently violates the contract by obtaining an absolute deed to himself and selling the land to a third person, who has notice of the agreement, the purchaser and his vendee hold the title in trust for the original owner.'

"With respect to the question when a constructive trust will be created by a court of equity, at section 171, vol. 1, Perry on Trusts (4th Ed.), it is said: 'Thus, where one buys land at an execution sale, or under a trust deed, under an agreement with the debtor that the latter may redeem, the purchaser holds in trust; it would be a fraud to allow him to repudiate the contract.'

"In the case of *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18, it is observed: 'Where one having an interest is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee ex maleficio.'

"In support of these texts are the following cases: *Sandfoss v. Jones*, 35 Cal. 481; *Wolford v. Herrington*, 74 Pa. 311, 15 Am. Rep. 548; *Mulholland v. York*, 82 N. C. 510; *Tankard v. Tankard*, 84 N. C. 286; *Avery v. Stewart*, 136 N. C. 437, 48 S. E. 775, 68 L. R. A. 776; *Rose v. Bates*, 12 Mo. 30; *Soggins v. Heard*, 31 Miss. 426; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Outler v. Babcock*, 81 Wis. 195, 51 N. W. 420, 29 Am. St. Rep. 229; *Ryan v. Dox*, 34 N. Y. 307, 9 Am. Dec. 696; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738."

In *Dickson v. Stewart*, 71 Neb. 424, 98 N. W. 1085, 115 Am. St. Rep. 596, it was held, where a party acquires legal title by purchase of land at the sheriff's sale, in pursuance of parol agreement with the judgment debtor that he will hold the property as security for the loan or the money paid and relieve the land from the judgment lien, and that he will reconvey when the money is refunded, that such an agreement is not within the statute of frauds, and that he can be compelled to reconvey. See, also, *Phillips v. Hartenberg*, 181 Mo. 463, 80 S. W. 891, and cases there cited; *Collins v. Williamson*, 94 Ga. 635, 21 S. E. 140; *Pope v. Dapray*, 176 Ill. 478, 52 N. E. 58.

In *Griffin v. Schlenk*, 139 Ky. 523, 102 S. W. 837, a parol agreement between joint owners of land that one of them should bid in the land at the mortgagee's sale for the benefit of all was held valid. In the course of the opinion, the court said: "Appellant's contention that the agreement, being parol, was within the statute of frauds is wholly untenable. 'An agreement between joint owners of real estate that one shall bid at a public sale of it for the benefit of both (or all) is valid, although by parol.' 29 Am. & Eng. Ency. of Law (2d Ed.) 899. Appellant's purchase of the land under the agreement created a trust by operation of law for the joint benefit of all the appellees and herself. Such trusts are enforceable at the suit of all or any of the beneficiaries. It is not material that she was not paid in advance their proportion of the money to purchase the property. Some of them, according to the evidence, were ready and able to buy it when her bid was accepted, but were prevented by the agreement from bidding. In permitting appellees to share with appellant the benefit of the purchase, the court could require them to contribute ratably to the making up of the purchase price. Appellees showed

their willingness to contribute their respective shares of the purchase price paid for the land by appellant, but were not permitted to do so by her act in repudiating the trust imposed by the agreement. Constructive trusts are held not within the statute of frauds, because they are bottomed on the doctrine of estoppel, and the operation of an estoppel is never affected by the statute of frauds. *Morris v. Shannon*, 75 Ky. 89; *Martin v. Martin*, 55 Ky. 8; *Miller v. Antle*, 65 Ky. 407, 92 Am. Dec. 495; *Green v. Ball*, 67 Ky. 586; *Parker v. Catron* [120 Ky. 145], 85 S. W. 740, 27 Ky. Law Rep. 536 [117 Am. St. Rep. 575]; *Pomeroy's Eq. §§ 1030-1044.*"

In *Carr v. Craig*, 138 Iowa, 126, 116 N. W. 720, the court said: "We see no difficulty about establishing such a trust obligation in a court of equity by parol evidence. Such evidence is not to be shut out on the ground that it tends to show an express trust in land, in violation of the statute of frauds, but is admissible to establish a constructive trust, arising from the violation of the defendant of the confidence reposed in him by his own procurement, violation of which constituted a fraud. There is enough in this record to show that, while defendant induced plaintiff to allow him to acquire title to her land by foreclosure, by means of a promise to refund to her the money she had invested, his real intention was to acquire title, and hold it in violation of such agreement. This purpose is evidenced by his subsequent conduct. Under such circumstances, a court of equity will treat the acts of the defendant as constructively fraudulent, and defeat his attempted wrong by imposing upon him a duty in the nature of a trust to carry out his agreement, although established only by parol evidence. *Gregory v. Bowlsby*, 126 Iowa, 588 [102 N. W. 517]; *Crossman v. Keister*, 223 Ill. 69, 79 N. E. 58, 8 L. R. A. (N. S.) 698, 114 Am. St. Rep. 305; *Larmon v. Knight*, 140 Ill. 233, 29 N. E. 1116, 33 Am. St. Rep. 229; 2 *Pomeroy, Equity* (2d Ed.) §§ 1044-1055."

In *Frost v. Perfield*, 44 Wash. 185, 87 Pac. 117, the same conclusion is arrived at, without giving much reason, other than it was wrong for the purchaser to so abuse the confidence of the owner, who had relied upon him. See, also, *Davis v. Kerr*, 141 N. C. 11, 53 S. E. 519; *Phillips v. Hardenberg*, 181 Mo. 463, 80 S. W. 891; *Collins v. Williamson*, 94 Ga. 635, 21 S. E. 140; *Pope v. Dapray*, 176 Ill. 478, 52 N. E. 58.

It is not intended to hold in this opinion that an agreement, such as was made here, would be enforced between strangers to the property, unless in writing. It is only in cases where the person, who is seeking to enforce the agreement, has an interest in the property sold that such a parol agreement can be enforced; but where a person has an interest in the property, and relies upon the promise that the purchase will be made for

his benefit, it will be enforced. Because of the promise, he has probably neglected to take other steps that he might have taken to protect himself, and thereby a fraudulent advantage has been taken. See *Lancaster v. Long*, 220 Pa. 449, 69 Atl. 993; *Boyd v. Hankinson*, 92 Fed. 49, 34 C. C. A. 197.

[2] The second question must also be decided against the appellant. It is true the law prohibits an administrator from purchasing at his own sale. This is a salutary rule, and cannot be too rigorously enforced. No man can lawfully act in a matter where there is conflict between duty and interest. It is the duty of an administrator to get the best price possible. If he were permitted to buy, it would be to his interest to obtain the property at the lowest price possible. The two positions are incompatible.

But this principle has no application in this case. Under the agreement of plaintiff and defendant, there was to be no change in the title, except that they should be reimbursed for the money paid out by them in obtaining Cowan's interest and paying the debts of the deceased. The defendant did not get more than he already had. No one was hurt. No one's interest was affected further than to the extent of the money advanced. Defendant, in entering into the contract with plaintiff, was merely protecting his own interest and that of the other tenants in common, or coparceners. The rule is laid down in 18 Cyc. 771 that, if the personal representative has an interest in the estate, he may purchase at his own sale, if necessary to protect his interest. A number of authorities are cited in support of this rule, and an examination shows they are in point. Section 5346 of Snyder's Comp. Laws prohibits an administrator from purchasing property of the estate he represents. Whether this statute will prevent an administrator from purchasing property in which he owns an interest, in order to protect that interest, it is not necessary to decide in this case. In this case the administrator did not purchase anything he did not already own. He merely protected his own interest and that of his insane brother by buying in Cowan's interest and paying off the debts of the estate.

[3] The recitals in his report of sale of the land do not estop the defendant from proving the contract with plaintiff. To create an estoppel, it must be shown that the party against whom it is sought to invoke the estoppel has, by words or conduct upon which the party invoking the estoppel relied, induced him to change his situation in such a way that it would result in loss to him to show the real facts. 18 Cyc. 722; *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111; *Clark v. Parsons*, 69 N. H. 147, 39 Atl. 898, 76 Am. St. Rep. 157. The filing of the report did not deceive plaintiff. He was not induced to alter his position with reference to the property in any way. All he did was done before

the report was filed. The filing of the report did not estop defendant from asserting his right against the plaintiff. The report was filed as it was pursuant to the agreement with plaintiff. No one was defrauded. The only persons interested were the creditors and the plaintiff, defendant, and their insane brother. The creditors were paid, and the brother's rights were safeguarded by the contract.

No opinion is expressed as to the effect of the report as to others than parties to the contract.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

OKLAHOMA FIRE INS. CO. v. BARBER ASPHALT PAVING CO.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 507*)—ACTIONS—SERVICE OF PROCESS.

Where the statute points out a particular method of serving process upon a domestic corporation, such method is exclusive, and must be followed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.*]

2. CORPORATIONS (§ 507*)—ACTIONS—SERVICE OF PROCESS.

A service of summons upon a director of a domestic corporation, other than the chairman of the board, is unauthorized by section 5604, Comp. Laws 1909; it not appearing in the return that such director was chairman of the board, or that he occupied any office named in said section, though the return recites that director served was "the highest officer" of the defendant corporation to be found in the county.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.*]

3. CORPORATIONS (§ 507*)—ACTIONS—SERVICE OF PROCESS—"CHIEF OFFICER"—"MANAGING AGENT."

A director, by or through the authority of his office, is not a "chief officer" or "managing agent" of a domestic corporation, within the meaning of section 5604, Comp. Laws 1909; hence service of summons on the corporation cannot be had by the delivery of a copy of the summons to such director.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971-1974, 1976-2000; Dec. Dig. § 507.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4320-4323.]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by the Barber Asphalt Paving Company against the Oklahoma Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Brook & Brook, of Muskogee, for plaintiff in error. Masterson Peyton, of Muskogee, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SHARP, C. October 8, 1909, defendant in error, plaintiff below, brought suit in the superior court of Muskogee county against the plaintiff in error, defendant below, to recover judgment on a certain policy of fire insurance theretofore issued by said defendant to plaintiff. The plaintiff in error is a New York corporation; the defendant in error a domestic corporation. Summons was issued October 8, 1909, directed to the sheriff of Muskogee county. The return thereon is in the following language: "State of Oklahoma, Muskogee County—ss.: Received within summons on this the 8th day of October, 1909, and, as commanded therein, made search for the president, vice president, secretary and treasurer, of the Oklahoma Fire Ins. Co., and, failing to find any of said officers of said defendant company in my county, I summoned the defendant, the Oklahoma Fire Ins. Co., on this the 9th day of October, 1909, by delivering a certified copy of the within summons, with all of the indorsements thereon, to Eck E. Brook, one of the directors of said company; he being the highest officer of said defendant, the Oklahoma Fire Insurance Company, to be found in my county. In witness whereof, I have hereunto affixed my hand and seal on this the 9th day of October, 1909. R. B. Ramsey, Sheriff. J. M. Brucker, Deputy."

Thereafter, and on the 13th day of October, 1909, the defendant corporation appeared specially, and filed its motion to quash the summons and purported service thereof, claiming that said summons was not issued and returned according to law, and that it was not served upon any officer or agent of defendant corporation, and that the court did not thereby acquire jurisdiction over said defendant. This motion was overruled and exceptions saved, and the action of the court is assigned as error.

[1] Section 5604, Comp. Laws 1909, provides that: "A summons against a corporation may be served upon the president, mayor, chairman of the board of directors, or trustees, or other chief officer; or, if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or, if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof." Where the statute points out a particular method of serving process upon domestic corporations, such method must be followed. *Great West Mining Co. v. Mining Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; *Illinois Central Ry. Co. v. Fairpoint Mfg. Co.*, 55 Ill. App. 231; *Toledo Ice Co. v. Munger*, 124 Mich. 4, 82 N. W. 663; *State ex rel. Ellis v. King Bridge Co.*, 28 Ohio Cir. Ct. 147; *Kernan, Adm'r., v. Northern Pac. Ry. Co.*, 103 Wis. 356, 79 N. W. 403; *El Paso & S. W. R. Co. v. Kelley* (Tex.)

83 S. W. 855; *Kennedy et al. v. Hibernia Savings & Loan Co.*, 38 Cal. 151; *Aldrich v. Anchor Coal & Development Co.*, 24 Or. 32, 32 Pac. 756, 41 Am. St. Rep. 831; *Reddington v. Mariposa, etc., Mining Co.*, 19 Hun, 405; *Cherry v. North, etc., Ry. Co.*, 59 Ga. 446; *Union Pacific Ry. Co. v. Miller*, 87 Ill. 45; *Waco Lodge Number 70, I. O. O. F., v. Wheeler*, 59 Tex. 554; *Clark & Marshall on Corporations*, § 267; *Chambers Bros. & Co. v. King, etc., Manufactory*, 16 Kan. 270.

Section 63 of the Civil Code of Kansas, upon which the decision in *Chambers Bros. v. King, etc., Manufactory* is based, is identical with section 5604, Comp. Laws 1909.

That there must be a compliance with the statute is, perhaps, nowhere better expressed than by the Supreme Court of the United States, in *Amy et al. v. City of Watertown*, 130 U. S. 307, 9 Sup. Ct. 539, 32 L. Ed. 946, in which Mr. Justice Bradley, speaking for the court, said: "The question, then, is reduced to this: Whether, in case the mayor has resigned, and there is no presiding officer of the board of street commissioners (a body which seems to take the place of the common council of the city for many purposes), service of process on the city clerk and on a conspicuous member of the board is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail, there would be no difficulty. In the absence of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. But, when a statute intervenes and displaces the common law, we are brought to a question of words, and are bound to take the words of the statute as law. The cases are numerous which decide that, where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations. *Kibbe v. Benson*, 17 Wall. 624, 21 [4 Ed.] 741; *Alexandria v. Fairfax*, 95 U. S. 774, 24 [1 Ed.] 583; *Settlemyer v. Sullivan*, 97 U. S. 444, 24 [1 Ed.] 1110; *Evans v. Dublin & D. R. Co.*, 14 Mees. & W. 142; *Walton v. Universal Salvage Co.*, 16 Mees. & W. 438; *Brydolf v. Wolf*, 32 Iowa, 509; *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 581; *Lehigh Valley Ins. Co. v. Fuller*, 81 Pa. 398. The courts of Wisconsin strictly adhere to this rule. *Congar v. Galena & C. U. R. Co.*, 17 Wis. 478, 485; *Watertown v. Robinson*, 59 Wis. 513 [17 N. W. 542]; *Watertown v. Robinson*, 69 Wis. 230 [34 N. W. 137]. The two cases last cited related to the charter now under consideration. In the first case, service was made upon the city clerk and upon the chairman of the board of street commissioners, whilst the board was in session, in the absence of the mayor, who could not be found after diligent search. The court, after referring to the provisions of the charter and the Revised Statutes on

the subject, say: 'The question whether the Revised Statutes control as to the manner of service is not a material inquiry here, because both the charter and general provision require the service to be made upon the mayor; but no service was made upon that officer, as appears by the return of the sheriff. The principle is too elementary to need discussion that a court can only acquire jurisdiction of a party, where there is no appearance, by the service of process in the manner prescribed by law.' In the last case (decided in 1887), service was made in the same manner as in the previous one, and the court say: 'When the statute prescribes a particular mode of service, that mode must be followed. "Ita lex scripta est." There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations: When the statute designates a particular officer to whom the process may be delivered, and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute.' It is unnecessary to look farther to see what the law of Wisconsin is on this subject. It is perfectly clear that by that law the service of process in the present case was ineffective and void." The fact that the defendant in the above case was a municipal corporation does not distinguish the rule announced from the instant case.

A number of the states have enacted that service on a corporation may be made upon a director. *Washington, A. & Georgetown R. R. Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675; *Pennsylvania R. Co. v. Bennett*, 47 N. J. Law, 275; *Delaware, etc., Ry. Co. v. Ditton*, 36 N. J. Law, 361; *Grubb v. Lancaster Mfg. Co.*, 10 Phila. (Pa.) 316; *Commonwealth v. Wilmington, etc., R. Co.*, 2 Pearson (Pa.) 408; *Webb v. Cape Fear Bank*, 50 N. C. 288; *Silsbee v. Quincy Hotel Co.*, 30 Ill. App. 204.

[2, 3] There is, however, no such statute in this state, though the statute specifically provides that service of summons may be had upon the chairman of the board of directors. The return of the officer does not show that Eck E. Brook was the chairman of the board, but, instead, that he was one of the directors of the corporation. The fact that the statute provides that summons may be had on the chairman of the board of directors speaks not only affirmatively, but it also speaks negatively. In such circumstances, the maxim, "Expressio unius est ex-

clusio alterius," has a particular application. In *Alabama & Tennessee R. R. Co. v. Burns-McKibbin Co.*, 43 Ala. 169, the summons was served on one of the directors of the railroad company. The court held that a director was not such a head or managing agent thereof as contemplated by the statute, and observed that a director, by virtue of his office, could attend to no business of the company himself; that there must be enough of the directory present to constitute a quorum, and that they must meet at a time and place at which every other director might attend; and that it was only in such a meeting that he was an officer of the company. The fact that the return shows that Eck E. Brook, a director, was the highest officer of the defendant corporation to be found in the county does not make him a "chief officer" or "managing agent," within the terms of the statute.

The assignment raises a question entirely different from that passed upon by this court in *Ravia Granite Ballast Co. v. Wilson*, 22 Okl. 689, 98 Pac. 949; *Ozark Marble Co. v. Still*, 24 Okl. 559, 103 Pac. 586; *Cunningham Com. Co. v. Rorer Mill & Elevator Co.*, 25 Okl. 133, 105 Pac. 676. There the question was one of the right of substituted service, where the return failed to state the absence from the county of the president, mayor, etc., and did not go to the question of the right to serve summons on an officer inferior in statutory rank, where proper showing of the absence of the superior officer appeared.

The motion to quash the service of summons should have been sustained. Exceptions being saved to the action of the trial court in overruling the motion, the fact that defendant below afterwards answered and went to trial does not constitute a waiver of its right to urge, as ground for reversal, the adverse decision on the motion to quash. *Chicago Building & Mfg. Co. v. Pewthers*, 10 Okl. 724, 63 Pac. 964; *St. Louis & S. F. R. Co. v. Clark*, 17 Okl. 562, 87 Pac. 430.

For the reason given, the judgment of the trial court should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

O. F. HALEY CO. v. STATE.

(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 251*) — SEARCHES AND SEIZURES — INTERPLEADER.

Where a firm ships whisky from another state into that part of this state formerly Indian Territory, and it is seized by the state authorities, and such firm interpleads and asks a return to it of such whisky, on the ground that it is an interstate shipment, and has not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lost its interstate character by delivery to the consignee, held that, because the allegations of the interplea show a violation of the criminal laws of the United States, the doors of the courts are closed as to such firm.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 389, 390; Dec. Dig. § 251.*]

Commissioners' Opinion, Division No. 2. Error from Murray County Court; Harry W. Fielding, Judge.

Upon the seizure of a quantity of intoxicating liquors under a search warrant, the O. F. Haley Company interpleads, claiming the liquor. From a judgment overruling the interplea, the O. F. Haley Company brings error. Affirmed.

Wm. Pfeiffer, of Ardmore, for plaintiff in error. J. M. Hayes, of Okmulgee, for the State.

BREWER, C. On September 17, 1909, in the town of Sulphur, Murray county, a large quantity of whisky and beer was seized, while in the railroad depot, under a search warrant issued by the county judge of that county, in pursuance of the enforcement act (Comp. L. 1909, § 4184).

At the hearing of the return to the writ, under section 4185, Comp. L. 1909, the plaintiff in error claimed the liquors seized under the writ, in a formal pleading in the nature of an interplea, and which, omitting caption, follows:

"Comes now O. F. Haley Co. and respectfully represents and shows to the county that it is the owner of and entitled to the immediate possession of certain liquor, to wit, and consigned to the following parties, to wit:

7/21/09. D. F. Wheeler.	2 casks of beer.
8/4/09. E. H. Brown.	6 cases whisky.
8/19/09. Wm. Moore.	2 " "
8/19/09. " "	2 " "
8/19/09. " "	2 " "
8/19/09. " "	2 casks beer.
8/20/09. " "	2 " "
8/20/09. " "	2 " "
8/23/09. Ed. Potts.	1 " "
8/21/09. A. J. Porter.	2 " "

"Which said liquor was consigned from Gainesville, in the State of Texas, to Sulphur, in the state of Oklahoma, and delivered by said O. F. Haley at said Gainesville to the common carrier, to wit, G., C. & S. F. Ry. Co., for transportation from said town of Gainesville to said town of Sulphur. That said goods were shipped to above-named parties under contract, commonly known as 'shippers order.' That said above-described goods were seized by the enforcement officers of this state from the freight and warehouses of the said G., C. & S. F. Ry. Co. at Sulphur, and before same were delivered to the consignee. That title and ownership of said liquors are now in the said O. F. Haley Company, and are now wrongfully in the possession of the sheriff of Murray county, state of Oklahoma. That the above-described goods

were not knowingly used or permitted to be used in violation of any of the provisions of what is known as the 'Billups Law' of this state. Wherefore, the premises considered, this interpleader prays that the above-described goods be returned to him as provided by law."

The court held that the averments of this interplea were not sufficient to entitle the plaintiff in error to a return of the seized goods, and, the interpleader electing to stand thereon, judgment was rendered that the goods were subject to seizure and confiscation, under chapter 61, Comp. L. 1909; and that they be delivered to the superintendent of the state agency at Guthrie. From this judgment on the pleading, this appeal is prosecuted.

It is clear that the claim set up here for a return of the goods is based on the supposed protection of the Constitution and laws relating to interstate commerce, upon the theory that these shipments were interstate commerce; and that, when seized, their character as such had not been lost by a delivery to the consignees. Ordinarily this contention would be sound. *State v. 18 Casks of Beer*, 24 Okl. 786, 104 Pac. 1093, 25 L. R. A. (N. S.) 492; *St. L. & S. F. R. Co. v. State*, 26 Okl. 300, 109 Pac. 230; *Schwedes v. State*, 1 Okl. Cr. 245, 99 Pac. 804; *High v. State*, 2 Okl. Cr. 161, 101 Pac. 115, 28 L. R. A. (N. S.) 162; *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 684, 42 L. Ed. 1088; *Vance v. Vandercook*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111; *Heyman v. Southern R. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130; *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 27 Sup. Ct. 608, 51 L. Ed. 987.

The decisions of the United States Circuit Court of Appeals, Eighth Circuit, in *United States Ex. Co. v. Friedman*, 191 Fed. 673, 112 O. C. A. 219, and *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. —, decided by the Supreme Court of the United States June 10, 1912, make it clear, however, that the plaintiff can find no relief on the theory advanced.

In the case of *Ex parte Webb*, supra, the Supreme Court quotes from the act of Congress of March 1, 1895, c. 145, 28 Stat. 693, as follows: "That any person, whether an Indian or otherwise, who shall, in said territory, manufacture, sell, give away, or in any manner, or by any means furnish to any one, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to any one, or carrying into said territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 125 P.—47

than one month nor more than five years." And proceeds to hold that while the provisions of that act have been impliedly repealed, in so far as the manufacture, sale, and furnishing of liquors is concerned, yet that it is in full force and effect, in so far as it relates to the introduction of liquors from another state into that part of Oklahoma which was formerly Indian Territory. This holding of the court is predicated on the fact that the Congress has, under the Constitution of the United States, sole power to "regulate commerce * * * among the several states, and with the Indian Tribes," etc. Article 1, § 8, Const. That the town of Sulphur and Murray county is part of the old Indian Territory, we know judicially.

It is immaterial what our views of the doctrine announced in the Webb Case may be, in so far as the question of interstate commerce is involved and decided in it; the rule announced by that court is the law of the land. On the precise point, we quote from the text of that opinion: "In view of these considerations, and others to be mentioned, it seems to us that Congress, so far from intending by the enabling act to repeal so much of the act of 1895 as prohibits the carrying of intoxicating liquors into the Indian Territory from points without the state, framed the enabling act with a clear view of the distinction between the powers appropriate to be exercised by the new state over matters within her borders, and the powers appropriate to be exercised by the United States over traffic originating beyond the borders of the new state and extending within the Indian Territory."

It follows, then, that the allegations of the interplea in this case, upon which the plaintiff in error demands the interference of the court, by ordering a return and delivery to it of the liquors seized by the state, when viewed in the light of the decision in the Webb Case, *supra*, clearly show that the interpleader has violated a law of the United States in shipping the liquors as it did. Those allegations, presented in a proper way to a federal grand jury, would justify an indictment; and later a conviction, carrying with it a possible sentence of five years in the penitentiary. Therefore it resolves itself into the single question: Will the court lend its aid to one who asserts a right growing out of his own violation of the law? We answer, "No." The principle of public policy involved is expressed in the maxim, "Ex dolo malo non oritur actio," and in discussing this maxim Lord Mansfield says: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own statement or otherwise, the cause of action appears to arise 'ex turpa causa,' or the transgression of a positive law of this country, there the court says he has no right to be assisted." Wharton's Legal Maxims, p. 81. This rule is sustained by this court in the

case of *Blunk v. Waugh et al.*, 122 Pac. 717, wherein it is said: "It is well established, we might say universally established, that the courts will not enforce any rights which directly arise out of an illegal contract." *Holden v. Lynn*, 120 Pac. 248; *Citizens' National Bank of Chickasha v. Mitchell*, 24 Okl. 488, 103 Pac. 730 [20 Ann. Cas. 3711]; *Wagner v. Minnie Harvester Co.*, 25 Okl. 558, 106 Pac. 969; *Binswanger v. Stanford*, 28 Okl. 429, 114 Pac. 621, in which the earlier Oklahoma cases are cited; *Rowman v. Phillips*, 41 Kan. 364, 21 Pac. 230, 3 L. R. A. 631, 13 Am. St. Rep. 292; *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Graves v. Johnson*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446; *Bancher v. Mansel*, 47 Me. 58; *Hanauer v. Doane*, 12 Wall. 342, 20 L. Ed. 439; *Fisher v. Lord*, 63 N. H. 514 [3 Atl. 927]."

If the courts will not open their doors to enforce an illegal or fraudulent contract, they certainly will not to enforce a demand inseparably connected with a violation of the criminal laws.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

COOKE COUNTY LIQUOR CO. v. STATE. (Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

FORMER DECISION FOLLOWED.

Same as syllabus in No. 2,027, O. F. Haley & Co. v. State, 125 Pac. 736, not yet officially reported.

Commissioners' Opinion, Division No. 2. Error from Murray County Court; Harry W. Fielding, Judge.

Proceedings by the State to forfeit intoxicating liquors, and the Cooke County Liquor Company intervenes. From a judgment against the intervener, it brings error. Affirmed.

Wm. Pfeiffer, of Ardmore, for plaintiff in error. J. M. Hayes, of Okmulgee, for the State.

ROSSER, C. This case arose out of certain proceedings by search warrant to forfeit to the state certain beer and whisky in the railroad depot at Sulphur, Okl. It is a companion case to case No. 2,027, O. F. Haley & Co. v. State of Oklahoma, 125 Pac. 736, just decided by Commissioner Brewer. It arose out of proceedings upon the same search warrant that case arose from, and the record is identical, except as to the names of parties and description of the property.

For the reasons given in that case, the judgment of the lower court in this case should be affirmed.

PER CURIAM. Adopted in whole.

LUDWIG v. BENEDICT.

(Supreme Court of Oklahoma. May 14, 1912.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 528*)—RECORD—SCOPE AND CONTENTS—MOTION FOR NEW TRIAL.**

A motion for a new trial copied into a transcript constitutes no part of the record, and will not be considered by the Supreme Court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384-2388; Dec. Dig. § 528.*]

2. APPEAL AND ERROR (§§ 292, 501*)—RECORDS—SCOPE AND CONTENTS—INSTRUCTIONS—NECESSITY FOR MOTION FOR NEW TRIAL.

Rulings on instructions, and exceptions thereto cannot be considered, unless the instructions are excepted to at the trial, the exceptions made to appear of record, and the objections pointed out to the trial court on motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1697-1699, 2300-2305; Dec. Dig. §§ 292, 501.*]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action between William H. Ludwig and John D. Benedict. From the judgment, Ludwig brings error. Dismissed.

Bailey & Wyand, of Muskogee, for plaintiff in error. Murphey & Noffsinger, of Muskogee, for defendant in error.

KANE, J. This cause comes on to be heard upon a motion to dismiss the appeal upon the following grounds: (1) Because the plaintiff in error has failed to attach to his petition in error a case-made and a bill of exceptions, preserving the evidence and such rules and orders of the trial court that are not by statute made a part of the record. (2) Because none of the errors complained of were presented to the trial court by a motion for a new trial. (3) Because the record does not show any motion for a new trial, or the rulings of the court thereon. (4) Because the evidence, motions, and orders of the trial court that are not a part of the record, unless made so by a bill of exceptions or case-made, have not been preserved, and are not a part of the record in this case. (5) Because the petition in error presents no question for the consideration of the court, independent of the evidence and other orders, rulings, and acts of the court that have to be, by law, made a part of the record by a case-made or bill of exceptions.

[1] The motion to dismiss must be sustained. The plaintiff in error attempts to appeal by attaching to his petition in error what he calls a "transcript of the record," which contains a certified copy of the summons, the return of the officer thereon, the petition of the plaintiff, the answer of the defendant, and the reply. It also contains what is designated as instructions asked by plaintiff and refused by the court, and the

exceptions noted, the verdict of the jury, and the motion for a new trial. It is apparent that a motion for a new trial was necessary to bring to this court for review the errors complained of. It has been many times held by this court that a motion for a new trial copied into a transcript constitutes no part of the record, and will not be considered by the Supreme Court on appeal. *McMechan v. Christy*, 3 Okl. 301, 41 Pac. 332; *Black v. Kuhn*, 6 Okl. 87, 50 Pac. 80; *Kingman & Co. v. Pixley*, 7 Okl. 351, 54 Pac. 494; *Menden v. Shuttee*, 11 Okl. 381, 67 Pac. 478; *McCarthy v. Bentley*, 16 Okl. 19, 83 Pac. 713; *Davis v. Lammers*, 23 Okl. 338, 100 Pac. 514; *Tribal Development Co. v. White Bros.*, 28 Okl. 525, 114 Pac. 736.

[2] Counsel for plaintiff in error contend that the instructions given and refused, when filed, form part of the record proper, and need not be incorporated into the case-made or bill of exceptions, in order to be reviewed by this court. It is well settled in this jurisdiction that rulings on instructions, and exceptions thereto, cannot be considered, unless the instructions are excepted to at the trial, the exceptions made to appear of record, and the objections pointed out to the trial court on motion for new trial. *Boyd v. Bryan*, 11 Okl. 56, 65 Pac. 940; *Glaser et al. v. Glaser et al.*, 13 Okl. 889, 74 Pac. 944; *Southwestern Cotton Seed Oil Co. v. Bank of Stroud et al.*, 12 Okl. 163, 70 Pac. 205; *Martin et al. v. Gassert*, 17 Okl. 177, 87 Pac. 586.

The appeal must be dismissed. It is so ordered. All the Justices concur.

Ex parte WILSON.

(Criminal Court of Appeals of Oklahoma.
July 29, 1912.)

*(Syllabus by the Court.)***1. ELECTIONS (§ 126*)—NOMINATIONS—PRIMARIES.**

Party nominations by primary elections is a fundamental principle of popular government, and is a permanent rule of public policy in this state, as declared by article 3, § 5 (section 47, Williams' Const.): "The Legislature shall enact laws providing for a mandatory primary system, which shall provide for the nomination of all candidates in all elections for state, district, county, and municipal officers, for all political parties, including United States Senators: Provided, however, this provision shall not exclude the right of the people to place on the ballot by petition any nonpartisan candidate."

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

2. ELECTIONS (§ 21*)—NOMINATIONS—PRIMARIES—CONSTITUTIONAL PROVISIONS.

Under this positive constitutional direction, it is the right and duty of the Legislature to prescribe reasonable regulations for the holding of mandatory primary elections; but such regulations must not contravene other constitutional provisions relating to elections.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 15; Dec. Dig. § 21.*]

3. ELECTIONS (§ 126*)—NOMINATIONS—POLITICAL PARTIES.

This provision of the Constitution recognizes political parties for the purpose of nominating candidates for elective offices, and contemplates that only electors who are members of political parties shall participate in primary elections for the selection of candidates for the respective parties, and then vote only the ballot of the party of which they are members.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

4. ELECTIONS (§ 120*)—NOMINATIONS—POLITICAL PARTIES.

The mandatory primary provision of the Constitution and the provision of article 3, § 4 (section 45, Williams' Const.), providing that "the Legislature shall enact laws creating an election board, not more than a majority of whose members shall be selected from the same political party," are a constitutional recognition of political party organization.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

5. ELECTIONS (§ 120*)—NOMINATIONS—"PRIMARY ELECTION."

Article 3, §§ 1, 4a, and 7 (§§ 42, 46, and 49, Williams' Const.), prescribing the qualifications of electors and guaranteeing their right to vote, applies to the election of public officers, and not to the selection of party nominees at a primary election. A "primary election" is one for the nomination of candidates of the respective political parties by the members thereof.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5551, 5552.]

6. ELECTIONS (§ 126*)—NOMINATIONS—PRIMARY ELECTIONS—QUALIFICATIONS OF VOTERS.

The qualifications of electors entitled to vote at a primary election are the same as the qualifications of electors entitled to vote at the general election within the election precinct where the primary is held, except that, in addition thereto, the elector participating in a primary election must be a member of a party recognized by the official ballots of said primary.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

7. ELECTIONS (§ 121*)—RIGHT OF SUFFRAGE—ORGANIZATION OF POLITICAL PARTIES.

The right of suffrage includes the right to form political parties, and the right of each party to promulgate rules, not reasonably prohibited by law, for making its organization effective, to promote its principles and policies by electing officers in harmony therewith to legislate and execute the law to that end.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 115; Dec. Dig. § 121.*]

8. ELECTIONS (§ 121*)—"POLITICAL PARTIES."

"Political parties" are voluntary associations of electors, having an organization and committee, and having distinctive opinions on some or all of the leading political questions of controversy in the state, and attempting through their organization to elect officers of their own party faith and make their political principles the policy of the government. They are governed by their own usages and establish their own rules.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 115; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5444, 5445; vol. 8, p. 7757.]

9. ELECTIONS (§ 121*)—POLITICAL PARTIES—POWERS.

Self-preservation is the right of political parties, as well as individuals. It is for the party to nominate; for the people to elect.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 115; Dec. Dig. § 121.*]

10. ELECTIONS (§ 120*)—PRIMARY ELECTIONS—STATUTORY PROVISIONS.

The provisions of the primary election law, which are designed only to prevent any but voters affiliated with a particular party from voting at primary elections, are reasonable and proper, in view of the object to be obtained by a mandatory primary election law, and do not infringe upon any constitutional rights of electors, since said law provides a method by which nonpartisan and independent nominations may be made by petition in accordance with the proviso of article 3, § 5 (section 47, Williams' Const.).

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 120.*]

11. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—QUALIFICATIONS OF VOTERS—DETERMINATION.

Whether a person offering to vote at a primary election has the requisite qualification as to being a member, in good faith, of the party whose ballot he asserts the right to vote must, on challenge for want of such qualification, be inquired into and determined by the inspector of election in the manner provided for proving qualification under the general election law.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

12. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—QUALIFICATIONS OF VOTERS—DETERMINATION.

When an elector demands a party ballot, if the election inspector, judge, or party watcher knows or has reason to believe that the elector offering to vote is a nonpartisan, or not a member of the party whose ballot he is attempting to vote, it is the duty of such election officers to challenge the right of such elector to vote; and any challenger for any candidate may challenge the right of such elector to vote the ballot of the party making the challenge. If the challenge be on the ground that the elector is not, in good faith, a member of the party whose ticket he is attempting to vote, the duty of the inspector is the same as upon challenge as to any other qualification; and proper proof should be required in the manner required by the general election law for proving qualification before such elector shall be permitted to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

13. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—QUALIFICATIONS OF VOTERS—DETERMINATION.

An elector cannot prescribe his own method of proving his qualification in respect to his party membership, so as to preclude the election inspector from disputing or rejecting his proof.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

14. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—QUALIFICATIONS OF VOTERS—DETERMINATION.

An elector offering to vote at a primary election shall prove his qualifications in the same manner in which electors are required by law to prove their qualifications at the general election. Such elector shall have the right to receive the ballot of the party of his affiliation, and no other.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

15. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—QUALIFICATIONS OF VOTERS—DETERMINATION.

The mere fact that an elector has registered and then and there stated his political party affiliation does not preclude the right to interpose a challenge, on the ground that he is not, in good faith, a member of the party stated in his registration certificate, and whose ballot he requests to vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 118; Dec. Dig. § 126.*]

16. ELECTIONS (§ 328*)—OFFENSES AGAINST ELECTION LAWS—DUTIES OF ELECTION OFFICERS.

An information charging an election inspector with the offense of refusing the request of the elector named therein, who has all of the constitutional qualifications of an elector at a general election, and who had duly registered as an elector in said precinct, but not as a Democrat, and who demanded and was refused a Democrat ballot, which information fails to allege that said elector was then and at that time a member of the Democratic party, or had at the last preceding general election voted the Democratic ticket, or that said elector then and there, on oath or affirmation, stated that he intended to support the nominees of the Democratic party at the general election for which nominees of the respective political parties were then and there being selected by a primary election, held that, the information failing to allege these facts, the facts stated do not constitute a public offense, and, as a matter of law, the facts stated constitute a legal justification for the action of the petitioner, as such election inspector, in refusing to deliver a Democratic ballot. Held, further, that to have delivered a Democratic ballot, and to have permitted the elector named to vote the same, under the facts stated in the information, would have been a violation of the petitioner's duty as such election inspector. Therefore the petitioner is entitled to be discharged.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 355-363; Dec. Dig. § 328.*]

(Additional Syllabus by Editorial Staff.)

17. ELECTIONS (§ 10½*)—CONSTITUTIONAL GUARANTIES—"FREE AND EQUAL ELECTION."

The guaranty of a "free and equal election" signifies that elections shall not only be open and untrammelled to persons endowed with the elective franchise, but shall be closed to all not enjoying such privilege under the Constitution.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 10½.*]

For other definitions, see Words and Phrases, vol. 3, p. 2963.]

Original application by Lee F. Wilson for writ of habeas corpus. Writ granted, and petitioner discharged.

The petitioner, Lee F. Wilson, on July 24, 1912, filed in this court a petition, which, omitting the title and verification, is as follows:

"Comes your petitioner, Lee F. Wilson, and respectfully shows to the court:

"(1) That he is imprisoned and restrained of his liberty in the county jail of Oklahoma county, Oklahoma, by Jack Spain, sheriff of said county.

"(2) That, according to the best of the knowledge and information of your petition-

er, he is so imprisoned and restrained of his liberty by the said sheriff under and by virtue of a warrant of arrest issued by the county judge of Oklahoma county, and based on an information filed in the county court of said county by Sam Hoeker, county attorney, charging, in substance, that your petitioner, on the 2d day of August, A. D. 1910, in Oklahoma county, Oklahoma, being then and there election inspector of precinct A of the Third ward, of Oklahoma City, and then and there acting as such at the primary election, then and there held according to law, did deprive one W. P. Cloonan, a duly qualified elector, of his vote in said primary election by then and there refusing to deliver to the said W. P. Cloonan a Democratic primary ticket, although the said W. P. Cloonan had then and there designated the Democratic primary ticket as the ticket he then and there desired to vote, and had then and there requested of the said Lee F. Wilson, election inspector, as aforesaid, that he, the said Lee F. Wilson, deliver to the said W. P. Cloonan the said Democratic primary ticket. A full, true, and correct copy of said information is attached hereto, marked 'Exhibit A,' and made a part hereof.

"(3) That the aforesaid restraint and imprisonment of your petitioner is illegal and without authority of law, in that the said information fails to charge a public offense, because the same contains no allegation. (1) that the said W. P. Cloonan was, on the 2d day of August, 1910, a member of the Democratic party, or (2) that the said W. P. Cloonan had at the last general election, prior to said 2d day of August, 1910, voted the Democratic ticket, or (3) that the said W. P. Cloonan then and there intended to support the nominees of the Democratic primary at the general election, for which the nominees of the several parties were then and there being named.

"Wherefore petitioner prays that the writ of habeas corpus may issue out of this honorable court, directed to the said Jack Spain, sheriff as aforesaid, commanding him to have the body of your petitioner, together with the time and cause of his detention, before the court at a time to be by the court fixed; that pending said sheriff's return to said writ, and the final determination of this cause, your petitioner may be admitted to bail in a reasonable sum to be fixed by the court; that upon such final hearing he may be discharged from the custody of said sheriff; and for all other proper relief."

And on said day the petition was presented to his honor, Presiding Judge Furman, who issued a writ, returnable July 25th, and ordered that, pending the determination of said application, the petitioner be admitted to bail in the sum of \$500. On said return day, respondent filed his return thereto. The case was thereupon argued and submitted.

*For other cases see same topic and section: NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

E. J. Giddings, Jennings & Levy, E. G. McAdams, E. L. Kistler, W. A. Ledbetter, and Norman R. Haskell, all of Oklahoma City, for petitioner Sam Hooker, Co. Atty., and Selwyn Douglas, Asst. Co. Atty., of Oklahoma City, for respondent.

DOYLE, J. (after stating the facts as above). The petition herein and the return to the writ issued thereon show that on July 24, 1912, Sam Hooker, county attorney of Oklahoma county, filed in the county court of said county an information against the petitioner, Lee F. Wilson, purporting to charge him with a violation of the primary election law, as follows: "That on said 2d day of August, 1910, a primary election was held in and for precinct A of the Third ward of Oklahoma City, in the county and state aforesaid, for the nomination of candidates of the several political parties for the general election to be held according to law in the month of November, 1910, and the said Lee F. Wilson was then and there the duly qualified and acting election inspector at and for the precinct aforesaid; and one W. P. Cloonan, who was then and there a duly qualified elector of the election precinct, city, county and state, aforesaid, then and there designated to the said Lee F. Wilson the Democratic primary ticket as the ticket he desired to vote at said primary election, and did then and there request of the said Lee F. Wilson, as such election inspector, that he, the said Lee F. Wilson, deliver to the said W. P. Cloonan a Democratic primary ticket; and the said Lee F. Wilson, then and there well knowing the said W. P. Cloonan to be a duly qualified elector, as aforesaid, did then and there willfully, knowingly, and unlawfully deny the request of the said W. P. Cloonan for such Democratic primary ticket, and did then and there willfully, knowingly, and unlawfully fail and refuse to deliver such Democratic primary ticket to the said W. P. Cloonan, upon the unlawful pretext that he, the said W. P. Cloonan, was not then and there entitled to cast his vote in the Democratic primary, for the reason that he, the said W. P. Cloonan, had theretofore not registered as a Democratic voter with said Lee F. Wilson as such inspector, and at said primary did not then and there exhibit to the said Lee F. Wilson his registration certificate as required by law, contrary to," etc. Upon the information the judge of said county court issued a warrant, which was duly executed by arresting the petitioner.

It is averred in the petition, and the learned counsel for petitioner contend, that the restraint and imprisonment of petitioner is illegal and without authority of law, in that said information fails to charge a public offense, and therefore does not authorize his detention to answer thereto.

On behalf of the respondent, it is claimed that an elector possessing the qualifications prescribed by the Constitution is invested

with the constitutional right to vote at any election in this state; and therefore the information charges a public offense.

[1] The question presented is, Does the information charge a public offense? The answer to it depends upon the construction now to be given to the primary election laws. Party nomination by primary elections is a fundamental principle of popular government, and is a permanent rule of public policy, as declared by provisions of our state Constitution: Article 3, § 5 (paragraph 47, Williams' Const.): "The Legislature shall enact laws providing for a mandatory primary system, which shall provide for the nomination of all candidates in all elections for state, district, county, and municipal officers, for all political parties, including United States Senators: Provided, however, this provision shall not exclude the right of the people to place on the ballot by petition any nonpartisan candidate." Const. art. 3, § 6 (paragraph 48, Williams' Const.): "In all elections by the people the vote shall be by ballot and the Legislature shall provide the kind of ticket or ballot to be used and make all such other regulations as may be necessary to detect and punish fraud, and preserve the purity of the ballot."

In pursuance of the constitutional direction, the first Legislature enacted a mandatory primary election law. Article 2, c. §1, of the Laws of 1907-08. Subsequently this act was amended. Article 4, c. 16, of the Laws of 1909.

The act in question cannot be set out in full without extending this opinion to an unreasonable length, however desirable it would be to do so; we therefore must be content to set out a few of the principal provisions, as follows:

Section 3266, Snyder's Sta.: "Political parties in this state shall select or nominate their respective candidates for the various state, district, county, township and precinct officers by a primary election as herein provided for, and no candidate's name shall be printed upon the official ballot for any general or special election at which all or any of the state, district, county, township or precinct officers are to be elected unless such candidate shall have been nominated as herein specified: Provided, that this provision shall not exclude the right of nonpartisan candidates to have their names printed upon such official ballots as hereinafter provided for. (L. 1909, S. B. 5. Took effect June 11, 1909.)"

Section 3267: "The first Tuesday in the month of August of each and every even numbered year, beginning with the year nineteen hundred eight, shall be the biennial primary election day at which time each and every political party entitled and intending to make nominations for the next general election shall nominate their candidates for all elective officers and positions enumerated in section 3266 of this act to be filled at such

general election, and including United States Senators: Provided, that nominations for any special election, held for the purpose of filling a vacancy in any office or offices, caused by death, resignation, or removal, may be made by delegate convention, if, in the judgment of the state election board, the time is too short in which to hold a primary election, or the cost of holding same would be excessive or unnecessarily burdensome: Provided, that if special primary elections are held to fill vacancies in the Legislature, they shall be held on a day fixed by the Governor by proclamation, which proclamation shall be issued fifteen days before the day of such special primary election. (L. 1907-08, p. 358.)

Section 3268: "The voting place in each precinct or ward, and the inspector, judges and clerks shall be designated and selected and advertised in the same manner as provided by law for general elections, and all provisions of the general election laws, not inconsistent with this act, shall govern such primary election. (L. 1907-08, p. 359.)"

Section 3275: "Each ward and voting precinct shall be provided with ballot boxes, ballots, poll books, tally sheets, blanks for returns, oaths and all necessary election supplies by the same officers and in the same way, and all expenses of such primary election borne and paid in the same manner as is now or may hereafter be provided by law for general elections. (L. 1907-08, p. 361.)"

Section 3277: "Each political party shall have the right to place one of its members at the polls as watcher during the whole time of receiving and counting the ballots, who shall be selected by the committeeman of such party in such ward or voting precinct. (L. 1907-08, p. 361.)"

Section 3286: "No ballot shall be given an elector for the purpose of voting until the name of the elector has been entered upon the poll book and the method of voting shall be the same as in other elections. Returns of primary elections shall be made in the manner provided by the general election laws. (L. 1909, S. B. 5. Took effect June 11, 1909.)"

Section 3290: "Every act declared to be an offense by the general election law shall be such under this act, and any person found guilty of any such offense shall be subject to the penalties prescribed by such election law. (L. 1909, S. B. 5. Took effect June 11, 1909.)"

Const. art. 3, § 6 (paragraph 48, Williams' Const.), provides: "The Legislature may, when necessary, provide by law for the registration of electors throughout the state or in any incorporated city or town thereof, and, when it is so provided, no person shall vote at any election unless he shall have registered according to law."

Article 1, subart. 8, c. 31, of the Laws of

1907-08, provides a system of registration for cities of the first class. This act requires, as a prerequisite to the exercise of the constitutional right to vote at any election, the previous registration of all electors in cities of the first class. It is provided therein that the elector shall state his political party affiliation, if any, and that his registration certificate shall set forth this fact.

It is claimed on behalf of respondent that by opinion of the Attorney General (section 9 of article 2, c. 31, of the Laws of 1907-08; section 3276, Snyder's Sts.), which provides: "The names of candidates of the several political parties shall be printed upon separate sheets of paper of different color under the party device and each voter shall designate which ticket he desires to vote, and upon request of the election inspector shall deliver to the voter the ticket called for. When the voter has made out his ballot he shall fold the same and hand it back to the inspector and in the presence of the voter the inspector shall deposit the ballot in the ballot box. The ballots of the several political parties shall be deposited in the same box. The number of ballots provided for each party, in each precinct, shall be equal to a number which is twenty per cent. in excess of the vote cast for the party candidate for Secretary of State in such precinct, at the last preceding general election. (L. 1907-08, p. 361)"—has not been repealed, and that the provision therein that "each voter shall designate which ticket he desires to vote, and upon request of the election inspector shall deliver to the voter the ticket called for," gives to any elector desiring to vote at a primary election the right and privilege to demand and vote any ticket, regardless of his party affiliations.

As we view the law, this section was repealed by substitution, upon the enactment of section 4, art. 4, c. 16, Laws of 1909 (section 3273, Snyder's Sts.), which provides: "The names of candidates of the several political parties shall be printed upon separate ballots and of different color. No party emblem or device shall appear thereon and no elector shall be permitted to vote for the nomination of candidates of more than one party in any primary election. The ballots for primary elections shall be printed by the county election boards as nearly in conformity with the provisions of the general election law as may be. (L. 1909, S. B. 5. Took effect June 11, 1909.)"

The rule of construction of statutes is that, where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute of the first act, it will act as a repeal of the first, especially where the subsequent act contains a general repealing clause, as in this case. *Pettit v. State*, 7 Okl. Cr. —, 121 Pac. 278.

It is also claimed that by opinion of the Attorney General the clause in this section, that "no elector shall be permitted to vote for the nomination of candidates of more than one party in any primary election," gives to the voter the right to vote one of ficial party ballot of any party he may designate. In our view this clause does not need construction at all. The plain purpose is to prevent a voter at a primary election from voting different party ballots for congressional, state, and county candidates.

It is alleged that the elector named in the information was a duly qualified and registered elector of the precinct named, but did not register as a Democrat. The petitioner is charged with having refused to deliver to him a Democratic ballot.

The propositions presented are, first, whether or not a qualified elector, who is not a member of any political party having official ballots at a general primary election, is entitled to vote at such primary election. Second, whether or not an elector may vote the ballot of any party he chooses to select, whether he is a member of that party or not.

[3] Upon careful consideration, we are of opinion that the constitutional provisions contemplate that only electors who are members of political parties shall participate in the primary election for the selection of candidates for the respective parties, and then vote only the ballot of the party of which they are a member, and that non-partisan electors having no party affiliations are relegated to their right to participate in the nomination of candidates for elective office by petition in the manner provided for by the primary election law. A few plain and unquestionable propositions will sufficiently present the views of this court in support of this position.

[4] The mandatory primary election provision of the Constitution and the provision of article 3, § 4 (section 45, Williams' Const.), "The Legislature shall enact laws creating an election board, not more than a majority of whose members shall be selected from the same political party," are a constitutional recognition of political party organization.

[5] "Political parties" are voluntary associations of electors, having an organization and committee, and having distinctive opinions on some or all of the leading political questions of controversy in the state, and attempting through their organization to elect officers of their own party faith and make their political principles the policy of the government. They are governed by their own usages and establish their own rules.

[7] No one with any knowledge of the history of our country will contend for a moment that political parties have not played an important part in shaping the destinies of our government; nor that they were not a powerful and necessary force in a successful

administration of the affairs of the national and state governments. So potent have they become in determining the measures and in administering the affairs of government, that they are now regarded as inseparable from, if not essential to, a republican form of government. "In his The American Commonwealth, Mr. Bryce says: 'In America the great moving forces are the parties. * * * The spirit and force of party has in America been as essential to the action of the machinery of government as steam is to a locomotive engine; or, to vary the simile, party association and organization are to the organs of government almost what the motor nerves are to the muscles, sinews, and bones of the human body. They transmit the motive power; they determine the directions in which the organs act. A description of them is therefore a necessary complement to an account of the Constitution and government; for it is into the hands of the parties that the working of the government has fallen. Their ingenuity, stimulated by incessant rivalry, has turned many provisions of the Constitution to unforeseen uses, and given to the legal institutions of the country no small part of their present color.' Sir Henry Sumner Maine says: 'It is not to be expected that all the hopes of the founders of the American Constitution would be fulfilled. They do not seem to have been prepared for the rapid development of party, chiefly under the influence of Thomas Jefferson, nor for the thorough organization with which the American parties before long provided themselves.' And again he says: 'The truth is that the inherent difficulties of democratic government are so manifold and enormous that in large and complex modern society it could neither last nor work if it were not aided by certain forces which are not exclusively associated with it, but of which it greatly stimulates the energy. Of these forces, the one to which it owes most is unquestionably Party.' The elector's choice of persons for office, to be effective, must be from party candidates, and so the nomination of candidates becomes as much a matter of public concern as the election of officers." State v. Felton, 77 Ohio St. 569, 84 N. E. 87.

From the provisions of the primary election law enacted in accordance with the constitutional direction, the intent of the Legislature would appear to be manifest. Its plain purpose is to provide for and regulate the nomination of candidates by political parties, and thereby preserve the purity of elections, upon which must depend the safety and security of republican forms of government.

[2] A mandatory primary election law, to be valid, must sustain the constitutional rights of electors, who, as members of a political party, participate in such primary elections; and it will not be presumed that the Legislature intended to deny the political

parties or members thereof participating in primary elections proper protection under the law.

The election provisions of the Constitution and the mandatory primary election law were intended for the protection of the party, and of the citizen in his rights as a member of a political party, and guarantee to him the right to express, through his ballot, at a primary election his wish as to the conduct of the affairs of his own party, and his preference in the selection of the candidates for office within his party. If this was not so, an elector participating in a primary election would be powerless, and without any method or means of protecting this right conferred upon him by the Constitution and law.

In the case of *People v. Board of Election Commissioners of Chicago*, 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562, Cartwright, C. J., delivering the opinion of the court, said: "The right to choose candidates for public offices, whose names will be placed on the official ballot, is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. There is scarcely a possibility that any person will or can be elected to office under this system, unless he shall be chosen at a primary election; and this statute, which provides the methods by which that shall be done, and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law. It is undoubtedly true, as urged by counsel for defendants, that it has become not only proper, but necessary, to provide additional safeguards and protection to the voters at primary elections, to the end that their will may be fully expressed and faithfully and honestly carried out, and any law having that object in view would naturally commend itself to the law-making power. The legitimate purpose of such a law, however, must be to sustain and enforce the provisions of the Constitution and the rights of voters, and not to curtail or subvert them, or injuriously restrict such rights."

[8] In the case of *Britton v. Election Com'rs*, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115, it was held that a primary election law permitting a voter, without regard to party affiliations, to vote at a primary election for delegates to the political convention of any party that he chooses to select, whether he is a member of that party or not, or ever intends to become such, gives an opportunity for disruption and destruction of political parties by its opponents, and is therefore void as a violation of the reserved rights of the people, which the Constitution declares shall not be impaired.

In the case of *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, Haney, P. J., delivering the opinion of the court, says: "Regarding legislative control of party nominations, this

court has said: 'It is for the party to nominate; for the people to elect. The question is not who shall be chosen to any particular public office. That is for the voters of all political parties to determine at the polls. It is simply who shall represent the organization as its nominees, and certainly the determination of that question should be controlled by the action of the party itself; otherwise party nominations are impossible. To what extent, if at all, the rights of organized political parties should be recognized and regulated by law is a matter of public policy, to be determined by the legislative department—a matter which does not concern this court. Its duties are done when it gives effect to the legislative will as expressed in statutes which do not conflict with any provision of the federal or state Constitution. *State v. Metcalf*, 18 S. D. 398, 100 N. W. 923, 87 L. R. A. 331. Undoubtedly the qualifications of an elector, as defined by the Constitution, for the purposes contemplated by its provisions relating to the elective franchise, are exclusive and conclusive. Undoubtedly no valid law can be enacted on any subject or for any purpose which deprives the elector of substantial rights under such provisions. Undoubtedly, by reason of the Australian ballot system, which limits the elector's choice of candidates to those whose names appear on the official ballot, a relation exists between primary elections and general elections which must not be disregarded. Nevertheless, in the application of constitutional provisions relating to such elections as were contemplated by that instrument to such elections as are provided for by this act, the substantial distinction between the choice of a candidate by an organized party and the choice of an officer by the entire electorate must be observed; otherwise the existence of organized political parties, under legislative control, is impossible. Regulation necessarily contemplates and sanctions the continued existence of what is regulated. No law can regulate what it destroys. Whether it would be wise or constitutional for the Legislature to abolish all organized political parties are questions foreign to the present inquiry. The legislation under discussion was not designed to accomplish that purpose. It was the evident intent of the lawmaking power to regulate, not to destroy; and, in order to accomplish its purpose, it was absolutely necessary that each party organization be permitted to establish its own rules regarding the qualifications of its members, or that a rule applicable to all be prescribed.' This is conceded by the plaintiff and supported by abundant authority. *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457; *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109; *State v. Drexel* [74 Neb. 776, 105 N. W. 174], *supra*. Indeed, it has been held that a law permitting electors, who are not members of a party, to participate in the nomination of

its candidates is unconstitutional. *Britton v. Board*, 129 Cal. 389, 61 Pac. 1115, 51 L. R. A. 115."

In the case of *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109, the Supreme Court of Illinois says: "The object of holding a primary election by a political party is to select party candidates, and it is too plain for argument that no voter should be permitted to vote at the primary election of a political party, unless he is a member of such party; and, unless provision is made to prevent persons voting at a primary election for the candidates of a party who are not affiliated with such party, the whole scheme of nominating party candidates by a primary election would fall, because of being incapable of execution."

[5] Recurring to the opinions of the Attorney General which the respondent refers to, wherein the primary law is construed as allowing indiscriminate voting, regardless of party affiliation, we are of the opinion that, if such an interpretation could be sustained, then the provisions of the sections referred to would, we think, be clearly unconstitutional, as being in violation of sections 4 and 5, art. 3, of the Constitution, and as being in contravention of that part of section 6, art. 3, which provides that "the Legislature shall make all such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot," and section 7, art. 3, which provides: "The election shall be free and equal; no power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage."

A primary election is one for the nomination of candidates for office of the respective political parties by the members thereof. If Republicans vote the Democratic party ballot, and Democrats vote the Republican party ballot, and Socialists vote any ballot but their own, then nominations so made cannot be said to be party nominations.

It needs no argument for the position that to permit electors participating in a primary election to vote indiscriminately any party ballot they might choose to select, regardless of their party affiliations, would be simply putting a premium upon deceit, dishonesty, and fraud, and would make it possible for the worst elements of the several political parties participating to direct and control their nominations. Obviously all of the provisions of the primary election law were enacted by the Legislature to prevent electors from voting any ballot except that of their respective parties, and thereby prevent fraud and preserve the purity of the ballot. The constitutional provision and the primary election law provides only for party elections. The right and privilege of the individual voter at the general election to cast his vote untrammelled for the candidate

of his choice, is no more sacred than the right of the individual member of a political party to express his choice for party candidates at a primary election; and such right cannot be taken from him without abridging his constitutional right to participate in a free and equal election.

[17] To be free means that the elector shall be left in the untrammelled exercise, whether by civil or military authority, of his right or privilege. That is to say, no impediment or restraint of any character shall be imposed upon him, either directly or indirectly, whereby he shall be hindered or prevented from participation at the polls. *De Walt v. Bartley*, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814.

The word "equal" has a different signification. Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege. Now, if persons, not legitimately entitled to vote, are permitted to do so, the legal voter is denied his adequate, proportionate share of influence, and the result is that the election as to him is unequal; that is he is denied the equal influence to which he is entitled with all other qualified electors. *Ballot Reform, Its Constitutionality*, John H. Wigmore, 23 Am. Law. Rev. 719; *Edmonds v. Banbury*, 28 Iowa, 267, 271, 4 Am. Rep. 177; *Davis v. School Dist.*, 44 N. H. 398, 404; *Commonwealth v. McClelland*, 83 Ky. 686. So that the terms "free" and "equal," used, as they are, correlatively, signify that the elections shall not only be open and untrammelled to all persons endowed with the elective franchise, but shall be closed to all not in the enjoyment of such privilege under the Constitution. *Ladd v. Holmes*, 40 Or. 167, 66 Pac. 714, 91 Am. St. Rep. 457.

In *Commonwealth v. McClelland*, 83 Ky. 685, 693, the court says: "What are free and equal elections in the meaning of the Constitution? They certainly are not such as may be secured by the indiscriminate exercise of the right of suffrage, without regard to qualifications or regulations necessary to test and determine the right of those who offer to vote. * * * Elections are free and equal only when all who possess the requisite qualifications are afforded a reasonable opportunity to vote without being molested or intimidated, and when the polls are in each county and in each precinct alike freed from the interference or contamination of fraudulent voters."

The members of the several political parties have the constitutional right to select their candidates for office with the same freedom as they have the right to vote for them after they are nominated, or the primary election at which they vote for candidates is a delusion and a fraud upon the individual voter. If the independent voter, or the voter affiliating with an opposition

party, can vote at the primary election the ballot of a party with which he has no political affiliation, and thereby control the nominations of a party to which he is opposed, the constitutional guaranty that "the election shall be free and equal" would be destroyed.

[10] Where primary elections for the nomination of party candidates are held, as authorized and required by law, under the supervision and inspection of election officials, including a party watcher present, as provided by section 8277, supra, it is not a violation of the Constitution that all electors are not permitted to vote at such primary election. As was said by the Supreme Court of Oregon, in the case of *Ladd v. Holmes*, supra: "Electors of one party have no desire, unless prompted by sinister or evil motives, nor have they any inherent right within or without the Constitution, to vote at some other party primary or election; hence no right or privilege of which they can complain has been intrenched upon or violated. We see no objection to the Legislature providing for party elections, and limiting the electoral privilege to party members. The exclusion of other party members from participating in such elections is not an infringement or denial of a constitutional right or privilege."

[8] A citizen's only right to vote depends upon his qualifications under the Constitution and the law, and this right is subject to limitations of age, ancestry, residence, and sex, and other matters mentioned therein. The qualifications of electors entitled to vote at a primary election are the same as the qualifications of electors entitled to vote at the general election within the election precinct where the primary is held, except that, in addition thereto, the elector participating in a primary election must be a member of some party recognized by the official ballots of such primary.

[14] Each elector shall prove his qualifications in the same manner in which electors in the election precinct in which he offers to vote are required by law to prove their qualifications at the general election; and each elector shall have the right to receive the ballot of the party of his affiliation, and no other.

The only statutory provisions in relation to challenges of electors and the duty of inspectors of election when an elector shall be challenged as unqualified are contained in the general election laws. Section 8285, Snyder's Sts., provides that: "Such primary election shall in all respects conform to the laws governing elections except as herein otherwise provided, and all provisions of law governing general elections not in conflict with this act are hereby made applicable and put in force herewith."

[11, 12] No specific provision is made by the primary law for testing the qualification

of an elector as to his party affiliation. The inquiry is, by the general election law, confined to the qualifications enumerated, in which this is not included. Under the foregoing provision, when an elector demands a party ballot, if the election inspector, judge, or party watcher knows or has reason to believe that the elector offering to vote is a nonpartisan, or not a member of the party whose ballot he is attempting to vote, it is the duty of such election officer to challenge the right of such elector to vote; and any challenger for any candidate may challenge the right of such elector to vote the ballot of the party making the challenge. If the challenge be on the ground that the elector is not, in good faith, a member of the party whose ticket he is attempting to vote, the duty of the inspector is the same as upon a challenge as to any other qualification. An elector who resists the challenge and makes oath that he possesses the qualification contemplated by the Constitution should bear in mind that the usual test is, Did the elector vote the party ticket at the last preceding general election? Another rule of party membership is: An elector who affiliates with the party and stands by his party organization, and as such member yields obedience to party rules and usages, and accepts and supports the regular party nominations.

By the primary law of Nebraska, the right of an elector to vote at a primary is made to depend upon his political affiliation with the party for whose candidates he desires to cast a ballot. It is therein provided that no person shall "be entitled to vote at such primary election until he shall have first stated to the judges of said primary election what political party he affiliates with, and whose candidates he supported at the last election, and whose candidates he intends to support at the next election," and when challenged he must make oath to the truth of the statements, above required, as to party affiliation and his support of the candidates of the party with whom he is offering to vote. Here, in the absence of a statutory test of the party qualification of electors at a primary election, the rules and usages of the respective political parties having official ballots to be voted at such primary election must control.

[13] The elector cannot prescribe his own method of proving his qualification in respect to his party membership, so as to preclude the election inspector from disputing or rejecting his proof; but may require him to make proof of his qualification in the manner and mode prescribed by the general election laws for proving qualifications.

[15] The mere fact that an elector has registered, and at that time stated his political party affiliation, does not preclude the right to interpose a challenge, on the ground that he is not a member of the party named in his registration certificate, and whose ballot he requests to vote. "While a person's name

on the registry list is prima facie evidence of his right to vote, yet the officers may strike off his name and reject his vote, if they can show that he is not entitled." *Brightly's Leading Cases on Elections*, p. 695; *Paine on Elections*, p. 296.

[16] The information charges that the elector named therein had all the qualifications of an elector, as required by article 3, §§ 1 and 4a (sections 42 and 46, Williams' Const.), and that he had duly registered as an elector in said precinct, but fails to state that said elector was then and at that time a member of the Democratic party, or had at the last preceding general election voted the Democratic ticket, or that said elector, then and there, on oath or affirmation, stated that he intended to support the nominees of the Democratic party at the general election for which nominees of the several political parties were then and there being named. The information failing to allege those facts, the facts stated do not constitute a public offense, and, as a matter of law, the facts stated constitute a legal justification for the action of petitioner as such election inspector. For petitioner to have delivered a Democratic ballot, and permitted the elector named to vote the same, upon the facts stated in the information, would have been a palpable violation of his duty as such election inspector.

For the reasons hereinbefore stated, we are of opinion that said petitioner is entitled to be discharged; and it is so ordered by the court.

ARMSTRONG, J., concurs.

FURMAN, P. J. (concurring). It is a settled rule of law that a statute should be construed with reference to its spirit and reason. To arrive at the spirit and reason of the law, courts must take into consideration what was the law before the statute was passed, and the mischief which it was enacted to correct. In construing a statute, an interpretation must never be adopted which will defeat the very purpose of the law, or which will enable persons to elude its provisions or defeat the objects for which it was enacted, if this can be avoided. When two different constructions may be placed upon an act, one of which will accomplish the purpose of the Legislature and the other render the act nugatory, the former should always be adopted. It must always be presumed that the legislative body intended to favor and foster, rather than to contravene, public policy, which is based upon principles of natural justice, good morals, and the settled wisdom of the law as applied to the ordinary affairs of life. Therefore courts should not place a construction upon a statute which is contrary to natural justice and right, or which is against public policy and good morals, if they can reasonably avoid doing so. These

rules of construction are so manifestly just, and are so well established and universally recognized, that it is not necessary to take time in citing authorities in their support.

To arrive at the spirit and reason of our primary election law, we must consider conditions existing before it was enacted. We will then be in a position to understand the evils at which it was aimed. Where the people are possessed of but little wealth, the territory limited, the population is small, and public questions are few and simple, there is little or no inducement for a republic for persons to organize to plunder the public treasury, or enrich themselves at the expense of the people. It is therefore possible to conduct the business affairs of such a republic without the organization of political parties; but where republics cover a vast extent of country, where the population is dense, the wealth is great, and public questions are many and complicated, experience demonstrates that special interests and personal ambition and selfishness will cause men to combine and organize for the purpose of perverting the government from its rightful purpose and objects, and use it as a means to advance their own personal, selfish interests and fortunes, without regard to the rights and liberties of the people, but for the sole use and benefit of such persons. These organizations are always private and secret, and, unless they are met by counter organizations, it is impossible to defeat their objects. It is through such combinations and organizations as these that the stream of wealth now produced by the honest, hard-working people of the United States has been diverted from its rightful channels and poured into the already overflowing and undeserving coffers of the few, who revel in immense and stolen wealth, while the people who bear the burdens of the government and do the work which makes this world worth living in find the struggles for existence daily becoming harder and harder, and that the chains which are binding them in the bonds of industrial slavery are daily becoming stronger and stronger and tighter and tighter. These wicked machinations cannot be defeated by independent individual efforts. Individual efforts will neutralize themselves, while those who are organized, and who act in concert with each other, will be sure of success. If the people would maintain the substance, as well as the form and shadow, of liberty, and if labor would eat the bread which it has earned and enjoy the wealth which it has created, the people must organize into political parties. These political parties must be organized upon the principles of government which they advocate.

The organization of political parties should not stop with simply advocating what are conceived to be correct principles of government; for principles do not enforce them-

selves. A political party organization will be vain, idle, and amount to nothing, unless it secures the election to office of men who are in sympathy with, and who will enforce, the principles which it advocates; for in this way only can these principles be made effective. It is therefore seen that the nomination of candidates for office is one of the most important functions of a political party. No political organization can be effective or command public confidence and respect where the integrity of its nominations can be called in question. A party nomination for office which does not represent the will of the majority of the persons composing such party has no rightful claim whatever to the support of the voters of such party. Neither will the principles advocated by such party have any binding force upon such nominee, because he would owe his nomination to persons who did not believe in such principles, and who are antagonistic to such political party. In fact, such a hybrid nomination would not be, in any sense of the word, a party nomination, but would be an independent nomination, independent of the party, principles and everything else. To whom would he owe allegiance? Whose creature would he be? Which master would he serve? Who can answer these questions? Such a nominee placed in office would be at perfect liberty to consult his own pleasure about whatever he might do. It is therefore clear that a party nomination represents the life of the party.

To protect the right of all political parties to select their own nominees for office, our present primary election law was enacted. It was passed to assist, and not to destroy, party nominations. Under the old convention system, by means of secret organization, a few members of a party could control the convention and make nominations against the will of the majority of the voters of such party. The law was passed to give to each member of all political parties a fair and equal voice in the selection of the nominee of his party. To allow persons who are not members of a political party, and who do not believe in its principles, but who are antagonistic to them, to participate in the primary election of the party, for the purpose of nominating its candidates, would be to inflict a greater injury upon political parties than would be possible under the old convention system, which the primary system abolished; for under the old system, while the will of the majority of the members of the party might be defeated, yet those who made the selection were at least members of the party making the nomination, while under the system now proposed men can par-

ticipate in a party nomination, and possibly control its action, who are antagonistic to the principles of the party, and who would vote against the nominees of the party on the day of election. The statement of this proposition is enough to show that it is absolutely unsound in principle. Suppose that the old system of making party nominations for office was still in existence, who would be bold enough to say that members of another political party, or persons without party affiliations, without being invited so to do, could force themselves in a political party nominating convention and participate in such nomination? Any such attempt would be universally denounced as a disgraceful outrage and result in a riot. What would be thought of an attempt on the part of members of a religious denomination, or of others who were independent of all religious denominations, attempting to interfere with and control the church affairs of a denomination of which they were not members, or of which they were entirely independent? Any such attempt would be resisted, even to death, by all persons who believe in religious liberty, and, if persisted in, would result in baptizing the country in fire and in blood. What legislative body would have the power to force a church to allow persons, who were not members thereof, to share in its privileges and rights and partake of its sacraments?

If the policy upon which this prosecution is based was adopted by the court, it would be death to all political organizations, and would convert our primary election into a mockery, a snare, and a delusion. Such a construction of the statute would make our primary election law revolutionary, unconstitutional, null and void, and of no effect. It would involve us in political anarchy. What is decided in this case is applicable solely and exclusively to primary or nominating elections alone, for the obvious reason that such elections are held for the sole and exclusive purpose of allowing political parties to nominate their respective candidates. Independent voters are not deprived of their rights by virtue of a primary election; for they have the constitutional right to bring out any candidates they favor by petition. When it comes to the election of officers, each voter has the unquestioned right to vote a party ticket, a mixed ticket, or an independent ticket, as he sees fit, because each voter has an equal right and interest in the men who are elected to office.

For these reasons, in addition to those so well expressed by Judge DOYLE, I heartily concur in the conclusions which he has reached.

In re BERTHOL'S ESTATE.

MOUSNIER v. TAYLOR. (S. F. 6,037.)

(Supreme Court of California. July 26, 1912.)

1. WILLS (§ 403*)—CONTEST—COSTS TO EXECUTOR—GOOD FAITH.

Under Code Civ. Proc. § 1720, which provides that the superior court may, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate, as justice may require, the discretion of the court, while it may be exercised in favor of an unsuccessful proponent of a will, should be exercised only in his favor where he has acted in good faith.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 876; Dec. Dig. § 403.*]

2. WILLS (§ 403*)—CONTEST—COSTS TO EXECUTOR.

Under Code Civ. Proc. § 1720, the superior court sitting in probate has no jurisdiction to make an order allowing expenses to an executor resisting the contest of the will, on application pending his appeal from a judgment denying probate of the will, since it is only upon a final judgment that the court can properly determine whether it would be justified in making the allowance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 876; Dec. Dig. § 403.*]

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Application to the Superior Court by Joseph Morcel, a nominated executor under the will of Therese Berthol, deceased, for an allowance of expenses incurred in resisting a contest against the probate of the will, prosecuted, after Morcel's death pending the application, by E. K. Taylor, as executor of his last will. From an order granting the application, Elsie Mousnier, administratrix of the estate of Therese Berthol, appeals. Reversed.

R. B. Tappan, for appellant. E. K. Taylor, for respondent.

LOBIGAN, J. This is an appeal from an order allowing respondent's testate, who was one of the nominated executors under the last will of Therese Berthol, deceased, expenses incurred by such executor in resisting a contest against the probate of her will. Said nominated executor—Joseph Morcel—was made the principal beneficiary under the will and petitioned for its probate, whereupon a contest against the probate was filed by the daughter and only next of kin of deceased on the ground of alleged undue influence exercised by said Morcel upon the deceased to procure the execution of the will in his favor. The verdict of the jury on the trial of the contest was in favor of the contestant on that ground, and the judgment was entered denying probate of the will therefor. Thereafter the motion of said Morcel for a new trial being denied, he ap-

pealed therefrom and from the judgment. Subsequently, an administratrix of the estate of said Therese Berthol having been appointed, said Morcel applied to the superior court for an allowance out of her estate of his expenses incurred as nominated executor in the contest of the will on the ground that these expenditures were made in good faith. Pending this application, Morcel died, and respondent, as executor of his will, thereafter proceeded in the matter. Appellant, while admitting the expenditures in the sum claimed—\$849.90—resisted the granting of the order, setting up in opposition thereto the verdict and subsisting judgment denying the probate of the will on the ground of undue influence of Morcel. The court granted the application and made the order from which this appeal is taken.

[1] The authority of the superior court sitting in probate to allow the costs and expenses of Morcel incurred in the contest of the will is based on section 1720 of the Code of Civil Procedure, as follows: "When it is not otherwise prescribed under this title the superior court * * * may, in its discretion order costs to be paid by any party to the proceedings or out of the assets of the estate as justice may require." While this provision of the Code places the matter of allowing costs and expenses within the discretionary power of the court, and permits it to be exercised in favor of an unsuccessful proponent of a will, still this discretionary power should be exercised only in his favor "as justice may require," where he has acted in good faith, and such discretion can be properly exercised only upon the final determination of the litigation.

[2] When the order here appealed from was made, there was no final determination of the controversy respecting which this allowance was claimed. It is only then that the court can properly determine whether it would be justified in making the allowance or not. In that respect the principle is declared in Estate of Yoell, 160 Cal. 741, 117 Pac. 1047, where there was under consideration an allowance for expenditures in the contest of a will, and where, in reversing the order, this court said: "The final determination of the litigation, consequently, must have a weight in influencing the court in the exercise of the discretion to award costs with which the law has vested it, and not until the final determination can that discretion be properly exercised."

In applying this principle, the merits of the application upon which an order purports to be based are not involved. Hence we make no discussion of them here. The court is simply without discretion to make any order until the final determination of the controversy. Under this view the superior court should have declined to entertain or

act on the application in behalf of the nominated executor Morcel until the litigation was ended and the probate of the will finally allowed or rejected.

The order appealed from is reversed.

We concur: HENSHAW, J.; MELVIN, J.

**CITY AND COUNTY OF SAN FRANCISCO
v. HYATT, Superintendent of Public
Instruction. (S. E. 5,988.)**

(Supreme Court of California. July 26, 1912.
Rehearing Denied Aug. 23, 1912.)

**SCHOOLS AND SCHOOL DISTRICTS (§ 19*)—AP-
PORTIONMENT OF FUNDS ACCORDING TO
SCHOOL ATTENDANCE—AUTHORITY OF STATE
BOARD OF EDUCATION—STATUTES.**

Pol. Code, § 1532, subd. 4, required the state superintendent of public instruction to apportion the school fund as provided by section 1858, which, as amended by St. 1911, p. 527, adding subdivision 5, provided that according to the number of teachers, calculating one teacher for every district having 35 units of average daily attendance, and defined such unit as the total number of days' attendance divided by the number of school days, and a school day as that part of a day or night in which one-twentieth of the work of a school month was performed. Pol. Code, § 1617, gave local school boards the same authority to prescribe rules as that possessed by the state board of education over the public schools of the state. Section 1697 declared 20 days, or 4 weeks of 5 days each, to be a school month. Section 1873 provided that no school should be in session more than six hours a day. Section 1663, subd. 2, required city or county boards to prescribe the course of study in day and evening schools. Sections 1543, 1664, 1665, 1771, and 1874 authorized such boards to prescribe and enforce a course of study and to amend or change it, and enumerated the branches to be taught in public schools. Section 1874 made it the duty of the state board to select text-books in such enumerated branches, to be used by the local boards in prescribing courses of study. And section 1861 provided that state school funds should be used only to pay salaries of teachers of the day and night elementary schools. The state board of education, empowered by Pol. Code, § 1521, to adopt rules for public schools not inconsistent with the laws of the state, adopted a rule that the minimum school day for schools sharing in state funds on a basis of average daily attendance should be four hours, each hour to be estimated as one-fourth of a day, which operated to cut down the apportionment to evening schools, in which the attendance averaged only two hours a day, to one-half the apportionment to day schools, averaging four to five hours a day. Held that, there being no statute expressly limiting the power of the state board or expressly conferring such power upon the local boards, the rule was valid as being within the general powers of the state board.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 34-37; Dec. Dig. § 19.*]

In Bank. Mandamus by the City and County of San Francisco against Edward Hyatt, Superintendent of Public Instruction of the State of California. Writ denied.

Percy VJ Long, City Atty., and J. F. English, Asst. City Atty., for petitioner. U. S. Webb, Atty. Gen., John H. Riordan, and W. H. Cobb, for respondent. J. D. Fredericks, Dist. Atty. of Los Angeles County, and Byron G. Hanna, Deputy Dist. Atty. of Los Angeles County, amici curie.

LORIGAN, J. This is a petition for a writ of mandate, and involves particularly the validity of a rule of the state board of education providing a minimum of four hours as the attendance necessary in the elementary schools of this state to constitute a school day's work in the matter of the apportionment of the state school funds to the different school districts.

Preliminary to quoting the rule adopted by the board and as bearing on the question of its validity, certain sections of the Political Code must be referred to.

Section 1532 of that Code, subdivision 4 thereof, requires the state superintendent "to apportion the state school fund" and "in apportioning said fund he shall apportion to every county and to every city and county two hundred fifty dollars for every teacher determined and assigned to it on school census by the county or city and county school superintendent for the next preceding school year as required of the county or city and county school superintendent by the provisions of section 1858 of this Code, and after thus apportioning two hundred fifty dollars on teacher or census basis, he shall apportion the balance of the state school fund to the several counties or cities and counties according to their average daily attendance as shown by the reports of the county or city and county school superintendents for the next preceding year." This section 1858, referred to, in said section 1532, as it stood prior to the session of the Legislature of 1911, read as follows: "The school superintendent of every county and city and county must apportion all state and county school moneys for the primary and grammar grades of his county or city and county as follows: (1) He must ascertain the number of teachers each school district is entitled to by calculating one teacher for every district having seventy or a less number of census children and one additional teacher for each additional seventy census children, or fraction of seventy not less than twenty census children, as shown by the next preceding census." Provision is further made that any moneys remaining after the apportionment on the census basis should be apportioned to the several districts in proportion to the average daily attendance for the preceding school year. This section was amended in 1911 (Stats. 1911, p. 527), and as now in effect reads, as to the apportionment of all state and county school moneys by the school superintendent of every county and city and county for the elementary

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

grades therein as follows: "(1) He must ascertain the number of teachers each school district is entitled to by calculating one teacher for every district having thirty-five or a less number of units of average daily attendance and one additional teacher for each additional thirty-five units of average daily attendance, or fraction of thirty-five not less than ten units of average daily attendance as shown by the annual school report of the school district for the next preceding school year; and two additional teachers shall be allowed to each district for every seven hundred units of average daily attendance," etc. At the same session a new subdivision was added to this section as follows: "(5) Units of average daily attendance wherever used in this section shall be construed to be the quotient arising from dividing the total number of days of pupils' attendance in the schools of the district by the number of days school was actually taught in the district. A school day is hereby construed and declared to be that portion of the calendar day or night in which school is maintained and in which one twentieth of the work of a school month may be performed. The attendance of pupils present less one fourth of any day shall not be counted for that school day and pupils present for one fourth of a day or for more than one fourth of a day shall be counted as present for one fourth of a day, one half of a day, three fourths of a day, or for a whole day, as the case may be."

Subsequent to the taking effect of these amendments to section 1858, the state board of education adopted the following rule, the validity of which is the main point in controversy: "The School Day: Computing Average Daily Attendance. The minimum school day for any school sharing in state funds on a basis of average daily attendance shall consist of not less than four hours of actual work and attendance exclusive of recesses. Each school day shall be divided into four approximately equal parts. One-fourth of a day's attendance shall consist of actual work and attendance for not less than one hour, exclusive of recesses; one half of a day's attendance shall consist of actual work and attendance for not less than two hours exclusive of recesses; three fourths of a day's attendance shall consist of actual work and attendance for not less than three hours, exclusive of recesses. In no event shall attendance by any individual on one calendar day be construed as more than one day's attendance. The word hour as used in this rule means a sixty minute hour. This rule shall govern the computation of average daily attendance in day and evening elementary and high schools, polytechnic, industrial, agricultural, and all other schools drawing state money on a basis of average daily attendance."

The powers of the state board of education as far as involved here are enumerated

in section 1521 of the Political Code: "The powers and duties of the state board of education are as follows: (1) To adopt rules and regulations not inconsistent with the laws of the state for its own government and for the government of the public schools and district school libraries. * * *

The substantial allegations of this petition for a writ of mandate are that, under the law, respondent state superintendent is required to give, and has always heretofore given, in computing the average daily attendance in elementary schools consisting of day and night schools, for the purpose of determining the annual apportionment of state school funds thereto, credit to the elementary night schools on an equal basis with the elementary day schools, making no discrimination between them; that he has calculated a night session of such night schools as being the equivalent of a day session for that purpose; that said respondent threatens and intends to now follow said rule of the state board of education fixing a minimum school day in making an apportionment of state funds to the elementary day and evening (night) schools; that by said rule the minimum for a school day is fixed at not less than four hours daily work and attendance; that the average attendance in evening elementary schools of the city and county of San Francisco and elsewhere in the state is, and necessarily will continue to be, an average period of two hours each night, while the average daily attendance in day elementary schools in said city and county and throughout the state is, and will continue to be, a period of from four to five hours; that under the rule adopted credit will only be given by said respondent for elementary work done in night schools in the various school districts upon the basis of one-half or less of the credit given to day elementary schools in said districts; and that the application of such rule to the apportionment would cut down the appropriation to which the elementary schools of the city and county of San Francisco claim they are entitled, to the extent of \$16,750.

The claim of petitioner is that the state board of education had no authority to adopt the rule in question because under certain sections of the Political Code to be referred to, taken in connection with subdivision 5 of section 1858, it is asserted that the power to determine the length of time to constitute a minimum school day for the purpose of apportioning the school funds has been left exclusively to the local boards of education.

As a special basis in support of this position certain sections of the Political Code other than we have mentioned are relied on by petitioner. Section 1697 thereof declares that "a school month is construed and taken to be twenty days or four weeks of five days each, including legal holidays." Section 1863, subdivision 2, provides that "the county or city and county boards of education must,

except in incorporated cities having boards of education, on or before the first day of July of each year, prescribe the course of study in and for each grade of the day and evening schools for the ensuing school year," and provisions of the city charter of the city of San Francisco are to the same effect. Section 1771 confers power on county boards of education "to prescribe and enforce in the public schools a course of study," and section 1543 requires the county superintendent of schools of each county "to enforce the course of study." Section 1673 provides as to the duration of school sessions that "no school must be continued in session more than six hours a day. * * *

Under these sections it is insisted by petitioner that, while the Legislature has fixed the maximum school day (by section 1678 just quoted) to be six hours, it has never established any minimum school day, but has left that to the local boards as incident to their right to determine the course of study; that authority to establish the course of study necessarily confers power on them to prescribe also the hours of study thereof—in effect to fix the minimum school day—and hence, when any local school board has determined what shall constitute a month's school work in said courses and has fixed the length of daily or nightly session in which one-twentieth of the school month work may be performed, such session, under subdivision 5 of section 1858, shall, for the purpose of apportioning school funds, be considered a school day's work, no matter what the hours less than the maximum may be which the local board has fixed; and that this authority cannot be interfered with by the state board of education under a rule making an average of four hours' daily attendance a minimum school day, with the result that in apportioning funds to the school districts the school work in the night schools, which necessarily cannot exceed two hours, shall only be credited with one-half the amount which is allowed for a day's work in a day school.

As against this claim, the position of respondent is that the authority to fix a course of study given the local boards of education confers no exclusive power upon them to prescribe whatever hours they see fit less than the maximum as constituting a minimum school day, and that subdivision 5 does not imply the existence of any such right, nor does it define of itself what shall constitute such school day. Hence it is claimed that as the local boards have not the authority asserted, and the Legislature has not specified in subdivision 5 of section 1858, what shall constitute a minimum school day, since it only defines a school day generally, it was the intention of the Legislature to leave the matter of fixing the length of the minimum school day session to the state board of education, particularly as it had theretofore declared what should constitute the maximum school day.

We are of the opinion from a consideration of the various sections referred to, particularly the later amendment of section 1858 which reflects the obvious intention of the Legislature, that the position of the respondent is correct.

It is apparent, we think, under the general power conferred on the state board of education "to adopt rules and regulations not inconsistent with the laws of this state * * * for the government of public schools," that it has the authority to define what shall constitute a minimum school day for any purpose, even for the apportionment of school funds, in the absence of any law defining it, or power elsewhere conferred to do so. The conference of this general power upon the state board of education is in harmony with the constitutional provision (article 9) requiring the adoption of one system of common schools which shall be applicable to all the common schools of the state, and the term "system" itself imports a unity of purpose, as well as an entirety of operation. *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558. Aside from general legislation designed to secure this entirety of operation and with a view to promote it, power to do so is expressly conferred on the state board, and unless there is some law which otherwise governs, it would appear that as this rule fixing the minimum school day operates in the apportionment of the state school funds equally and uniformly throughout the state without discrimination, it is within the power of the state board to prescribe it.

If the rule adopted by it, in question here, is unauthorized it can be so only because, as contended by petitioner, the various sections of the Code upon which it relies, taken in connection with subdivision 5 of section 1858, confer exclusive power upon the local school boards of education to regulate the length of the school day for all purposes, and the existence of this power precludes the state board from attempting to exercise any authority upon the subject of the regulation for the apportionment of school funds. But certainly no section of the Code referred to by petitioner confers any such power on the local boards, or places any such limitation on the authority of the state board, nor impliedly requires any such construction.

Particular reliance is placed on those sections of the Political Code cited, which require the local boards to prescribe "the course of study" for each grade in the schools, and the argument is that the power to prescribe the course of study necessarily confers the power to determine the hours of daily or nightly session for the study thereof—therefore authority to determine the minimum school day. It is quite clear, however, what is meant by the "course of study" which these local boards shall prescribe through reference to section 1865 of the same Code, in which the various branches to be taught in the public schools and which shall constitute

the course of study therein are specifically enumerated. The requirement that the local boards shall prescribe a course of study is a mandate that they shall establish a course which shall embrace the enumerated branches. While in doing so some measure of discretion is given to the local boards as to the extent of the course and authority also given them to amend or change it whenever they deem it necessary (section 1664, Pol. Code); this discretion is still to a degree controlled by the state board of education, as it is given the right and made its duty (section 1874, Pol. Code) to select the line of textbooks in these enumerated branches which must be used by the local boards in prescribing the course of study in the schools and the use of which the state board must enforce. In the section relied on, no power is expressly given to do anything else than to prescribe this course; nothing conferring on them the exclusive authority to fix the time or hours per day when any one of the prescribed branches shall be studied; or the length of the school day which shall be devoted to their study as a course. It may be conceded that, from the duty enjoined on the local boards to prescribe a course of study, it must logically follow that the local boards are authorized to determine the daily session for the study of such course; but still it does not legally follow that this amounts to an exclusive right to determine that this session shall constitute a minimum school day for all purposes; under the school laws, or even confer exclusive right to determine what shall constitute a minimum school day for the study of the course in the schools where required. There is nothing inconsistent in requiring the local boards to prescribe a course of study and, on the other hand, empowering the state board of education to determine what shall constitute a minimum school day for its study. The Legislature in the first instance, in requiring the local boards to prescribe such a course, and using the same language now found in the sections, might have in addition declared what should constitute a minimum day for the study thereof. It would be the duty of the local boards thereafter to prescribe a course, the study of which should engage the minimum school day as so fixed. Only the same result would follow under the power conferred on the state board to do so and the exercise of it.

It may not be questioned but that, in the absence of any statute or rule of the state board on the subject, the local board could exercise the right to regulate the school day sessions in their respective cities or counties. This power exists, however, not by virtue of their right to prescribe a course of study, but under section 1617 of the Political Code, which gives them the same authority over the schools in their district that is conferred on the state board over the public school throughout the state, namely, "to prescribe

and enforce rules * * * for the government of schools" within their districts. But the exercise of this power is subject to the control of the state board on that subject, because in this same section it is declared that such rules must be "not inconsistent with law or those prescribed by the state board of education." It is apparent from this section that, except as to those matters where express power is conferred on the local board to act exclusively, it was the intention of the Legislature to make their action, relative to public school matters, secondary and subsidiary to the control of the state board. Under the section last referred to, the local boards might fix the session of the schools in their district, and hence determine what should constitute a minimum school day therefor; but the power in that respect was subsidiary to that of the state board and subject to control and regulation by it at any time that it deemed it proper to act in the matter, and the regulation of the state board would abrogate any rule which might have been adopted by the local boards for a minimum school day, if in conflict with that prescribed by said board.

It is of no moment, in considering the power of the state board, that it had not deemed it necessary heretofore to exercise control over the local school boards in the matter of school sessions or to fix a minimum day therefor. It simply indicates that the public school system throughout the state, in the matter of daily sessions of schools as heretofore prevailing, was so established by the local boards as to render any rule of the state board on the subject unnecessary. In fact, as to such a session the state board has not undertaken now to interfere with its regulation by the local school authorities, but simply to define a minimum school day for the purpose of apportioning the school money under the new system of apportionment. Under the old system the apportionment was made on the basis of the number of census children in the school district; whether they actually attended the schools thereof or not, and the remaining money was apportioned on the basis of the average daily attendance, regardless of how long the pupils remained at the school session or how long a session of school was prescribed. The school day under that system was of no importance except to ascertain the average daily attendance for the purpose of distributing the surplus money after the apportionment on the census basis, and the length of the school session was of no importance for any purpose.

Under the new system provided for by the amendment to section 1858, making the "unit of average daily attendance" the exact basis of apportionment, the minimum school day became an important factor in calculating the apportionment, and, on the assumption that no such day had been fixed by the Legislature, or power vested elsewhere to deter-

mine it, the state board undertook to fix it. Having the general power to regulate for the public schools throughout the state, it could pass any rule or regulation for that purpose which it deemed necessary, unless constrained by some statutory provision. It cannot be said that the fixing of a minimum school day for the purpose of apportioning state school funds is not a proper part of the government of the public school system. Nor do we understand petitioner to claim that the powers conferred upon the state board are not comprehensive enough to embrace authority to fix a minimum school day for all purposes, including the apportionment of the school funds, in the absence of any legislation on the subject. The claim only is that the power has been exclusively conferred on the local boards, and the daily school session as fixed by them is recognized in subdivision 5 as a minimum school day for the purpose of apportioning the state school fund. This claim of exclusive power vested in the local boards, for the reasons given above, we deem untenable, and, unless there is some merit in the claim of petitioner under subdivision 5, we are satisfied that the state board, in the exercise of its paramount authority respecting the public schools of the state, had the right to adopt the rule in question declaring what should constitute a minimum school day.

As to subdivision 5 of section 1858: The purpose of adding this subdivision to the section will be readily observed. While this amended section made the "unit of average daily attendance" the basis of apportionment for the state funds, it did not define what was meant thereby, and subdivision 5 was added for that purpose. In so defining it, it is stated therein that "a school day is hereby construed and declared to be that portion of the calendar days or nights in which one-twentieth of the work of the school month may be performed." Petitioner contends that thereby the minimum school day was fixed; that the declared intention of the Legislature was to make the unit quantity of daily work as fixed by the local boards govern as to such day for the purpose of apportionment. But if this was its intention, certainly the language used does not clearly or definitely express it, or really express it at all. All that is declared is that a school day is that portion "in which one-twentieth of the work of the school month may be performed," and after the definition has been read the inquiry still presents itself, What is the minimum school day? There is nothing clear or determinative on the subject in the language used. The most that can be said for it is that it defines a school day generally. When the Legislature had occasion to define a maximum school day, it defined it plainly and on a basis of hours, and if it had intended to itself define a minimum school day in this subdivision 5, we would naturally expect to find it defined on

a similar basis of time. If it was intended to depart from this standard previously employed and provide for some other, we would look to find some clear expression of that intention. In other words, if it was intended that the quantity of a school day's work, as it might be variously fixed by the different local boards throughout the state, should constitute a minimum school day, we would expect to find something definite to that effect. But we find in the subdivision nothing of the kind. It contains no expression of intention to define the minimum school day on the basis of quantity of daily work as fixed by the local school boards, or on such a basis at all; nor, on the other hand, does the language contain the slightest suggestion that time or hours of daily session be made the basis. It simply does not define the minimum school day at all, nor declare any standard—whether the unit quantity of work or the unit of time—whereby it shall be fixed. If it had intended to define a minimum day itself, or to declare that the unit quantity of daily work, as the local school boards, throughout the state might variously determine the period for its daily performance, should constitute a minimum school day, or that the time or hours as the unit of the basis should not be employed for that purpose, it was a very easy thing for the Legislature to have plainly said so. An entire absence of any statutory declaration, or the presence of any language from which it can be reasonably inferred, strongly implies that it did not intend to declare anything on the subject of a minimum school day, or provide any standard under which it should be determined, but to leave the whole matter to that body which, in the absence of any direct legislation on the subject, was empowered to deal with it, namely, the state school board. It doubtless concluded that the board charged with the duty of regulating the public schools would be in a much better position than itself to regulate that subject. It was not necessary for the Legislature to provide all the details in its legislation on the new system of apportionment. Having legislated on that subject as far as it deemed reasonably practical, it could leave the matter of the length of daily sessions of the schools—or the fixing of the minimum day—to the discretion of the state board.

That its purpose was to do so we think is quite apparent when we consider the intention of the Legislature in establishing the new system of apportionment of the state funds. Under the old method, the apportionment thereof was based on the number of census children in the district, whether they attended the schools or not, and the surplus distributed on the basis of average daily attendance, independent of any consideration of the time the pupils spent in school. Under this system, in the more populous districts of the state, where census children attended private schools and did not attend the

public schools, these children were, however, enumerated and entered into the basis upon which such districts, to that extent, unnecessarily participated in the state school fund, to the disadvantage of less populous districts and where the schools were better attended, while under the same system distribution of the surplus fund was made on a basis of average daily attendance, irrespective of the length of time the children spent at the daily sessions or how long those sessions lasted. Under the new system the basis of apportionment is radically changed, and but one basis provided for, namely, the unit of average daily attendance. The general intention of the Legislature was to establish a more definite and exact and apparently a more fair and equitable method or basis of apportionment than previously obtained; to apportion the funds to the schools in proportion as the necessary cost and expense of their maintenance as represented by the unit of average daily attendance. While providing generally a basis to attain that end, no standard by which the unit of attendance should be measured was fixed by the Legislature. As we have said, it was not necessary that it should legislate as to the details, for a board existed, empowered to further the intent by its separate action, and in making the rule in question the state board did so by establishing a minimum school day based upon time as the unit under which the apportionment should be made. There can be no question but that this standard was a proper and definite one. It is that which is generally employed in educational matters where, as pointed out by respondent, high school pupils are credited to the state university, and that university itself credits its students upon "units," signifying so many hours of work in the classroom during the term. This is a proper, adequate, and definite standard, capable of being sustained on various considerations, if it were necessary here to do so. In fact, the complaint is not that it is not a definite or proper standard, but that it is too definite as applied to the night schools. But definiteness and exactness as to all schools was the very matter which the Legislature contemplated; to remove under the new system the laxity which prevailed under the old, by precluding particular schools throughout the school districts or classes of schools therein which are maintained either daily or nightly for but one or two hours, or even a less period of session, from receiving the same apportionment as those conducted for longer hours or for the maximum time. While it is true that under the Constitution the day and night elementary schools are placed on an absolute equality, this, as far as the apportionment of school funds for their maintenance is concerned, only means that no discrimination should be made between them. This rule of the state board makes none. It operates equally and uniformly upon all schools upon the basis of average daily attendance calcu-

lated under the established minimum school day. On the theory of petitioner, as the day schools are conducted for at least four hours and night schools, admittedly, for not exceeding two, the former, in order to get the same apportionment as the latter, would be compelled to maintain a session of twice the length. This would create a decided lack of uniformity and constitute a discrimination in favor of the night as against the day schools which it was designed by the Legislature under the new system of apportionment to prevent, and which is effectually prevented under the rule of the state board.

The beneficence of night schools is unquestioned; but it is to be noted that they exist almost entirely in the large cities, are for the benefit particularly of the residents thereof, and, in the nature of things, as their sessions do not exceed two hours, the expense of their maintenance cannot equal that of the day schools having sessions of twice that length. Under section 1861 of the Political Code, "the state school fund must be used for no other purpose than the payment of the salaries of teachers of primary and grammar schools," being the day and evening elementary schools. The principal element in the expense of the maintenance of schools is the salary of teachers, to pay which the state fund must be devoted, and this expense is based on the duration of their employment. Necessarily, this cannot be the same as between teachers employed in the night and day schools, and, in the ordinary course of things, the teacher employed but one-half the time that another is employed receives but one-half the compensation.

Under these circumstances, we would hardly expect to find the Legislature in subdivision 5 declaring, either expressly or impliedly, that the unit quantity of school work prescribed to be daily or nightly performed by the local school board, no matter how limited its sessions for the performance thereof might be, should constitute a minimum school day for the purpose of equal apportionment of the school funds, with schools holding longer sessions or impliedly declaring against the fixing of the minimum school day on the time or hour basis.

It is of no moment, on the question of the authority of the state board to fix such school day for purposes of apportionment, to consider how the rule adopted has affected the efficient maintenance of the night schools. No such question is involved. It is simply one of power and authority of the board to make the regulation, and in the absence of any express legislation on the subject or authority vested in the local boards to determine it, we are satisfied that the state board had this authority and that the rule in question is valid.

The application for the writ is denied.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

LAMB et al. v. WILKE. (Civ. 1,100.)

(District Court of Appeal, Second District, California, June 19, 1912. Rehearing Denied by Supreme Court Aug. 16, 1912.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—QUESTIONS OF FACT.

Where there is some competent evidence to support each finding of the trial court, it is not within the province of the Court of Appeal to weigh the testimony, thereby substituting its judgment for that of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. EVIDENCE (§ 269*)—ADMISSIBILITY—DECLARATIONS.

In an action to set aside a deed of a decedent for fraud, undue influence, and lack of mental capacity, declarations of the decedent some time before its execution with reference to the disposition he intended to make of his property was competent as bearing on his mental condition, but not to prove fraud or undue influence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1063-1067; Dec. Dig. § 269.*]

3. EVIDENCE (§ 501*)—OPINIONS—MENTAL CONDITION.

In an action involving the mental condition of a deceased person on a particular date, an intimate acquaintance may express his opinion of his mental condition when followed by a statement of the facts upon which his opinion is based tending to show his mental condition at that time, for months preceding, and on the day following the date in question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.*]

4. NEW TRIAL (§ 108*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

A new trial should not be granted for newly discovered evidence unless it is of such a character as to render a different result probable on the new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

5. APPEAL AND ERROR (§ 981*)—DISCRETION OF TRIAL COURT—NEW TRIAL.

On a motion for a new trial on the ground of newly discovered evidence, the trial court exercises a discretionary power which will not be interfered with except when manifest abuse is apparent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by A. W. Lamb and others against Frederick G. Wilke. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. T. Morrow and A. R. T. Truex, for appellant. Joseph Scott, James L. Irwin, and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for respondents.

ALLEN, P. J. Action to set aside a deed executed by one James D. Watson, deceased, to appellant while deceased was of unsound mind and acting under undue influence of appellant. Plaintiffs and respondents are nephews and nieces of the deceased. The action was tried by the court, which finds all of the material allegations of the complaint to be true; that Watson was of the age of

76 years at the time of the execution of the deed and was of unsound mind and incompetent to make a contract; that at such time he did not possess a mind sufficiently clear and strong to enable him to know and understand the nature of the act in which he was then engaged, or to know and recollect those who were the natural objects of his bounty; that at the time of the execution of the deed he was sick and suffering from a disease causing his death two days thereafter; that he was upon his deathbed when the deed was signed; that deceased had no independent advice, but acted solely upon the inducement and advice of defendant; that no consideration was paid for the deed; that at the time of the conveyance of said property, and for some time prior thereto, Watson implicitly confided in and trusted defendant and wholly depended upon defendant's advice and counsel in matters of business, and a relation of trust and confidence existed between them; that said deed was delivered and recorded on the 24th day of January, 1908, the day succeeding the date of its execution and the day preceding the date of the death of the grantor; that defendant immediately took possession of the property; that Watson did not know the nature or consequence of his act and was incapable of understanding its force and effect at the time of the execution of the deed, and was not then of sound and disposing mind. The court set aside the deed, and from this judgment and an order denying a new trial defendant appeals.

[1] The principal specifications presented by appellant relate to the insufficiency of the evidence to justify the findings. No good purpose would be served by incorporating herein a résumé of the evidence. We think it sufficient to say that a careful examination of the entire record demonstrates that there was some competent evidence before the court justifying each and every finding by the court made. The cause was tried by a learned jurist, competent to weigh the testimony and consider the force and effect which should be given the statements of witnesses. These witnesses, whose statements were conflicting and irreconcilable, were before the trial court, and it determined to what statements credit was due, and it is not within the province of this court to weigh the testimony, thereby substituting its judgment for that of the trial court.

[2] Appellant claims prejudicial error on account of the action of the trial court in permitting the witness Lundregan to testify to conversations had with the deceased some time before the execution of the deed with reference to making a disposition of his property. It may be conceded, "where the testator was, beyond question, of sound mind, such statements were entitled to no weight at all, in the absence of proof of influence as to the very testamentary act." In *re* Mc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Devitt, 95 Cal. 17, 80 Pac. 101. While such declarations are not admissible to prove undue influence or fraud charged, they are, however, admissible to prove the state of mind or mental capacity. One of the chief allegations, the thing most relied upon, was the matter of the grantor's soundness of mind at the time of the execution of the deed. As said in *Estate of Arnold*, 147 Cal. 593, 82 Pac. 256: "The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves." See, also, *In re Calkins*, 112 Cal. 301, 44 Pac. 577. The whole narrative objected to went more toward establishing the mental condition of deceased than that of anything else, and, in so far as it tended to establish his mental condition, it was in our opinion, competent evidence.

[3] It is also claimed the court erred in permitting the witness Lundregan, who was shown to have long been a familiar and intimate acquaintance, to testify as to his opinion of the mental condition of deceased on the day preceding the execution of the deed. This opinion was followed by a statement of facts upon which such opinion was based, not only tending to show his mental condition on that day, but for months preceding and upon the day succeeding the execution of the deed. We think there was no error which intervened on account of the admission of such evidence.

[4, 5] It is finally claimed by appellant that the court erred in denying his motion for a new trial based upon affidavits disclosing newly discovered evidence. The most that can be said of these affidavits is that they tended to show that upon a new trial defendant would be able to establish that the statement of plaintiffs' chief witness as to the amount Watson received from a certain crop was untrue, and that the statements made by Watson to such witness as to the ownership of certain horses were untrue. Under the rule that newly discovered evidence should be of such character as to render a different result probable upon a new trial, and such question being one to be determined by the trial court in the exercise of a discretionary power, which power will not be interfered with except when manifest abuse is apparent (*Oberlander v. Fixen & Co.*, 129 Cal. 692, 62 Pac. 254), we are unable, as said by the court in *People v. Buckley*, 143 Cal. 392, 77 Pac. 176, to say "that it is clear that the proposed evidence would render a different result probable." We are of the opinion that the entire record develops

evidence in support of the findings, that such findings are sufficient to support the judgment, and that no prejudicial error intervenes.

Judgment and order affirmed.

We concur: JAMES, J.; SHAW, J.

(19 Cal. App. 280)

PEOPLE v. SCHENONE. (Cr. 180.)

(District Court of Appeal, Third District, California. June 17, 1912.)

1. FALSE PRETENSES (§ 16*)—LARCENY (§ 14*)—DISTINGUISHING ELEMENTS.

An instruction that the distinction between larceny and obtaining money by false pretenses turns on the question of title, that if, when the taking is consummated by the use of a trick, artifice, or device, the complaining witness being deceived by the act or representations of the defendant parts not only with the possession, but also with the title to his property, the offense is obtaining property by false pretenses, but if the complaining witness only parts, and only intends to part, with the possession of his property and not with the title, the offense is larceny, was correct.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 20, 25; Dec. Dig. § 16*; *Larceny*, Cent. Dig. §§ 34-38; Dec. Dig. § 14.*]

2. FALSE PRETENSES (§ 16*)—LARCENY (§ 14*)—CONFIDENCE GAME—EVIDENCE.

Complainant intrusted his money to defendant with the understanding that defendant and his confederate B. were each to contribute a like sum to a common fund to be used for the advantage of all. Neither defendant nor B. contributed anything to the enterprise, but retained complainant's money. Held that, until contributions had been made by defendant and B., the title to complainant's money remained in him and was the subject of larceny, and hence the withholding thereof constituted larceny and not false pretenses.

[Ed. Note.—For other cases, see *False Pretenses*, Cent. Dig. §§ 20, 25; Dec. Dig. § 16*; *Larceny*, Cent. Dig. §§ 34-38; Dec. Dig. § 14.*]

Appeal from Superior Court, San Joaquin County; O. W. Norton, Judge.

Manuel Schenone was convicted of grand larceny, and he appeals. Affirmed.

Webster & Webster and S. N. Blewett, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. The defendant, having been convicted of grand larceny, appeals from the judgment and the order denying his motion for a new trial.

The principal contentions of appellant are that the court erred in the matter of instructions and that the defendant was entitled to an acquittal for the reason that the offense, if any, was that of obtaining money by false pretenses, instead of grand larceny.

[1] Appellant concedes that "it would be very difficult for us to point out the specific particulars wherein the instructions prejudice the substantial rights of the defendant." As might be expected from this statement, we find no less difficulty in the premises.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The point to which special attention is directed—that is, the importance of instructing the jury clearly in reference to the distinction between these two different offenses—received due consideration from the court. For instance, it was declared: "The distinction which the law makes between larceny and obtaining money by false pretenses turns on the question of title. If, when the taking is consummated by the use of trick, artifice, or device, the complaining witness, being deceived by the acts or representations of the defendant, parts not only with the possession, but also with the title to his property, the offense is that of obtaining property by false pretenses; but if the complaining witness only parted and intended only to part with the possession of his property, and not with the title, the offense is larceny." This proposition was somewhat elaborated in other instructions, and the jury were expressly charged that: "The burden is upon the prosecution in this case to prove the offense charged, and if the prosecution fails to prove that the defendant committed the crime of larceny, even though the evidence may tend to prove some other offense, you must find the defendant not guilty, and if you believe from the evidence that at the time the complaining witness, G. Saloni, parted with the possession of the \$137, he also at the same time parted with the title to the same, although the same was induced by fraud, misrepresentation, or artifice on the part of the defendant, nevertheless I instruct you to acquit the defendant." Indeed, the jury were fully and correctly instructed upon every phase of the case necessary for their enlightenment, and no error was committed in refusing certain instructions proposed by the defendant.

[2.] It is equally clear that the verdict finds support in the evidence. It was a reasonable inference from all the facts, as implied in the verdict, that the complaining witness did not intend, at the time of the transaction, to vest in the defendant the title to the money in question, and that it was the defendant's purpose at all times to obtain possession of the money by trick and device and afterwards appropriate it to his own use. The money was entrusted to the defendant with the understanding that he and his confederate, one Ballo, were each to contribute a like amount to the common fund to be used for the advantage of all. It is probably unnecessary to add that neither the defendant nor Ballo contributed anything to the common enterprise, and until they did so the title to the money remained in the prosecuting witness and was the subject of larceny. The principle governing such cases is fully discussed in *People v. Delbos*, 146 Cal. 737, 81 Pac. 131, and *People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729, and we

deem it unnecessary to add to what is therein stated.

The case here, in brief, is that of a slick swindler who, by means of cajolery, misrepresentations, and dalliance with an easy victim's weakness for liquor, secured, with the fraudulent intent of appropriating to his own use, the money of the prosecuting witness; the latter consenting to the change in its possession for a certain purpose that was never consummated and never intended by the defendant to be consummated. The proof of guilt is entirely satisfactory and the record should not be examined with a microscope to discover abstract error.

The fact is, though, that the defendant was legally and fairly tried, and the judgment and order are affirmed.

We concur: OHIPMAN, P. J.; HART, J.

MARTLAND v. BEKINS VAN & STORAGE CO. (Civ. 1986.)

(District Court of Appeal, First District, California. June 18, 1912. Rehearing Denied by Supreme Court Aug. 18, 1912.)

1. CARRIERS (§ 197*)—LIEN FOR CHARGES—ENFORCEMENT—RIGHT OF POSSESSION.

While a person agreeing to transfer furniture and household goods from a certain place "to and within a dwelling house" specified has a lien thereon for his services, under the express provisions of Civ. Code, § 3051, he has no right to refuse to complete the transfer by placing the goods in the house until paid, where the owner promises to pay if he will complete the delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

2. CARRIERS (§ 197*)—LIEN FOR CHARGES—WAIVER OR DISCHARGE.

A person agreeing to transfer furniture and household goods and deliver them in a dwelling house does not, by placing them in the house, surrender his possession so as to destroy his lien, where, upon such delivery, the owner refuses to pay for his services, but may remove the goods, and, if prevented, bring an action in claim and delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

3. REPLEVIN (§ 80*)—DAMAGES—COUNSEL FEES.

The prevailing party in claim and delivery cannot recover counsel fees which have not been paid, although he has become liable therefor.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 310; Dec. Dig. § 80.*]

Appeal from Superior Court, City and County of San Francisco; James M. Trout, Judge.

Action by R. W. Martland against the Bekins Van & Storage Company. Judgment for plaintiff, and defendant appeals. Modified.

Wm. H. Chapman, for appellant. F. V. Meyers, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

KERRIGAN, J: This is an appeal by the defendant from a judgment in favor of the plaintiff in an action in claim and delivery.

For a given rate the defendant orally agreed to carry and transfer the furniture and goods of the plaintiff from a certain place "to and within a dwelling house" on Fifth avenue, San Francisco. Defendant delivered and placed all the goods in said house, except a piano. As to that article, defendant transported it to the entrance of the place of delivery, but refused to deliver it until paid the amount of its charges, to wit, \$28. At the time of such refusal, plaintiff questioned the correctness of the bill, but informed defendant's employes that he would pay it if they would perform the contract and place the piano within the house. Subsequently he renewed this offer in writing.

Under the provisions of section 8051 of the Civil Code, the defendant had a lien on the goods of plaintiff for the services rendered in the carriage thereof, dependent upon possession.

[1,2] The trial court found that the defendant was not entitled to be paid until the piano was delivered within the house. This accords entirely with our view of the case. Under the attending circumstances, the plaintiff insisting, as he did, that the defendant place the piano in the house, and promising to pay upon the performance of such act, it was clearly the duty of defendant, we think, to comply with plaintiff's demand, and thus fully perform its contract, in order to be entitled to payment of its charges, or to the benefit of its lien as carrier. We do not believe that if the defendant had placed the piano in plaintiff's home, and then and there demanded payment, and payment was refused, this would have been such a delivery as to deprive it of the right of possession for the purpose of preserving its lien. It would have had the right at once to remove the piano, and, if prevented, it could have brought an action in claim and delivery. *Bigelow v. Heaton*, 6 Hill (N. Y.) 43; *Id.*, 4 Denis (N. Y.) 496; 5 Am. & Eng. Ency. of Law, 412.

In *Bigelow v. Heaton*, the defendant declined to pay the plaintiff's freight for carrying a cargo of flour until the flour should be delivered, but promised to pay all charges upon delivery. The flour was thereupon delivered; but defendant refused to pay, unless the plaintiff would make a certain deduction from his freight for pretended injuries to the flour, which he claimed were caused by the manner of delivery. The plaintiff disaffirmed the act of delivery and demanded restitution of the goods. This being refused, he brought an action of replevin. It was held that the action was maintainable.

[3] The finding of the court that the plaintiff became indebted to his counsel for bringing this action in the sum of \$75, and for

services in connection therewith, and that therefore he was entitled to damages in such sum, cannot be sustained. Counsel fees, not paid, cannot be recovered as damages by the prevailing party in an action of claim and delivery. In *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200, it was held that the giving of a note by the plaintiff to his attorney for his services in a claim and delivery action would not support a finding of money expended by plaintiff in pursuit of the property.

In *Hays v. Windsor*, 130 Cal. 230, 235, 62 Pac. 395, in a similar case, the court held the same way, strongly intimating that in no case of claim and delivery would the prevailing party be entitled to attorney's fees as damages incurred in the pursuit of the property.

The judgment is, therefore modified by striking therefrom the provision awarding the sum of \$75 as damages to the plaintiff, and, as thus modified, the judgment is affirmed, appellant to recover from respondent the costs of this appeal.

We concur: LENNON, P. J.; HALL, J.

LAPIQUE v. MONROE, Judge, et al.
(Civ. 1,103.)

(District Court of Appeal, Second District, California. June 14, 1912. Rehearing Denied by Supreme Court Aug. 13, 1912.)

ACTION (§ 50*)—CAUSES OF ACTION—PARTIES—MISJOINDER.

Where plaintiff sought to allege a cause of action for malicious prosecution as a first cause of action, and attempted as a second to state a cause of action under Pen. Code, § 1505, providing a penalty if a judge, on proper application, refuses to grant an order for a writ of habeas corpus, or if the officer to whom it is directed refuses obedience thereto, and various persons, including the sheriff and his bondsmen, and ministerial officers of the court were made parties to the second cause of action, the complaint was demurrable for misjoinder of causes of action, as well as parties defendant. [Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511-547; Dec. Dig. § 50.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by John Lapique against Charles Monroe, Judge, and others. From an order sustaining demurrers to the complaint, plaintiff appeals. Affirmed.

John Lapique, in pro. per. Henry T. Gage, W. I. Foley, E. J. Fleming, James S. Bennett, and D. K. Trask, for respondents.

ALLEN, P. J. The first cause of action is one for malicious prosecution; that is to say, the matters alleged approach more nearly a statement of a cause of action of that character than of any other. In substance, it is alleged that certain of defendants conspired together to charge and prosecute plaintiff for a public offense of which he al-

leges he is innocent. He was, however, bound over by the magistrate, tried by a jury, and convicted, which judgment was subsequently reversed by this court. A second cause of action is attempted to be stated under section 1505 of the Penal Code, which section provides a penalty if a judge, after proper application, refuses to grant an order for a writ of habeas corpus, or if the officer to whom it is directed refuses obedience thereto. Various persons, including the sheriff and his official bondsmen, and ministerial officers of the court are made parties to this second cause of action. The writ was issued, and no disobedience of same is made to appear. Another attempted cause of action is against the superior judge and officers of the court connected with his trial and conviction, claiming that he was improperly convicted by reason of perjury on the part of certain witnesses and improper conduct upon the part of the court and officers. Separate demurrers were interposed by all of the parties, upon about every ground recognized by statute, and the same were sustained. Plaintiff not desiring to amend his complaint, judgment was entered for defendants, from which plaintiff appeals.

We see no error in the action of the trial court. The misjoinder of causes of action, as well as of parties defendant, is apparent, and the ambiguities and uncertainties pointed out by the demurrers are obvious. Aside from this, no cause of action was stated, or attempted to be stated, against a large number of demurring defendants.

Judgment affirmed.

We concur: JAMES, J.; SHAW, J.

FLEMING v. SHAY. (Civ. 1,005.)

(District Court of Appeal, First District, California. June 17, 1912.)

1. TRUSTS (§ 365*)—ENFORCEMENT—DELAY—LACHES.

When for a great length of time a trustee treats the trust property as his own, with knowledge of the beneficiary, who makes no assertion of his conflicting claim, and the delay works a substantial prejudice to the trustee, or to third persons, and is unaccounted for, equity, acting independently of the statute of limitations, will refuse relief on the ground of laches.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

2. TRUSTS (§ 365*)—ENFORCEMENT—DELAY—LACHES.

Prior to the year 1895, plaintiff intrusted intestate with various sums of money to be invested, the income to be divided equally between them. In that year an accounting was had, in which it was found that intestate owed plaintiff \$5,000; whereupon it was agreed that the same should be reinvested on the same terms. Intestate never thereafter made an accounting, but acknowledged his holding of the trust funds for plaintiff, and told her that it was producing good returns, and that it

would be for her benefit to allow the money to remain, which she did until after his death. Held, that plaintiff was not barred by laches from enforcing the payment of the trust fund from intestate's estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by J. T. Fleming against Frank Shay, administrator of the estate of William Hale, deceased. From a judgment entered on an order sustaining a demurrer to plaintiff's amended complaint, he appeals. Reversed, with directions to overrule the demurrer.

S. J. & H. J. Hankins, for appellant.
Frank W. Shay, for respondent.

KERRIGAN, J. This is an appeal from a judgment entered upon an order sustaining a demurrer to an amended complaint.

Substantially, and so far as material, the allegations of the amended complaint are as follows: That prior to the year 1895 the plaintiff had intrusted to William Hale, for the purpose of investment, various sums of money, which, it was agreed, should be held by William Hale in trust, and the profits divided equally between them; that in said year an accounting was had, and upon such accounting it was agreed and determined that Hale at that time had in his hands, in trust for the use and benefit of plaintiff, the sum of \$5,000, and that it was further agreed that this sum should remain in the hands of Hale, to be reinvested under the same conditions and trust as before, to wit, Hale to retain in trust for the benefit of plaintiff the \$5,000 and one-half of all the profits arising out of or on account of said fund; "that from time to time since the said year of 1895, up to the time of the death of said William Hale, said William Hale, deceased, as trustee, acknowledged and stated to the said plaintiff that the said \$5,000 held in trust by the said William Hale, deceased, for the use and benefit of said plaintiff, was invested in and used for various purchases of real property; that said \$5,000 was producing good returns; and that the said trust fund of \$5,000 and the one-half of all the profits accruing from the investments of said \$5,000 would be paid over to the plaintiff herein whenever he (the said plaintiff) so demanded, but that it would be to the benefit of the said plaintiff if he (the said plaintiff) would allow the said money to remain in trust with the said William Hale, deceased; and to be used by said William Hale, deceased, and invested as aforesaid;" that by reason of the request of Hale plaintiff allowed the trust fund to remain in the latter's hands for the purpose just set forth; that Hale never repudiated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said trust, and no demand was ever made on him by plaintiff for an accounting; and that the trust fund was in his hands at the time of his death in the year 1908; that the fund was so commingled with the moneys and property of Hale as to make it impossible for plaintiff to trace the fund; that plaintiff presented a claim against the estate of Hale, which was rejected. Thereupon the present action was brought.

A demurrer to the amended complaint was sustained, and, upon the plaintiff refusing to further amend, judgment was entered against him, from which this appeal is taken. The demurrer was based upon several grounds; but the only one relied on here by the respondent presents the question of whether or not the plaintiff was guilty of laches.

[1] When for a great length of time a trustee acts toward trust property as if it were his own, with knowledge of the beneficiary, who makes no assertion of his own conflicting claim, or when it appears that the long delay of the beneficiary in asserting his rights works a substantial prejudice to the trustee, or to third persons, and the delay is unaccounted for, equity, acting independently of the statute of limitations, will refuse to grant relief on the ground that the cestui que trust has been guilty of laches. 16 Cyc. 158, 167, 174; Kleinclaus v. Dutard, 147 Cal. 245; 81 Pac. 516; 18 Am. & Eng. Ency. of Law, 99 et seq.

[2] In the present case it does not appear that the trustee's estate has been injured by the delay, unless it be by his supervening death; nor does it appear that the trustee, with the knowledge of the plaintiff, or at all, handled or dealt with the funds in any way hostile to the claim of plaintiff; nor was the delay unexplained, for plaintiff alleges that the deceased never disavowed the trust, and from time to time up to his death acknowledged the same, and stated that the fund was producing a good profit, and that the whole sum due would be paid over on demand at any time. *Hevey v. Bradbury*, 112 Cal. 620, 44 Pac. 1977; 16 Cyc. 174; *Cooney v. Glynn*, 157 Cal. 583, 589, 108 Pac. 506; 18 Am. & Eng. Ency. of Law, 111. The last authority cited lays down the rule in this regard in the following language: "When positive evidence exists, which proves that the defendant has all along recognized the plaintiff's right, delay on the part of plaintiff in bringing the suit will be excused."

"The continued acknowledgment," reads 16 Cyc. 174, "by the defendant of plaintiff's right is generally sufficient to account for delay by plaintiff in bringing suit to enforce it."

In the case of *Peebles v. Reading*, 8 Serg. & R. (Pa.) 484, 494, it was held that 14 years would not be a reasonable time to en-

force a trust, unless the trust was kept up by declarations from time to time.

A similar declaration to the one here was considered in the case of *Kleinclaus v. Dutard*, supra; but there it appeared that Dutard for 35 years had "dealt with all the property acquired as absolutely his own. He carried on a produce and commission business in his own name. He invested and re-invested the profits thereof in his own name in all kinds of property, in several different states, accumulating a great fortune. He never recognized any other person as having any interest therein." For those and other reasons stated in the opinion, the court said that the complaint, taken as a whole, presented a case "where every act of the alleged trustee was openly and notoriously hostile to the claim of plaintiff;" that consequently no such relation between the parties was evidenced by the complaint as justified the plaintiff in disregarding those acts and relying upon any declaration of Dutard.

The complaint in the present case reveals nothing inconsistent with the alleged acknowledgment of the trust. We think the complaint does not show laches on the part of the plaintiff.

The judgment is therefore reversed, and the trial court is directed to overrule the demurrer to the amended complaint.

We concur: LENNON, P. J.; HALL, J.

MOTT et al. v. SCANLAN et al. (Civ. 968.)
(District Court of Appeal, First District, California. June 13, 1912.)

MUNICIPAL CORPORATIONS (§ 187*)—POLICE DEPARTMENT—PENSION FUND—INDEMNITY—"UNMARRIED SISTERS."

Act March 4, 1889 (St. 1889, p. 56) as amended by Act March 31, 1891 (St. 1891, p. 287), provides that whenever any member of the police department of a city after 10 years' service shall die from natural causes, his widow or children; or if there are no widow or children then his mother or "unmarried sisters," shall be entitled to \$1,000 from a fund created by the act. *Held*, that the words "unmarried sisters" as so used did not mean never having been married, but included sisters of the officer who were widowed at the time of his death.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 518-521; Dec. Dig. § 187.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7196, 7197.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Frank K. Mott and others against Theresa Scanlan and others. Judgment for defendant Theresa Scanlan, and plaintiffs and defendant Louise B. Edes appeal. Reversed.

W. S. Angwin, for appellants. Fitzgerald & Abbott, for respondent.

KERRIGAN, J. This is an appeal from a judgment on the pleadings entered in favor of Theresa Scanlan, one of the defendants. The action springs from a statute entitled "An act to create a police relief, health and life insurance fund in the several counties, cities and counties, cities, and towns of the state," approved March 4, 1889, and amended March 31, 1891. Stats. 1889, p. 56; Stats. 1891, p. 287. Section 7 thereof provides: "Whenever any member of the police department of such * * * city * * * shall, after ten years of service, die from natural causes, then his widow or children, or if there be no widow or children, then his mother or unmarried sisters, shall be entitled to the sum of \$1,000.00 from said fund."

On September 10, 1910, John P. Scanlan, who had been at that time a member of the police department of the city of Oakland for more than 10 years, died from natural causes. At the time of his death he left surviving him no widow, children, or mother, but left three sisters, one of whom, Theresa Scanlan, had never been married, and two of whom, Louise B. Edes and Mary O'Neill, were widows. With more detail these facts were set forth by the plaintiffs in a complaint against the defendants, demanding that they interplead, and both sides submitted the case for judgment on that complaint. The question presented for solution is: Were the widowed sisters of the deceased unmarried sisters? Appellants contending that they were, and respondent taking the view, as did the trial court, that the word "unmarried," as used in the statute, means never having been married.

This act making provision, as it does, for those dependent and near and dear to police officers, is intended to provide a reward for long, courageous, and faithful performance of duty. A widowed sister is equally close to a brother as one who has never entered the state of matrimony, and the common experience of mankind teaches us that there is little difference, if any, as to their necessities and ability to earn a living. Hence it would seem that the Legislature intended to make no distinction between them. No such difference as is here contended for by respondent was held tenable in the case of *In re Will of Kaufman*, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292, when the court, passing on a statute providing that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage," held that this provision was not restricted in its application to women who have never been married; the court saying: "The unmarried woman referred to by the statute must be defined according to that rule of statutory construction which requires that the words used in legal enactments shall be understood and taken in their or-

dinary and familiar significance. So read, the unmarried woman of the statute is the woman who is not in a state of marriage. That the Legislature could have had any other idea is both inconceivable and unreasonable."

In the case of *Est. of Conway*, 181 Pa. 156, 37 Atl. 204, the testator gave his residuary estate to his "spinster or unmarried nieces." Six of his nieces had never been married, and two of them were widows. While the court held that the word "or" was used conjunctively, and that therefore both classes of nieces were entitled to share in the residuary estate, in the course of the opinion the court said: "The spinsters and widows stood in the same relation to the testator; their actual condition was that of single or unmarried women, and no reason for discriminating between them appears in the will or in the circumstances presented by the case. This construction relieves the testator * * * from an arbitrary discrimination between those standing in the same degree of relationship to him, and works equality in the distribution of the estate."

So a divorced daughter was held to be an "unmarried daughter," and protected in her homestead rights after the death of her parents. *Anderson v. McGee* (Tex. Civ. App.) 130 S. W. 1040, 1043.

There is a line of cases in conflict with those just adverted to, in which the term is held to mean, as contended by respondent, "never having been married." 39 Cyc. 837. But it must be conceded that slight circumstances will be sufficient in any case to give the word its other meaning of not having had a husband or wife at the time in question. *Peters v. Balke*, 170 Ill. 304, 312, 48 N. E. 1012; *Muller v. Balke*, 167 Ill. 154, 47 N. E. 355; *In re Oakley*, 87 App. Div. 493, 74 N. Y. Supp. 206; *Frail v. Carstairs*, 187 Ill. 310, 58 N. E. 401; 29 Am. & Eng. Ency. of Law, 347.

Section 56 of the Civil Code provides that "any unmarried male of the age of eighteen years * * * and any unmarried female of the age of 15 years, etc., are capable of consenting to * * * marriage." Section 1300 of the same Code, prior to the amendment of 1905, provided that a will executed by an unmarried woman shall be deemed revoked on her subsequent marriage. * * * In neither of these instances did the Legislature, by the word "unmarried," intend to designate only one who had never entered the state of matrimony; and we are aware of no instance where the Legislature in this state has employed the term in its narrow sense.

No reason suggests itself why the lawmaking power should have intended to prefer one class of sisters to the other; and, as the Legislature has on other occasions used the word to mean not being married at the par-

ticular time, we feel justified in so construing it in this act.

The judgment is reversed.

We concur: LENNON, P. J.; HALL, J.

GRIMES v. CATHCART.

(Supreme Court of Washington. Aug. 17, 1912.)

1. HIGHWAYS (§ 184*)—COLLISION BETWEEN VEHICLES—ACTION FOR INJURY—JURY QUESTION.

In an action for collision between vehicles on a highway, whether plaintiff's injuries were sustained in the collision or immediately afterward held, under the evidence, a jury question.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

2. DAMAGES (§ 132*)—PERSONAL INJURY—EXCESSIVENESS.

\$2,000 is not so excessive recovery for personal injury to a farmer, 56 years old, received in a collision between vehicles on a highway, negligently caused by defendant, as to show passion or prejudice of the jury, where plaintiff had previously been in good health and able bodied, and where his injuries confined him to his house for two or three months and practically disabled him from work up to the time of trial, 10 months after the collision.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

3. HIGHWAYS (§ 184*)—COLLISION BETWEEN VEHICLES—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for injuries received in a collision between vehicles in a highway, evidence held insufficient to raise the issue of contributory negligence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

In a personal injury action, an instruction that the jury, in passing on the elements of damage, could consider plaintiff's age and condition in life was not prejudicially erroneous as referring to his pecuniary worth.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

Department 1. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by James N. Grimes against William H. Cathcart. Judgment for plaintiff, and defendant appeals. Affirmed.

Hulbert & Husted, for appellant. Robert McMurchie and M. J. McGuinness, both of Everett, for respondent.

PARKER, J. This is an action for the recovery of damages for personal injuries, which the plaintiff claims resulted to him from the negligence of the defendant. From a verdict and judgment in favor of the plaintiff, the defendant has appealed.

There was competent evidence given upon the trial tending to show and sufficient to warrant the jury in believing the following: In the neighborhood of the homes of appellant and respondent, in Snohomish county,

there is a county road, which winds down along the side of a steep hill. The roadway is improved about 15 feet wide at the place where respondent's injuries occurred. At this point the hill rises on one side of the road and descends upon the other, so that travel is there confined entirely to the improved portion of the road. On July 3, 1910, respondent was driving down this road with one horse hitched to a light buggy. Appellant was following him, driving a horse hitched to a heavy milk wagon. Appellant came within view of respondent around a turn in the road at a distance of about 200 feet. Prior to reaching this point appellant had been driving rapidly, even urging his horse into a run, according to the testimony of one witness. Upon coming to the turn where he could see respondent, appellant continued to drive rapidly down the hill, without any effort to check his speed, until within a very short distance of the rear of respondent's buggy. As he came to the turn in view of the respondent, he made remarks, accompanied by profanity, indicating his intention to proceed recklessly on his course. Upon arriving within about 50 feet of respondent, he called to him to get out of his way, and about the same time attempted to check his horse. About this time a neighbor, who was riding with appellant, applied the brake on his wagon, which seemed to give way, or for some cause refused to work. Respondent made an effort to get out of the way by turning close to the hillside, but the left shoulder of appellant's horse struck the rear right wheel of the buggy, throwing his horse to the ground and getting his feet entangled in the spokes of the wheel of the buggy, injuring the buggy to some extent, though it did not entirely upset it. Just as the horse struck the buggy, respondent, seeing the impending danger, was proceeding to get out of his buggy, when the shock of the collision threw him to the ground and against one of the wheels of the buggy, causing the injuries for which he now seeks recovery. Respondent's injuries were internal, and did not become manifest until some little time later, while he was driving home, when he became sick and dizzy. His injuries caused him to be confined to his house for two or three months thereafter, and he had been practically entirely disabled from his work up to the time of the trial, which occurred 10 months after he was injured. He was attended by a physician, and incurred considerable expense on that account. He is a farmer, 56 years old, and was, previous to being injured, in good health and fully able to perform his usual farm work. The jury awarded him \$2,000 on account of the injuries received.

[1] It is contended that appellant was entitled to judgment notwithstanding the verdict, or in any event to a new trial, upon the ground of the insufficiency of the evi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence to render him liable for respondent's injuries. The theory of this contention is that respondent was injured while getting out of his buggy after the collision, and after his buggy had come to rest, and that he was not therefore injured by any act of appellant. The answer to this contention is that the testimony was conflicting upon this question, and it was therefore for the jury to decide. There was competent evidence, as we have already noticed, to warrant the jury in believing that the shock of the collision threw respondent from his buggy, while he was attempting to get out and escape the apparent impending danger; and there was ample evidence to support the conclusion that the collision was the direct result of appellant's negligent and reckless driving.

[2] It is also contended that the verdict was excessive in amount, and that the respondent should be required to accept a less amount or submit to a new trial. We are satisfied, however, that in view of the nature and extent of respondent's injuries the amount of the verdict does not suggest such passion or prejudice on the part of the jury as to call for our interference on that ground. It is true that the extent of respondent's injuries had to be determined by the jury largely upon his own testimony and his complaints made to his physician, from time to time, as to his pain and suffering, since his injuries were of that nature which physicians designate as subjective, rather than objective; that is, they were not such as could be seen by the physician. An examination made of respondent by other physicians at the time of the trial, according to their testimony, indicates that his health was not then seriously impaired; but in its last analysis the nature and extent of respondent's injuries was only a question of fact upon which the evidence was conflicting, and it was therefore for the jury, and not the court, to decide.

[3] It is contended that the trial court erred in refusing to give certain requested instructions upon the theory of respondent's contributory negligence in not exercising due care to avoid the collision. We find no evidence in the record pointing to any want of care on the part of respondent. It follows that the question of his contributory negligence was not a question for submission to the jury; and therefore, of course, no instruction was required thereon.

[4] In its instruction to the jury upon the elements of damage which they might take into consideration, the court instructed the jury, among other things, that they might "take into consideration his age and condition in life. * * *". This, it is contended, was prejudicially erroneous. Counsel for appellant construe this language as referring to the financial worth of respondent. If that were the meaning of the words "condition in life," as used in the instruction, it

would be subject to criticism. For, of course, that would not be a proper subject of inquiry in such a case. We think, however, that the language, as used in the instruction, would not convey to the mind of an ordinary juror any such meaning, in view of the fact that the evidence is silent as to the financial worth of respondent. We think the jury was not led to regard the expression as having any reference to anything more than respondent's age, physical condition, earning capacity, etc. The Missouri courts have declined to reverse judgments on the ground of the use of similar expressions in instructions to juries by trial courts. *Ross v. Kansas City*, 48 Mo. App. 440, 447, and cases cited. While it would have been better for the court to have omitted from its instructions the words "condition in life," we think their use, under the circumstances, was not prejudicially erroneous. Other assigned errors, we think, are wholly without merit, and do not call for discussion. The judgment is affirmed.

MOUNT, CROW, GOSE, and CHADWICK, JJ., concur.

CHARBADJIEFF v. GROFF et ux.

(Supreme Court of Washington. Aug. 14, 1912.)

APPEAL AND ERROR (§ 1009*)—ISSUES OF FACT—VIEW.

Findings by the trial court in a suit to rescind a contract, based on conflicting evidence and sustained thereby, will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Tony Charbadjieff against O. C. Groff and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Willis H. Merriam, for appellant. Cohn & Rosenhaupt, of Spokane, for respondents.

PER CURIAM. This action was commenced by Tony Charbadjieff against O. C. Groff to rescind a contract of sale and recover the purchase money paid thereon. The trial court made findings in favor of defendant, and entered an order of dismissal. The plaintiff has appealed.

Appellant claims that he purchased from respondent a tailor shop in the city of Spokane, for which he paid \$800; that to induce appellant to make the purchase, respondent, who seems to be conducting a large merchant tailoring business in Spokane, agreed to give appellant all of his tailor work; that after full payment of the purchase price respondent refused to give appellant any work; that the value of the shop, without the work, did not exceed \$200;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and that appellant rescinded the contract, offered a return of the shop, and demanded repayment of the purchase price. Respondent denied that he made the sale; claimed that the shop was sold to the appellant by one Silver, subject to a chattel mortgage held by respondent; that the purchase price was applied to the payment of the mortgage; that respondent made no promise of work to appellant; that he did give appellant work, which he was unable to do; and that later appellant refused to accept further work, unless he received all that respondent had, which, respondent contends, appellant was unable to perform.

Issues of fact only are involved on this appeal. The trial judge saw the witnesses, heard them testify, passed upon their credibility, resolved the conflicting evidence in favor of respondent, and found that respondent did not make the alleged contract. We have carefully read the evidence, and conclude that it sustains the findings made.

The judgment is affirmed.

ANGEL v. COLUMBIA CANAL CO.

(Supreme Court of Washington. Aug. 20, 1912.)

1. CONTRACTS (§ 271*)—RESCISSION—NOTICE OF ELECTION.

Commencement of suit to cancel an executory contract, if timely, is sufficient notice of election to rescind.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1190, 1191; Dec. Dig. § 271.*]

2. CONTRACTS (§ 270*)—RESCISSION—FRAUD.

One who seeks to avoid a contract for fraudulent representations must proceed with reasonable promptness upon discovering the fraud, or he will be held to have waived his right to rescind.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.*]

3. VENDOR AND PURCHASER (§ 119*)—CONTRACT TO PURCHASE—RIGHT TO RESCIND—MISREPRESENTATIONS.

One is not entitled to rescind executory contracts for the purchase of land on the ground of misrepresentation that there was an inexhaustible supply of water to irrigate the lands, where he did not act promptly after becoming aware of the actual conditions.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 212-214; Dec. Dig. § 119.*]

Department 1. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by Richard Angel against the Columbia Canal Company. From the judgment, plaintiff appeals. Affirmed.

W. B. Mitton, of Walla Walla, for appellant. Shank & Smith, of Seattle, and Pedigo & Smith, of Walla Walla, for respondent.

GOSE, J. Suit for a rescission of two contracts for the sale of real estate. Rescission denied, and money judgment entered for the plaintiff, who has appealed.

In the month of February, 1909, the ap-

pellant, then a resident of the city of Duluth in the state of Minnesota, was attracted by an advertisement of the lands of the respondent located at Attalia, Walla Walla county, in this state, and called upon its sales agent at that place to discuss them. As a result of the discussion he entered into a written contract with the respondent on the 25th day of February for the purchase of two five-acre tracts. On the 5th day of June he made a second contract with it, for the purchase of a third five-acre tract, and on the 3d day of July he made a third contract with it for the purchase of a like tract. Thereafter he left his home in Duluth for the purpose of taking up his residence at Attalia, and arrived there about the middle of October, 1909. He then examined the tracts of land embraced in his contracts and, being dissatisfied with them, arranged with the respondent to exchange them for two five-acre tracts. This arrangement was made on the third day after his arrival at Attalia. He had paid \$1,725 on the earlier contracts and was credited with that sum in the new contracts. The new contracts were not executed until the 7th day of December. At the time of making the first purchases, the appellant had been a railroad bridge builder for 20 years, and had no knowledge of irrigation. The basis of his complaint is that the respondent's sales agent at Duluth represented that the respondent had an inexhaustible supply of water for the irrigation of its lands, and that later at Attalia its manager made a like representation, when in fact its water supply was wholly inadequate. The sales agent at Duluth, for the purpose of inducing the appellant to enter into the contract, gave him one of the respondent's illustrated circulars, which stated that it "obtained an ample and inexhaustible gravity supply of water from the Walla Walla river." The circular shows the river, dam, and canal. The appellant testified that the sales agent further said to him that he need not fear a shortage of water, as the respondent had a great reservoir which contained enough water to meet all demands for from 14 to 16 years, and that he entered into the contracts relying upon these representations. He further testified that, a few days after he arrived at Attalia, a number of reliable people informed him that the respondent could not furnish water sufficient to produce crops; that he then told Mr. Given, the respondent's manager, that he had "learned" that it did not have water; that the manager said that the company had an abundance of water; that the tunnel had caused trouble that season, "but when they got it fixed" there would be an adequate supply of water for all purposes; that, relying on his statement, he continued making improvements; that a few days later he told the manager that he wanted his money; that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the latter replied that he "would not do anything for me"; that witness "counted 11 families moving away then"; and that later he signed the new contracts. The appellant and his wife both testified that they got the first water for irrigation in the season of 1910 on the 24th day of April, and intermittently thereafter until the 3d day of July, and that they had no water thereafter until in September. The appellant also testified that the tunnel was repaired before the irrigation season opened; that the shortage of water was caused by the drying up of the waters of the Walla Walla river, the source of the defendant's canal; that a few days after he reached Attalla he made inquiry about the reservoir, of "the people living there" and of the respondent's manager; and that the latter informed him that they had an abundance of water. Both the respondent's manager, Mr. Given, and its horticulturist, Mr. Wright, testified that they made no representations to the appellant about the supply of water. The respondent obtains its water supply by a gravity flow from the Walla Walla river and an auxiliary pumping plant on the Columbia river. An unprecedented drought in 1910 caused the former to go dry, and lowered the latter several feet below the intake. The appellant left the land in September or October. His wife remained there until December 4th. The action was commenced on October 17th. Upon the facts stated, the court denied rescission, and gave the appellant a judgment for \$150 damages and costs in consequence of the respondent's failure to furnish water for the irrigation of the lands, "as provided in the contract."

[1] The prayer of the complaint is "that said contract of purchase be delivered up to be canceled," and for damages. There was no demand for a rescission after the execution of the contracts, prior to the filing of the complaint. The commencement of the action for a cancellation of the executory contracts, if timely, was a sufficient notice of an election to rescind. The execution of a release of the contracts could have been provided for in the decree. *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 684.

[2] One who seeks to avoid a contract, which he has been induced to enter into by the fraudulent representations of another touching the subject-matter of the contract, must proceed with reasonable promptitude upon discovering the fraud, or he will be held to have waived his right to rescind. *Skoog v. Columbia Canal Co.*, 63 Wash. 115, 114 Pac. 1034; *Stelter v. Fowler*, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879; *Owen v. Pomona Land & Water Co.*, 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; *Culver v. Avery*, 161 Mich. 322, 126 N. W. 439; *Tarkington v. Purvis*, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607, and footnote.

[3] The appellant did not act promptly after he became aware of the actual conditions at Attalla. According to his own testimony, he knew before he signed the contracts in suit that there had been a shortage in the supply of water that season. He says he was so advised by reliable people. He says that, when he disclosed his information to the respondent's manager, the latter said that there would be an abundance of water when the tunnel was fixed. He knew that the tunnel was repaired before the commencement of the irrigation season, and he says that he had no water until the 24th day of April, and that he only had it intermittently thereafter, until the 3d day of July, when the supply ceased altogether until some time in September. Despite this knowledge and the information that he must have gained from living in the neighborhood, a small community where water was the chief resource and no doubt the leading topic of conversation, he took and retained possession of the land until after the commencement of the action, set out fruit trees, and planted alfalfa, berries, and vegetables, and made other improvements. His conduct was equivalent to an election to affirm his contracts, and he is precluded under all the authorities from making a second election.

The judgment is affirmed.

CROW, CHADWICK, ELLIS, and PARKER, JJ., concur.

CONSOLIDATED SCHOOL DIST. NO. 105, SNOHOMISH COUNTY, et al. v. JONES, Superintendent of Schools of Snohomish County.

(Supreme Court of Washington, Aug. 19, 1912.)

SCHOOLS AND SCHOOL DISTRICTS (§ 44*)—CONSOLIDATED DISTRICTS—DISSOLUTION.

A county superintendent has no power to dissolve a consolidated school district, as such dissolution can only be effected by order of a court of competent jurisdiction in quo warranto or other appropriate proceeding.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 88-91; Dec. Dig. § 44.*]

Department 1. Appeal from Superior Court, Snohomish County; W. F. Bell, Judge.

Action by Consolidated School District No. 105, Snohomish County, and others against Lizzie Jones, Superintendent of Schools of Snohomish County. Defendant's demurrer to the complaint was overruled, and she appeals. Affirmed.

Ralph C. Bell, of Everett, for appellant.

CHADWICK, J. On the 20th day of July, 1910, school district No. 20 of Snohomish county, forming with other districts union high school district No. 103, consolidated with school district No. 80 of the same coun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ty, which formed with other districts union high school district No. 100. The consolidated district is known as consolidated school district No. 105. The defendant, as county superintendent, has threatened to dissolve the consolidated district, for the reason that the two districts were consolidated without warrant or authority of law, and the present action was instituted by the board of directors of the consolidated district to enjoin such threatened action on her part. A demurrer to the complaint was overruled, and, the defendant electing to stand on her demurrer, and refusing to plead over, final judgment was entered, granting a permanent injunction as prayed. From this judgment, the defendant has appealed, and by stipulation the appeal is submitted to this court on a transcript of the record and the appellant's brief.

The question sought to be raised by the appeal is the right of two school districts, lying in different union high school districts, to consolidate under the law permitting consolidation in certain cases; but we do not think that appellant can raise that question. The two districts have been, in fact, consolidated; and we are cited to no provision of the law authorizing the county school superintendent to dissolve a consolidated district, whether the consolidation be legal or illegal. In the absence of a statute conferring such power on the superintendent, the district can only be dissolved by an order of a court of competent jurisdiction in a quo warranto or other appropriate proceeding.

Without expressing any opinion on the merits of the question thus presented, the judgment must therefore be affirmed; and it is so ordered.

GOSE, PARKER, and CROW, JJ., concur.

P. D. HILLIS LOGGING CO. v. MESCHER.

(Supreme Court of Washington. Aug. 14, 1912.)

PRINCIPAL AND AGENT (§ 136*)—PERSONAL LIABILITY OF AGENT—MISREPRESENTATIONS.

A bill of sale containing the usual covenants of title, and signed by the defendant as the seller's agent, is insufficient to charge defendant personally for misrepresentations as to the seller's title, in the absence of a showing that he knew the representations to be false.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 470-491; Dec. Dig. § 136.*]

Department 1. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by the P. D. Hillis Logging Company against C. T. Mescher. Judgment for defendant, and plaintiff appeals. Affirmed.

Merrick & Mills, of Everett, for appellant, J. Henry Denning, of Seattle, for respondent.

PARKER, J. The plaintiff commenced this action in the superior court to recover damages resulting to it from alleged false and fraudulent representations made by the defendant, inducing it to purchase from the Betz Mescher Company, a corporation, a secondhand donkey engine. The cause was tried before the court and a jury. At the close of the evidence, the court directed a verdict in favor of the defendant, which the jury returned. Judgment was rendered accordingly. The plaintiff has appealed.

The controlling facts are not in dispute. Appellant purchased the engine from the Betz Mescher Company, through respondent as agent of that company, at an agreed price of \$600. The purchase price was paid by appellant to respondent, and by him turned over to the Betz Mescher Company. Thereafter appellant lost the engine because of the defective title of the Betz Mescher Company, thereto at the time of the sale. The alleged false representations made by respondent to appellant, inducing the sale, were that the Betz Mescher Company had good title to the engine and right to convey the same. It is undisputed, however, that no representations whatever were made by respondent to appellant, relating to the title, orally in the negotiations leading up to the sale. The only representations made as to title were those of the usual covenants of warranty of title which were contained in the bill of sale executed for the conveyance of the engine. This was a bill of sale executed by "Betz Mescher Co. by C. T. Mescher." There is but little evidence tending to show what knowledge respondent had of the title to the engine; but what little there is tends to show that he honestly believed that the Betz Mescher Company had, at the time of the sale, perfect title to the engine and a right to sell it. Respondent was apparently fully authorized to make the sale for the Betz Mescher Company, so far as his agency authority is concerned, and no contention is made to the contrary. The facts indicate that appellant may have a good cause of action against the Betz Mescher Company upon its warranty; but it seems clear to us that sufficient has not been shown to support a charge of fraudulent representation against respondent. He is not shown to have made any representations personally. In so far as the language of the covenants of warranty is concerned, it is the language of the Betz Mescher Company. That language having been used by it through respondent as its agent might render him responsible therefor, if known by him to be false, but not otherwise. 20 Cyc. 24.

The judgment is affirmed.

MOUNT, GOSE, CROW, and CHADWICK, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

CLEVELAND v. MALDEN WATERWORKS CO.

(Supreme Court of Washington. Aug. 20, 1912.)

1. WATERS AND WATER COURSES (§ 203*)—WATER COMPANIES—RATES.

A water company can fix rates for service, if they are reasonable and not discriminatory, in the absence of a valid contract or legislative control.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 290-299; Dec. Dig. § 203.*]

2. WATERS AND WATER COURSES (§ 233*)—WATER COMPANIES—RATES.

The reasonableness of a water rate charged by a company depends largely on the amount of investment and the amount of returns.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 290-299; Dec. Dig. § 203.*]

3. WATERS AND WATER COURSES (§ 194*)—WATER COMPANIES—SERVICE TO CONSUMERS—REQUISITES.

Under a waterworks franchise requiring the grantee to furnish service at fixed rates, he must provide the necessary service pipe from the main line in an abutting street to the consumer's property line.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 280; Dec. Dig. § 194.*]

Department 1. Appeal from Superior Court, Whitman County; Thomas Neill, Judge.

Mandamus proceeding by Charles E. Cleveland against the Malden Waterworks Company. From an order granting a peremptory writ, respondent appeals. Affirmed.

Wakefield & Witherspoon, A. C. Shaw, and E. P. Twohy, all of Spokane, for appellant. J. N. Pickrell, J. M. McCroskey, and R. M. Burgunder, all of Colfax, for respondent.

CHADWICK, J. The material facts in this case are as follows: The plaintiff, Cleveland, is the owner of a lot abutting on Ninth street, in the town of Malden, in Whitman county. The defendant water company is a public service corporation, owning and operating a water system along Ninth street and other streets of the town, under a franchise from the town council. Sections 1, 2, 3, and 4 of the ordinance granting the franchise read as follows: "Section 1. That the Malden Waterworks Company, a corporation existing under the laws of this state, its successors or assigns, be and is hereby granted the right and privilege of excavating and laying pipes and mains in the public streets and alleys of said town for the purpose of furnishing to its inhabitants fresh water for domestic and sewerage purposes and for fire protection and otherwise as may be designated by proper ordinance for a period of twenty-five years from the granting and acceptance of this ordinance.

"Sec. 2. The said corporation shall lay such pipes and place hydrants as directed by the street committee or such other committee

of said town as may be charged with the duties of looking after the streets and alleys, provided that a sufficient number of persons on the streets to be benefited by said extensions shall first petition and sign contracts with the company guaranteeing twelve per cent. net on the estimated cost of said extension, which said pipes and mains shall be of sufficient size and of quality to furnish ample and sufficient water for all purposes intended and to be placed and extended for consumer's use, and commence the laying of same within such time as designated by resolution of the council and directions of the said street committee.

"Sec. 3. That it shall have the right to make the necessary excavations for the laying, maintaining and repairing of said pipes, mains and hydrants, but must without unnecessary delay refill all ditches and place the streets and grounds in safe and proper condition, and for the failure so to do immediately after being directed by the street committee, they may cause the same to be done at the expense of the said corporation and charge the same up as a tax against said plant.

"Sec. 4. That said corporation may charge and collect such tolls for the furnishing of water to users and consumers as shall be considered reasonable and just to give them fair return on the investment, which price may be changed and revised at periods of five years after the first ten-year period, if so requested by resolution of the council and for a period of the first ten years the following rates shall be the maximum monthly amount which can be charged for the water under such reasonable rules and regulations as may be promulgated by said corporation: * * * Private dwellings, four rooms or less, \$1.50. * * *

The plaintiff tendered to the defendant company the sum of \$1.50, and demanded that it furnish water to him through its pipes at the property line of Ninth street, for use in his dwelling house on the lot above described. The company refused to comply with this demand, unless the plaintiff would pay the further sum of \$14.50, the cost of extending the pipe line from the main to the property line and making the connection with the main. This proceeding was thereupon instituted, and resulted in the issuance of a peremptory writ of mandate, requiring the water company to comply forthwith with the demand of the plaintiff. From this order, the present appeal is prosecuted.

[1, 2] From the foregoing statement, it will be seen that the sole question presented for decision is whether the property owner or the water company must defray the expense of conducting the water from the main to the property line and making the necessary connection with the main. In the absence of a valid contract or legislative con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trol in the matter of its rates, a water company may fix and collect rates for furnishing water, provided they are reasonable and just and do not discriminate. A reasonable rate depends in a large measure upon the amount of money invested and the returns received. *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

[3] If the company only lays its mains in the streets; it will, as a matter of course, have less money invested than if it carries its pipes to the property line of each individual consumer, and will be compelled to charge less in the former case than in the latter; and, if there be no contract or statutory or municipal regulation in the way, a regulation requiring the property owner to defray the expense of piping and conducting the water from the main to his property line, and in addition to pay a reasonable monthly charge for the use of the water, would not seem unreasonable, provided the two charges combined be but a reasonable charge for the services rendered. But this case is controlled by the franchise ordinance, which requires the company to furnish water to users and consumers at certain fixed rates; and we are of opinion that it is not so furnished, within the meaning of the ordinance, unless it is delivered to the consumer at his property line. *Pocatello Water Co. v. Stahley*, 7 Idaho, 155; 61 Pac. 518; *Bohne v. Consumers' Co.*, 18 Idaho, 568; 92 Pac. 583, 24 L. R. A. (N. S.) 485; *Hatch v. Consumers' Co.*, 17 Idaho, 204, 104 Pac. 671; *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816; *Plum Bluff Corporation v. Forey*, 96 Ark. 845, 181 S. W. 680, Ann. Cas. 1912B, 544.

The case of *State ex rel. Foley v. Hillyard Water Co.*, 49 Wash. 232, 94 Pac. 1080, is not in conflict with the views here expressed. The court there held that the plaintiff was not entitled to water from the main from which he demanded it, and no franchise or contract obligation was involved.

The judgment is affirmed.

CROW, GOSE, ELLIS, and PARKER, JJ., concur.

Lennon et ux. v. CITY OF SEATTLE.

(Supreme Court of Washington. Aug. 14, 1912.)

1. MUNICIPAL CORPORATIONS (§ 831*)—DRAINAGE PLANS—ADOPTION—CITY'S LIABILITY.

Acts of municipal officers in adopting drainage plans and in determining when and where sewers are to be constructed are quasi judicial, in the exercise of which judgment and discretion the city will incur no liability, as it will ordinarily be presumed, in the absence of any showing of actual negligence, that reasonable care was used.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1780, 1781; Dec. Dig. § 831.*]

2. MUNICIPAL CORPORATIONS (§ 831*)—SEWERS—DEFECTIVE SYSTEM—CONSTRUCTION—NEGLIGENCE.

Plaintiffs' property was injured by the breaking of a tile sewer, part of the system of defendant city. The sewer extended down a steep gulch between two streets for a distance of 174 feet, falling 90 feet. The upper sewer was constructed of 15-inch tile pipe and the lower one of 12-inch pipe. The sewer had broken once before, damaging certain adjoining property, which the city purchased, after which it slightly changed the course of the connecting sewer by constructing a new line of 8-inch pipe through the land purchased and building a bulkhead of logs to retain earth with which it filled and graded the property, after which the bulkhead gave way and the 8-inch connecting pipe broke from the excessive pressure of the larger pipe above, precipitating sewerage down on and across the rear of plaintiffs' lot. Held, that such facts, in the absence of evidence to the contrary, showed actual negligence in the construction of the plans of the sewer system, and that the city was therefore liable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1780, 1781; Dec. Dig. § 831.*]

Department 1. Appeal from Superior Court, King County; R. W. Prigmore, Judge.

Action by Ole Lennon and wife against the City of Seattle. Judgment for plaintiffs, and defendant appeals. Affirmed.

James E. Bradford and W. F. Van Ruff, for appellant. Leopold M. Stern and J. W. Russell, both of Seattle, for respondents.

CROW, J. This action was commenced by Ole Lennon and Sirene Lennon, his wife, against the city of Seattle, to recover damages to real estate. From a judgment in plaintiffs' favor the defendant has appealed.

Some years since appellant installed and has since maintained a public sewer system, in which a connection extended down a steep gulch from the intersection of East Spruce street and Lakedell avenue to Central avenue. The length of this connection was about 174 feet, and in that distance it descended or fell about 90 feet. The upper sewer on East Spruce street was constructed with tile sewer pipe 15 inches in diameter. The lower sewer on Central avenue was constructed of tile sewer pipe about 12 inches in diameter, and the connecting sewer line from East Spruce street to Central avenue was constructed with tile sewer pipe 8 inches in diameter. About 1906 a like connection from East Spruce street to Central avenue ran down the same gulch on a slightly different line. At that time it broke and damaged real estate of one Mrs. Getto. She filed a claim for damages which was adjusted by the city purchasing her lots located on Lakedell avenue near the upper portion of the gulch and East Spruce street. Thereafter the city slightly changed the course of the connecting sewer by constructing a new line with 8-inch tile sewer pipe through the Getto lots. It also constructed on the rear of the lots and above the sewer a large bulk-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

head of logs to retain earth with which it filled and graded the lots. Respondents own two lots below the Getto lots, near the point where the connecting line entered the lower sewer on Central avenue. There was no evidence that respondents' lots were connected with, or in any manner benefited by, the sewer system. Their lots, which were improved with a residence, an outbuilding, a fence, and numerous fruit trees, were much lower at the rear toward the gulch and sewer than at the front. Shortly prior to or about January, 1910, the appellant city graded Lakedell avenue, and removed earth therefrom, which it deposited on the Getto lots above, over, and across the bulkhead. Shortly thereafter the bulkhead gave way, and the 8-inch connecting sewer pipe broke, with the result that the bulkhead, earth, and sewerage were precipitated down upon and across the rear of respondents' lots, carrying away and destroying their fence, outbuilding, and fruit trees. To recover the resulting damages this action was instituted.

The above facts were shown by undisputed evidence. Respondents introduced further evidence to show that the 8-inch sewer was installed to convey all sewerage from the upper 15-inch pipe on East Spruce street to the 12-inch pipe in Central avenue; that the 8-inch pipe was 274 feet long, dropped 90 feet, and was installed by the city on land owned by it; that it passed under or through the log bulkhead; that the capacity of the 15-inch pipe was about $3\frac{1}{4}$ times that of the 8-inch pipe; that in the event of the lower pipe becoming clogged, the pressure of water from above on the inside of the 8-inch pipe would be about 40 pounds to the square inch; and that the 8-inch pipe which would have to withstand this enormous pressure was only an ordinary tile sewer pipe. Upon this evidence respondents make a calculation showing that in the event of the 8-inch pipe becoming clogged or stopped at its lowest point, where it connected with the Central avenue sewer, it would be subjected to an enormous and excessive pressure which would gradually decrease from that point to its upper portion at East Spruce street. After these facts had been shown and respondents had proven their damages, appellant introduced evidence as to the extent of the damages, and rested without offering any evidence as to the construction of the sewer, the method of its maintenance, or the cause of the break.

Appellant contends that its challenge to the sufficiency of the evidence should have been sustained; that the respondents have shown no negligence on its part; that the doctrine of *res ipsa loquitur* cannot be applied to a case of this character; that no previous notice to appellant of any defect or obstruction in the sewer has been shown; and that the proof of the mere happening of

the break is insufficient to sustain a recovery.

[1] Acts of municipal officers in adopting drainage plans and in determining when and where sewers are to be constructed are recognized as quasi judicial, as they involve an exercise of deliberate judgment and discretion. It has frequently been held that, in exercising such judgment and discretion or in adopting sewer systems and plans, municipalities will incur no liability for such acts, as it will ordinarily be presumed, in the absence of any showing of actual negligence, that reasonable care has been used.

[2] While the elementary rule is as stated, we do not think it should prevent a recovery on the facts before us. It has been shown that on a previous occasion an 8-inch connection went out in substantially the same location, causing damage to the Getto lots; yet the city constructed another 8-inch tile connection in practically the same location, under similar conditions, built the bulkhead which it covered with earth, and that the sewer again went out in practically the same place, carrying the bulkhead and earth with it. These facts, coupled with the certainty of an immense pressure on the 8-inch tile in the event of a stoppage, made at least a *prima facie* case of notice to the city and negligence as against the city. Appellant made no effort to disclose the true cause of the break, or to show that it was without negligence. It was in a better position to understand the situation and to explain the true cause of the accident than were respondents. Without any attempt to do so, it now argues that respondents have proven no negligence, and should be precluded from recovery. This position cannot be sustained. Respondents' rights have been invaded. Their property has been destroyed without fault or negligence on their part. The destruction was caused by an agency under the absolute dominion and control of the city. Sewerage, earth, and debris have been precipitated upon respondents' property, and thereby they have been injured.

In *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552, a well-considered case, in which damage to private property was occasioned by a sewer, Judge Cooley, after citing and discussing numerous decisions, well said: "It is very manifest, from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable

for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it is done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

In *Roberts v. Dover*, 72 N. H. 147, 153, 55 Atl. 895, 899, a sewer case, the court, discussing the duties and liability of a municipal corporation, said: "In *Rowe v. Portsmouth*, 56 N. H. 291 [22 Am. Rep. 464], it was held that in maintaining a public sewer a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole loss or risk was to be his alone. The case renders unnecessary a discussion of the liability of a city or town, which builds a sewer under legislative authority, for defects in the plan adopted. When, having constructed a sewer, it connects it with other sewers and drains, overtaxing its capacity, and allows insoluble materials to accumulate in it and obstruct the flow of the water, causing it to flow back upon private property, its liability for the resulting damage does not differ from that of an individual, who so unreasonably manages his property as to cause damage to the adjoining property of his neighbor. The fact that it is a public corporation, performing certain public duties, does not exempt it from liability for negligence when performing a work not imposed upon it as a public agent, but voluntarily assumed by it under a legislative license. Having undertaken the construction and management of a system of sewerage for the local accommodation and convenience, its duties to individuals liable to be damaged thereby is measured by the same rule of ordinary care and prudence under the circumstances as would be applied if it were a private business corporation, partnership, or individual engaged in the same work."

The appellant has made no attempt to show the cause of the break which damaged respondents, but asserts its exemption from liability on the ground that no negligence has been shown on its part in the adoption of the original system and plan which it installed. If the system had been properly adopted and afterwards maintained, it would seem that, in the ordinary course of events, it would not have damaged respondents in the manner here shown. We therefore con-

clude that the prima facie case of notice and negligence which respondents have made imposed upon appellant the duty of introducing at least sufficient proof to meet the same. In *King v. Kansas City*, 58 Kan. 334, 338, 49 Pac. 88, 89, the court said: "The city cannot without liability collect sewage and filth and precipitate it upon the property of a citizen, even if the plan is devised in good faith and the best material is used in the construction. It is immaterial from which end of the sewer the discharge is made; the consequence and liability are necessarily the same. 'Courts of the highest respectability have held that if the sewer, *whatever its plan*, is so constructed by the municipal authorities as to *cause a positive and direct invasion* of the plaintiff's private property, as by collecting and throwing upon it to his damage water or sewage which would not otherwise have flowed or found its way there, the corporation is liable.' 2 Dillon on Municipal Corporations (4th Ed.) § 1047. See, also, *Ashley v. Port Huron*, 35 Mich. 296 [24 Am. Rep. 552]; *Tate v. St. Paul*, 56 Minn. 527 [58 N. W. 158, 45 Am. St. Rep. 501]; *Selfert v. City of Brooklyn*, 101 N. Y. 136 [4 N. E. 321, 54 Am. Rep. 684]; *Lehn v. San Francisco*, 66 Cal. 76 [4 Pac. 965]; *North Vernon v. Vogler*, 89 Ind. 77; *West Orange v. Field*, 37 N. J. Eq. 600 [45 Am. Rep. 670]." The views here expressed are in harmony with the holding of this court in *Hayes v. Vancouver*, 61 Wash. 536, 112 Pac. 498, where we quoted from *Ashley v. Port Huron*, supra, the identical excerpt above quoted, and said: "The decisions of the courts relating to damage caused by cities in maintaining sewers and drains, especially where the damage is the result of a positive direct act of the city, seem to be quite uniform in holding that the city is liable for such damage, and that it cannot escape upon the plea that it was the result of the performing of a purely governmental act."

A prima facie case of negligence sufficient to sustain the judgment was made by the respondents which, in the absence of any showing by the appellant, should be sustained. The judgment is affirmed. *

PARKER, GOSE, and CHADWICK, JJ., concur.

HOLT MFG. CO. v. THOMAS et al.
(Supreme Court of Washington. Aug. 16, 1912.)

1. ATTACHMENT (§ 47*)—DISPOSITION OF PROPERTY WITH INTENT TO DELAY AND DEFRAUD CREDITORS.

Whether an alleged disposition of property was with intent to defraud defendants' creditors, and whether the transferee participated in the fraud so as to sustain an attachment on that ground, is to be determined by the acts and words of the debtors and transferee at the time of the transfer much more than by their sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sequent testimony as to what their intentions then were.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 120, 861-876; Dec. Dig. § 47.*]

2. ATTACHMENT (§ 44*)—GROUNDS—DEFRAUDING CREDITORS.

Where a debtor in making a transfer of property not only intended to prefer the transferee, who was a creditor, but also intended to delay and defraud plaintiff and other creditors, the transfer was sufficient to sustain an attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 110; Dec. Dig. § 44.*]

3. ATTACHMENT (§ 47*)—GROUNDS—FRAUDULENT CONVEYANCE—EVIDENCE.

Defendants, while insolvent and with full knowledge of their indebtedness to plaintiff and of its purpose to enforce the same, conveyed practically all of their property to B., another creditor, who accepted the conveyances which were absolute in form, without anything on their face to indicate that he received such property in trust for any one else, as he thereafter claimed. The property was worth at least twice as much as the indebtedness due B., including his surety obligation for defendants. The conveyances were advised by B., and, after being made, he offered to share with the president of a bank which was another creditor, in case he would aid in reinstating defendants on the property conveyed. He also evidenced his concern in defendants' efforts to thwart legal proceedings looking to a collection of plaintiff's claim, and made inconsistent statements with reference to the purpose of the conveyances. The attorney who drew the transfers claimed that they were absolute and intended so to be by the parties, but failed to state any facts indicating the nature of an alleged trust by the transferee in favor of certain banks. *Held*, that the transfers were made not only to prefer B, but also with specific intent to hinder, delay, and defraud plaintiff, and were therefore ground for attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 120, 861-876; Dec. Dig. § 47.*]

4. APPEAL AND ERROR (§ 1011*)—REVIEW—QUESTIONS OF FACT.

The rule that the Supreme Court will not arrive at a different decision than that of the trial court on the ground of a disputed question of fact has no application on an appeal from an order dissolving an attachment heard by a visiting judge on affidavits only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by the Holt Manufacturing Company against L. O. Thomas and another. From an order granting defendants' motion to dissolve an attachment, plaintiff appeals. Reversed and remanded.

W. W. Zent, of Spokane, for appellant. Lovell & Davis, of Ritzville, for respondents.

PARKER, J. The plaintiff commenced this action in the superior court seeking recovery from the defendant upon two promissory notes and an open account aggregating approximately \$5,000. At the same time the plaintiff sued out a writ of attachment against the property of defendants upon the

ground that they had assigned, secreted, and disposed of their property with the intention to delay or defraud their creditors. The defendant moved the court to dissolve the attachment, alleging that it was wrongfully issued. The motion came on for hearing before the court upon evidence produced in the form of affidavits only, in behalf of the respective parties; the only issue involved being as to whether or not the defendants had made disposition of their property with intention to delay or defraud their creditors. This issue being submitted on these affidavits, the court entered its order dissolving the attachment. From this order the plaintiff has appealed.

On the 2d day of October, 1911, and for some time prior thereto, respondents were engaged in farming on an extensive scale in Adams county. On that date they were insolvent and owed their principal creditors approximately as follows: W. J. Bennington, \$5,000; Pioneer Bank of Ritzville, \$12,000; Bank of Lind, \$12,000; Holt Manufacturing Company (appellant), \$5,000. The total value of their property at that time, which consisted of land, stock, farm implements, and wheat on hand, was between \$24,000 and \$30,000. A few days prior to October 2d the vice president of appellant had a conversation with both of respondents in which payment of the amount due upon the indebtedness here sued upon was demanded of them, and in which conversation they were given to understand that legal proceedings would be promptly taken looking to the securing and collection of their indebtedness to appellant unless it was immediately paid. They then pleaded for an extension of time, promising to pay at least \$2,400 upon the indebtedness in a few days when they would sell some of their wheat, and promising to meet a representative of appellant at Lind and make the \$2,400 payment on October 4th. On that day, or possibly the day previous, in a telephone conversation with the vice president of appellant, one of respondents informed him that they would not meet the representative of appellant at the time stated and would do nothing more for appellant, as other arrangements had been made. On October 2d and 3d, which was after the understanding had as to the payment of the \$2,400 and before the agreed time for such payment had arrived, respondents executed two bills of sale and a quitclaim deed conveying substantially all of their personal property and land which was of the value of \$24,000 or more to W. J. Bennington. These facts we think may be considered as established beyond dispute.

These conveyances to Bennington were absolute in form, contained no provisions indicating that they were given as security, nor that Bennington was taking the title to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

property in trust for any other creditor than himself. It is now claimed, however, by respondent and Bennington, that these conveyances were made to him in trust for the payment of the claims of himself, the Pioneer Bank of Ritzville, and the Bank of Lind in this order. These claims, as we have already noticed, would aggregate approximately \$30,000. We will now notice the principal statements made in the several affidavits of witnesses relating to facts which are more or less in dispute.

One witness states in his affidavit, in substance, that on October 6th Bennington said he was not acting in the interest of any one else in taking the property by these conveyances, and that they were taken to secure him in the sum of \$5,000 owing to him by respondents, and also to secure him to the extent of \$6,000 for which sum he was surety for respondents. This \$6,000 was evidently a part of the indebtedness owing by the respondents to one of the banks. This witness also states that Bennington stated to him at that time that the conveyances were taken as security only and intended as mortgages.

Another witness stated in his affidavit, in substance, that on October 6th he heard a conversation between Bennington and the witness above mentioned, which conversation was evidently the same one above mentioned, wherein Bennington stated that the conveyances were made only as security to him and that he had not purchased the property.

Two other witnesses stated in their affidavits, in substance, that on about October 20th they had a conversation with both of respondents, wherein they stated, in substance, that appellant as one of their creditors had made unreasonable demands on them and were crowding them for the payment of the indebtedness due it and had threatened defendants with suit and attachment unless the same was settled; that they had gone to their friend Bennington and advised him of the acts and threats of appellant, and at the suggestion of Bennington they then transferred to him all of their real and personal property; that the transfer had been made for the purpose of preventing appellant from getting any undue advantage; that Bennington, being then present, claimed that he was going to use the property for the purpose of realizing on his own claim first, and thereafter he would turn the balance over to the Pioneer Bank of Ritzville and the Bank of Lind. These witnesses also state that respondents said that Bennington advised them to transfer their property to him for the purpose of preventing appellant from carrying out its threat to enforce its claim.

Another witness, who is interested in the Bank of Lind and represented it, states in his affidavit, in substance, that he had a conversation with Bennington about the 6th or

7th of October relating to the conveyance of the property to him by respondents, wherein Bennington stated that the conveyances had been made to him as security only to secure what respondents were then owing him and to secure him on certain notes that he was surety on for them payable to the Pioneer National Bank of Ritzville; Bennington further stating to the witness at that time that, if the defendants could be reinstated upon the ranch in Adams county, he would agree with the witness for the Bank of Lind that the property should be treated as security for the amount owing the Bank of Lind by respondents as well as for the amount owing him, and that the proceeds of the property would be by him distributed pro rata to the Bank of Lind, to Bennington, and to the Pioneer National Bank of Ritzville; provided, however, that the witness would comply with certain conditions named, in aiding and assisting Bennington to reinstate the defendants upon the ranch. The witness further states that at no time did the Bank of Lind nor any one acting for it authoritatively take or receive from defendants any property in settlement of their indebtedness to it, and that it has since brought suit to recover such indebtedness.

Another witness, the president of the Pioneer National Bank of Ritzville, states in his affidavit that he agreed with respondents and Bennington that the conveyances should be made to Bennington in trust for the payment of the claims of Bennington, the Pioneer National Bank of Ritzville, and the Bank of Lind in this order. It is not claimed by him that such agreement or understanding was evidenced in writing.

The substance of the affidavits of the respondents is that they did not make the conveyance with intent to defraud their creditors, but that such conveyances were made to Bennington for the purpose of paying the indebtedness due him, the Pioneer National Bank of Ritzville, and the Bank of Lind. Whether or not respondents understood that those claims were to be paid in this order does not appear from anything they have stated in their affidavits. They claim, however, that the conveyances were absolute and were not made with intent to delay or defraud their creditors.

Another witness, one of the attorneys for respondents, states that he was present at the making of the conveyances, was in consultation with respondent, that he heard all the conversation leading up to the making of the conveyances, and that they were not made as security, but as an absolute transfer to Bennington, and that Bennington then delivered to respondents all of the evidence of indebtedness he had against them. The affidavit of this witness is silent upon the question of how the surplus was to be applied by Bennington after the satisfaction of his own claim. We think the foregoing is

a fair summary of all of the principal facts disclosed by the affidavits.

Whether or not these facts show an intent on the part of respondent to delay or defraud their creditors, and especially appellant, within the meaning of the attachment law, is the problem for our solution.

[1] What the intention of respondents and Bennington was in that respect is to be determined by their acts and words which were seen and heard by others, much more than by what they may now say that their intentions were at the time.

[2] It may be conceded that they intended to prefer Bennington as a creditor, and still not be subject to the charge if intending to delay and defraud appellant or other creditors; but, if the circumstances proven show that they intended the latter as well as the former, the conveyances made with such intention would support attachment proceedings at the instance of this appellant. In *Bump on Fraudulent Conveyances* (4th Ed.) §§ 172, 173, following a statement of the general rule of law allowing honest preference to creditors, the author says: "A transfer, however, may be fraudulent, although it is made in consideration of an honest debt, for an honest claim may be used as a cover to a covinous transaction. The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, or to delay creditors in the collection of their debts. While the law permits an insolvent debtor to make choice of the persons he will pay, it denies him the right in doing it to contrive that other creditors shall never be paid, or to use the debt of the preferred creditor as a colorable consideration to screen and protect his property from their claims or to delay, hinder, and embarrass them in the enforcement of their demands. The amount of the property transferred compared with the debt intended to be secured or paid, and the number, amount, and character of the other debts, are proper subjects for consideration in determining the good faith of the transaction towards other creditors. The property must bear a reasonable proportion to the preferred debt." And at section 174 the author further observes: "Creditors also are not allowed to gain a preference by means of a secret undertaking to hold a part of the property for the benefit of the debtor. The law looks with great jealousy upon the manner of giving preferences, and denounces all departures from good faith, and requires that the parties shall not secure any covert advantage to the debtor in prejudice of his creditors." In *Ellis v. Musselman*, 61 Neb. 262, 85 N. W. 75, in considering the effect of an intent to prefer a creditor with an intention to defraud other creditors, the court observed: "It is true that Joseph Ellis was indebted to his sons at the time he conveyed to them

the land in question, but that fact did not necessarily make the conveyances valid, nor shield them from the assaults of creditors. The plaintiffs in error might lawfully accept security from their father, but it was not permissible for them to do so with the intention of defrauding other creditors. If a conveyance is the product of two motives, one innocent and the other corrupt, it is, according to all the authorities, within the proscription of the statute of frauds." In the same decision the court quotes with approval the text in 14 Am. & Eng. Ency. of Law (2d Ed.) pp. 295, 296, as follows: "'Although a creditor who obtains from an insolvent debtor an assignment of property in payment of, or as security for, his debt, may know that his debtor is acting with the design of delaying and defrauding other creditors, he will not lose his preference, by reason of such knowledge, if he takes the assignment in good faith, and without any view of aiding in the consummation of the purpose, further than necessarily results from securing a preference to himself. If, however, it appears from the circumstances attending the transaction that the preferred creditor was not acting with the sole purpose of securing the payment of his own debt, but also from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit, the creditor will not be protected, but the transaction will be declared fraudulent.'" The following decisions of this court are in harmony with these views: *O'Leary v. Duval*, 10 Wash. 666, 39 Pac. 163; *Hotaling Co. v. Clancy*, 21 Wash. 1, 56 Pac. 929; *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347. In the last-cited case it is true the court declined to set aside the conveyances as a fraudulent preference, but nevertheless the principles recognized in that decision are in harmony with the views indicated by the above quotations.

[3] Now the main facts disclosed by these affidavits pointing to an intent on the part of respondents to delay and defraud this appellant as one of its creditors we think may be fairly summarized as follows: First, insolvency of respondents at the time of the conveyances with full knowledge thereof and full knowledge of the affairs of respondents and of the indebtedness due from them to appellant and of appellant's purpose to enforce the same, on the part of Bennington who accepted the conveyances; second, the conveyances made to Bennington absolute in form without any language therein or in any other instrument of writing expressing any such trust for the benefit of the banks in addition to himself, as is now claimed by him and respondents; third, conveyance of the property to Bennington having a value of at least twice the amount of the indebtedness due from respondents to him including the

amount of his surety obligation incurred in their behalf; fourth, friendly concern on the part of Bennington for respondents, evidenced by his advice to them to make conveyance to him of all their property beyond that which would be reasonably sufficient to satisfy his own claim, and also evidenced by his offer to the president of the Bank of Lind to share pro rata with it in the payment of its claim against respondents upon condition that its president would aid in reinstating respondents upon the farm, also evidenced by his concern in the efforts of respondents to thwart any legal proceedings which might be instituted by appellants looking to the collection of their claim, his efforts in this regard going far beyond what was necessary to secure a fair preference to himself as a creditor; fifth, inconsistent statements made by Bennington as to the purpose of the conveyances; sixth, concern of respondents indicating their desire to hinder and delay appellants in the collection of their claim as well as a desire to merely prefer other creditors; seventh, the statement of the attorney for respondents to the effect that the sale was absolute and intended so to be by respondents and Bennington, yet failing to state any facts indicating the nature of the claimed trust in favor of the banks. It may not be easy to point out among these facts any particular one which of itself shows an intent on the part of respondents to delay and defraud appellant by these conveyances; but it is probably seldom that such an intent can be shown by other than a series of acts. We think that taking all of the facts shown by these affidavits, making due allowance for the conflicting statements therein, there is sufficient here shown to require our holding that respondents in making these conveyances did so, not for the sole purpose of preferring bona fide creditors, but also with the specific intent to hinder, delay, and defraud this appellant as a creditor. We think that both they and Bennington, in the making of these conveyances, did not manifest that degree of good faith and fairness which the law demands in the conveyance of property by an insolvent debtor to one of his creditors for the purpose of discharging the debt owing such creditor. Clearly if these conveyances were made to Bennington for the purpose of discharging his debt alone, they were fraudulent and void as to other creditors because of the manifest excessive value of the property conveyed over and above the amount of the obligation sought to be satisfied; and we are not at all impressed with the claim that the surplus value was to be in trust for the banks. Even if such were the original intention of respondents and Bennington, the facts point to the intent of both respondents and Bennington to delay and defraud appellant. We think such intent is

sufficiently shown to render the conveyances void as to appellant.

[4] Some effort is made to invoke the general rule that this court should not arrive at a different decision than that of the trial court upon a disputed question of fact. That rule has but little application here, because no oral evidence was submitted to the trial court, and it had no better opportunity to see or hear the witnesses than we have. Indeed, the question was not even determined by a resident judge, but was submitted to a visiting judge from another district. The reason of the rule invoked is therefore not present in this case.

We are of the opinion that the trial court erroneously dissolved the attachment. It follows that the order to that effect must be reversed. It is so ordered.

GOSE, CROW, and CHADWICK, JJ., concur.

BANK OF LIND v. THOMAS et al.

(Supreme Court of Washington. Aug. 16, 1912.)

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by the Bank of Lind against G. H. Thomas and another. From an order dissolving an attachment, plaintiff appeals. Reversed.

Wakefield & Witherspoon, A. C. Shaw, and E. P. Twohy, all of Spokane, for appellant. Lovell & Davis, of Ritzville, for respondents.

PER CURIAM. This is an appeal from an order dissolving an attachment. The facts involved are substantially the same as in *Holt Manufacturing Company v. Thomas et al.*, 125 Pac. 772, which we have just decided. For the reasons given in that decision the order dissolving the attachment in this case is reversed.

COOK et ux. v. CITY OF SPOKANE.

(Supreme Court of Washington. Aug. 19, 1912.)

MUNICIPAL CORPORATIONS (§ 450*)—STREETS—IMPROVEMENT—ASSESSMENT DISTRICTS—LIMITATION.

Spokane City Charter, § 61, originally provided that street improvement assessment districts should be coterminous with the part of the street, etc., improved, and that the side lines should in no event be further than 150 feet from the nearest line of the street, etc. As amended, the section provides that, unless otherwise provided by ordinance, the district shall be coterminous with the street, etc., "and in such case the side lines of such assessment district should in no event be distant more than 150 feet from the nearest side line of the street," etc. *Held*, that the city is not authorized to extend the side lines of a district beyond the 150-foot limit.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge. Action by J. L. Cook and wife against the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

City of Spokane. Judgment dismissing the action, and plaintiffs appeal. Reversed, with directions.

F. W. Girand and Robertson & Miller, for appellants. A. M. Craven and Wm. E. Richardson, both of Spokane, for respondent.

CHADWICK, J. This is an action to cancel a special assessment for a street improvement. A demurrer to the complaint was sustained, and, the plaintiffs electing to stand on their pleading and refusing to plead further, a judgment of dismissal was entered, from which this appeal is prosecuted.

The appellants' property is situated more than 150 feet from the nearest line of the street improved, and the power of the city to assess property beyond that limit is the sole question presented by this appeal. The solution of the question depends upon a provision of the city charter. Section 61 of the charter, as originally adopted, authorized the city to improve its streets, and to levy and collect special taxes or assessments on abutting property to defray the expense, "and, for this purpose, the city shall, by ordinance, establish assessment districts, which shall include the lots and parcels of land benefited by said improvement: Provided, however, that such assessment district shall be coterminous with that portion of the street, avenue, public way or alley improved, and the side lines of such assessment district shall in no event be distant more than 150 feet from the nearest line of the street, avenue, public way or alley improved. * * * " This section was later amended; the amendatory section containing the following proviso: "Provided, however, that *unless otherwise provided in such ordinance*, the said assessment district shall be coterminous with the portion of the street, avenue, public way or alley improved, and, *in such case* the side lines of such assessment district shall in no event be distant more than 150 feet from the nearest side line of the street, avenue, public way or alley improved. * * * " The italicized words indicate the changes made by the amendment. By the original charter provision, both the end lines and side lines of the assessment district must be coterminous with the portion of the street improved longitudinally, and the side lines not more than 150 feet distant from the nearest line of the street improved.

The language of the amendment is by no means free from ambiguity; but we find in it no warrant for holding that the city was authorized to extend the side lines of the district beyond the 150-foot limit. The amendment fixes definitely end lines for the district, and then provides by implication that these lines may be changed or extended by ordinance. What the phrase "in such cases" relates to is uncertain, to say the least.

Grammatically speaking, it must relate to something that precedes it. If it relates to districts which must be coterminous with the street improved, there is no limitation where the city has otherwise provided by ordinance; if it relates to districts where the city has otherwise provided by ordinance, there is no limitation where such provision has not been made; and if it relates to districts of both kinds, the city's contention falls to the ground. But, whatever the intention of the framers of the amendment may have been, they have failed to use language sufficiently definite and explicit to remove the 150-foot side limit to assessment districts imposed by the original charter provisions; and the judgment is accordingly reversed, with directions to overrule the demurrer and take such proceedings as are not inconsistent with this opinion.

CROW, ELLIS, PARKER, and GOSE, JJ., concur.

PRATT et al. v. CITY OF SPOKANE

(Supreme Court of Washington. Aug. 19, 1912.)

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by William G. Pratt and others against the City of Spokane. Judgment for defendant; and plaintiffs appeal. Reversed and remanded.

John Salisbury, for appellants. A. M. Craven and Wm. E. Richardson, both of Spokane, for respondent.

PER CURIAM. The judgment in this case is reversed on the authority of Cook v. City of Spokane, 125 Pac. 776, just decided, and the cause is remanded for further proceedings.

NELSON v. IMPERIAL TRADING CO.

(Supreme Court of Washington. Aug. 14, 1912.)

1. SALES (§ 170*)—CONTRACT—BREACH—RESCISSION.

Where defendant ordered two tons of turkeys to arrive in Spokane, Wash., November 23, 1907, and plaintiff accepted the order, he was bound to ship the turkeys in time to reach Spokane during business hours on November 23d, and, having filled the order in two shipments, one of which was shipped so as to arrive during the night of the 23d, and the other during the night of the 24th, defendant, in the absence of waiver of the delay, was entitled to refuse to receive them.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 424; Dec. Dig. § 170.*]

2. SALES (§ 79*)—PLACE OF DELIVERY.

In the absence of a provision of a contract to the contrary, the place of delivery is the place where the goods are at the time of the sale, usually the place of business of the seller, or of manufacture or of shipment, so that delivery to a carrier for transportation to the buyer constitutes delivery to him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 214-216; Dec. Dig. § 79.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. SALES (§ 176*)—BREACH OF CONTRACT—REJECTION OF BUYER—GROUNDS—WALVER.
Where a seller of turkeys to arrive November 23, 1907, did not ship them in time to so arrive, and on arrival of the first lot the buyer inspected them and rejected the whole quantity, without inspecting the second lot at all, and it did not appear that the rejection was solely because of inferior quality, it was not estopped, on being sued for breach of contract, to claim the right to reject because of untimely arrival.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.*]

Department 1. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by Carl Nelson against the Imperial Trading Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to dismiss.

Danson, Williams & Danson and George D. Lantz, for appellant. Charles P. Lund, of Spokane, for respondent.

CROW, J. Appellant is engaged in the wholesale fish and poultry business in Spokane. Respondent resides in Hutchinson, Kan. The alleged contract of sale was made by the following telegrams which passed between the parties:

"Spokane, Washington, November 16th, Carl Nelson, Hutchinson, Kansas. Can you ship three tons fancy dry picked turkeys 16 Hutchinson? Answer. Imperial Trading Company."

"November 16—07. Imperial Trading Company, Spokane, Wash. Can ship two tons dry picked turkeys 17c. Answer immediately. Carl Nelson."

"Spokane, Wash., November 16—07, Carl Nelson, Hutchinson, Kansas. Ship two tons fancy dry picked turkeys 17, arrive Spokane 23d. Acknowledge. Imperial Trading Company."

"November 17—07, Imperial Trading Company, Spokane, Washington. All right. Will ship C. O. D. Weather warm, shall I use ice? Carl Nelson."

"November 18. Carl Nelson, Hutchinson, Kansas. Ship without ice. Imperial Trading Company."

Appellant contends that, instead of being fancy dry picked, many of the turkeys which respondent shipped were of inferior quality; that they did not reach Spokane within the contracted period; and that excessive shipments were made. It refused to accept the shipments. A portion of the turkeys, which subsequently spoiled, were condemned and destroyed. The remainder were stored, and later sold for less than the contract price. Respondent claimed damages for express charges, storage charges, loss of turkeys destroyed, and depreciation in price. The undisputed evidence shows that after being killed and dressed turkeys should be permitted to cool for 24 hours before shipment; that when respondent received the order he had only 2,000 pounds of live turkeys on

hand; that he killed and dressed these on November 18th, permitted them to cool, and shipped them about 6 o'clock on the afternoon of November 19th; that after receiving the order he purchased about 3,000 pounds of live turkeys, which he killed and dressed on November 19th, permitted them to cool for 24 hours, and shipped them about 6 o'clock on the afternoon of November 20th. These two shipments reached Spokane during the night of November 23d and during the night of November 24th, practically one and two days later than was contemplated by the contract. The first shipment amounted to 1,920 pounds, a little less than half the order. The second amounted to 3,100 pounds, which, added to the first, exceeded the entire order by more than half a ton. Appellant contended and introduced evidence to show that it needed the turkeys to supply retail dealers for the Thanksgiving trade; that to supply this trade it was necessary to receive the stock not later than during business hours on Saturday, November 23d; that both shipments arrived too late for that purpose; and that appellant was unable to fill its orders. Appellant introduced further evidence to show that the turkeys were of an inferior quality, and not suitable for appellant's trade, while respondent's evidence was that when shipped the turkeys were all of the quality ordered, well packed, and in good condition.

Appellant's principal contention is that the trial court erred in denying its challenge to the sufficiency of the evidence and its motion for judgment notwithstanding the verdict. It insists that respondent's duty was to deliver an entire shipment of two tons at Spokane not later than during business hours on November 23d; that he failed to do so; that the shipments were made too late; that he finally shipped more turkeys than were ordered; that the turkeys were of an inferior quality; and that by reason of any one of these breaches appellant was entitled to reject the entire shipment. Respondent insists that appellant's only assigned reason for rejecting the turkeys was that they were of an inferior quality; that by assigning that exclusive reason it waived other objections now urged; that by their verdict the jury found the turkeys were of the quality ordered; and that the judgment should be affirmed.

In considering appellant's challenge to the sufficiency of the evidence, and its motion for judgment notwithstanding the verdict, we proceed upon the theory that the turkeys were of the quality ordered. The evidence on that issue was conflicting, and was resolved by the jury in respondent's favor. It is conceded, and respondent testified, that the first shipment was made from Hutchinson on November 19th, about 6 p. m.; that the second was made on November 20th, about 6 p. m., and that it would require at least four

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nights and three days for transportation to Spokane. Some question is raised as to whether delivery was to be made in Hutchinson or in Spokane. Appellant contends that delivery was to be made in Spokane; that it was respondent's duty to deliver the entire shipment there not later than during business hours on Saturday, November 23d; that time was a material and vital element of the contract; and that appellant was entitled to reject the entire shipment for respondent's failure to make a prompt delivery, as well as for other reasons.

[1] We hold the contract contemplated that the delivery was to be made by shipment at Hutchinson, in time for arrival in Spokane not later than November 23d, and during business hours of that day. Appellant was not advised of the arrival of the first shipment in Spokane until the morning of Sunday, November 24th.

[2] "In the absence of any provision in the contract fixing a place for delivery, the general rule is that the delivery shall be made at the place where the goods are at the time of the sale, and this will usually be the place of business of the seller, or of manufacture, or of shipment." 35 Cyc. 472.

"Ordinarily a delivery of goods by the seller to the carrier designated by the purchaser, or to one usually employed in the transportation of goods from the place of the seller to that of the purchaser, is a delivery to the purchaser; the carrier becoming the agent or bailee of the buyer." 35 Cyc. 193, and cases cited.

[3] The first shipment could and did reach Spokane late during the night of November 23d. The second was not made from Hutchinson until November 20th, at 6 p. m., too late, according to respondent's testimony, to reach Spokane prior to November 24th. Respondent thus failed to comply with a material stipulation of his contract, in that he failed to make prompt shipments; and, unless appellant has waived this breach, respondent cannot recover. We are unable to find any such waiver. Although appellant insisted the turkeys were of inferior quality, there was no evidence that it assigned that fact as its exclusive reason for rejecting them. Appellant inspected the first shipment on Sunday morning after its arrival in Spokane, and immediately rejected it. At that time appellant did not waive or show any intention to waive any other breach of the contract. The only theory upon which any waiver can be claimed is kindred to that of estoppel. "The question of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver, unless so intended by one party and so understood by the other; or one party has so acted as to mislead the other,

and is estopped thereby. . . . Mere silence at a time when there is no occasion to speak is not a waiver, nor evidence from which waiver may be inferred, especially where such silence is unaccompanied by any act calculated to mislead." 40 Cyc. 261, 263.

No facts constituting an estoppel or disclosing an intentional waiver by appellant are shown in this action. Appellant examined the first shipment and immediately rejected it, without assigning any special reason. The second shipment was not examined. There is no evidence that appellant at any time advised respondent, or that respondent knew, the shipment was rejected because of inferior quality. Appellant was entitled to have the entire order shipped from Hutchinson, in time to arrive in Spokane not later than November 23d, during business hours. The greater portion of it was shipped too late for arrival within that time. The fact that respondent did not have all the stock on hand when the order was made, and that he had to purchase some of it, does not excuse him. He should not have contracted, if he could not deliver within the stipulated time. He testified that on November 24th or 25th he received a telegram from the express agent at Spokane, advising him that the shipment had been rejected; but he failed to state that any reason appellant may have assigned was communicated to him. He further testified that he ordered the express company to place the turkeys in storage; that after the agent informed him this had been done he let the matter rest until February, 1908, when he made a trip to Spokane and endeavored, but failed, to effect a settlement; that he then asked appellant why the shipment had been refused, but that it had no particular excuse to offer. The record fails to show that any specific reason for rejecting the shipment was communicated to respondent by appellant, or through any other person. No act of appellant has been shown constituting a waiver of any sufficient reason it had for rejecting the shipment, or which will estop it from asserting the defense of late shipment. Appellant's challenge to the sufficiency of the evidence should have been sustained.

The judgment is reversed and the cause remanded, with instructions to dismiss.

GOSE, PARKER, and CHADWICK, JJ., concur.

STATE ex rel. COOMBS et al. v. SUPERIOR COURT OF KLICKITAT COUNTY.

(Supreme Court of Washington, Aug. 12, 1912.)

CERTIORARI (§ 64*)—SUBJECTS OF BELIEF—REFUSAL OF TEMPORARY INJUNCTION.

Certiorari does not lie to review an order of the superior court refusing a temporary in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexed

junction; there being no finding of insolvency of the party sought to be enjoined.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. § 64.*]

Certiorari by the State of Washington, on relation of Rufus C. Coombs and wife, to review an order of the Superior Court of Klickitat County refusing a temporary injunction. Writ denied.

Miller, Crass & Wilkinson, of Vancouver, for plaintiff.

CROW, J. In pursuance of certain proceedings theretofore had, the city of Goldendale, a municipal corporation of the fourth class, on May 20, 1912, awarded to J. L. Hill & Co., a partnership, a contract for the grading and improvement of certain streets. Thereafter Rufus C. Coombs and wife, owners of property within the assessment district, commenced an equitable action against the city of Goldendale and J. L. Hill & Co., in the superior court of Klickitat county, to have the contract declared void and to enjoin the defendants from proceeding with the improvement. In their complaint they alleged, for reasons which need not be here stated, that the proceedings upon which the contract had been awarded were irregular and void. On July 1, 1912, upon plaintiffs' ex parte application, an emergency order was made and entered, restraining the defendants from in any manner proceeding with the work of the improvement until the further order of the court, and commanding them to appear on July 6, 1912, and show cause why a temporary injunction should not be granted pending the litigation. At the time named the parties appeared, the plaintiffs' application was heard, and the trial judge vacated the emergency restraining order and refused a temporary injunction. The plaintiffs Coombs and wife, as relators, have applied to this court for a writ of certiorari to review this order of the superior court, and to obtain an order directing that a temporary injunction should issue to preserve the status pending the litigation.

It is conceded that the relators have no appeal from the order of which they complain, as no finding of the insolvency of the respondents was made by the trial judge. Respondents now insist that this court has no authority in this proceeding to review the order of the trial judge in denying a temporary injunction. This contention must be sustained. The order of the trial judge is not appealable. If it can be reviewed at this time by this court by the writ of certiorari, there is no reason why any order denying a preliminary injunction may not be reviewed. That such an order will not be thus reviewed we have heretofore held in *State ex rel. Young v. Superior Court*, 43 Wash. 34, 85 Pac. 989, and *State ex rel.*

Mohr v. Superior Court, 54 Wash. 225, 103 Pac. 17. In the *Young Case*, after citing section 6500, subd. 3, Bal. Code, we said: "There is no finding of insolvency in this case, and it is conceded that no appeal would lie." *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112; *Anderson v. McGregor*, 36 Wash. 124, 78 Pac. 776. Why did the Legislature deny an appeal, except in cases of insolvency? It seems to us the reason is obvious. It was not because the Legislature had already provided another method for the review of such orders, nor because it contemplated a different method of review in the future, but because it deemed an appeal from the final judgment, or an action at law for damages, an adequate remedy in such cases. In other words, it is plain to us that the Legislature intended that such orders should not be subject to review in this court in any form, except on appeal from the final judgment. The power of this court to review interlocutory orders and the method of review are purely statutory, and when it is apparent that the Legislature intended that a particular order should not be subject to review here, we are entirely without jurisdiction in the premises."

The writ is denied.

MOUNT, ELLIS, GOSE, and PARKER, JJ., concur.

(69 Wash. 434)

ILSE v. AETNA INDEMNITY CO.

(Supreme Court of Washington. Aug. 16, 1912.)

1. LIMITATION OF ACTIONS (§ 14*)—CONTRACTS AS TO PERIOD—INDEMNITY BOND.

Parties to an indemnifying bond may fix a period of limitation for actions brought thereon different from that provided by statute; and such limitation will be valid, if reasonable, and there appears no reasonable excuse for the delay in commencing suit.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 59-61; Dec. Dig. § 14.*]

2. PRINCIPAL AND SURETY (§ 149*) — NEW SUIT AFTER DISMISSAL.

A bond securing the performance of a subcontract provided that suit must be brought, if at all, within six months after completion of the work specified in the contract. The subcontractor having defaulted, the contractor obtained a certificate of the excess cost of completing the work from the architect and brought suit thereon within the time, but was cast in such suit, because it was proven that the architect's certificate had been obtained by fraud, after which plaintiff instituted a new suit on a quantum meruit more than three years after the completion of the work, and more than six months after the filing of the remittitur on appeal in the former case. Held, that the second suit was barred.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 414; Dec. Dig. § 149.*]

3. LIMITATION OF ACTIONS (§ 88*)—FOREIGN CORPORATIONS—LIMITATIONS.

The rule that a foreign corporation cannot avail itself of the statute of limitations, be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cause, under Rem. & Bal. Code, § 168, it is at all times out of the state, being competent to dwell only in the place of its creation, does not apply to a contract limitation in a foreign indemnity company's bond, providing that any suit thereon must be commenced within six months after the completion of the work specified in the contract secured.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 463; Dec. Dig. § 88.*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by August Ilse against the Aetna Indemnity Company. Judgment for defendant, and plaintiff appeals. Affirmed.

F. W. Girard and Robertson & Miller, for appellant. Peters & Powell, of Seattle, and W. E. Cullen, of Spokane, for respondent.

GOSE, J. This is a suit upon an indemnity bond. A demurrer to the complaint was sustained, and, upon the plaintiff's statement that he would stand upon his complaint, a judgment of dismissal was entered. The plaintiff has appealed.

The bond, which is made a part of the complaint, provides: "If any suits at law or proceedings in equity are brought against said surety to recover any claim hereunder, the same must be instituted within six months after the completion of the work specified in said contract." The complaint alleges that the appellant had a contract for the erection of a courthouse and jail in Shoshone county, the state of Idaho; that, on the 21st day of July, 1906, the International Fireproof Construction Company, a copartnership, undertook and agreed with him to do certain work thereon; that on the 31st day of July following the copartners, as principals, and the respondent, as a surety, executed the bond in suit, conditioned for the faithful performance of their contract; that they failed to perform their contract, and wholly abandoned it about the 1st day of April, 1906; that the appellant was compelled to and did complete the work required by their contract at an expense to him of \$15,000 in excess of the price for which they had contracted to do the work; that, on the 15th day of February, 1907, the appellant commenced an action in the superior court of Spokane county, based upon the architect's certificate, to recover the amount expended by him; that the action was dismissed without prejudice, and that, upon appeal to this court, the judgment was affirmed on the 4th day of November, 1900, the remittitur being filed in the court below on the 4th day of January, 1910; that the action was dismissed, on the ground that the appellant had mistaken his remedy in suing upon the certificate of the architect, instead of upon a quantum meruit; and "that plaintiff pursued his said remedy upon advice of counsel, and any delay in institut-

ing this action was occasioned by the facts hereinbefore set forth and an endeavor to determine his remedy, and the said delay, if any, has not injured or placed the defendant at a disadvantage in the defense of said action, or at all."

The original complaint in this case was verified July 19, 1910, and service was made on August 15th following. The suit is upon a quantum meruit. The bond runs directly to appellant, and recites that the respondent is "a corporation existing under and by virtue of the laws of the state of Connecticut." A reference to the dates given discloses that this suit was commenced more than three years after "the completion of the work specified in said contract," quoting from the stipulation in the bond, and more than six months after the filing of the remittitur from this court in the court below. We think the demurrer was properly sustained. *Sheard v. U. S. Fidelity & Guaranty Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 278.

[1] In that case, in speaking of the legal effect of a clause in a bond fixing the time for the commencement of suits thereon, we said: "The authorities generally agree that it is competent for the parties to an indemnity bond to fix a period of limitation different from that provided by statute; and we think the better rule is that the limitation, if reasonable, and there is no reasonable excuse for delay in the commencement of the action, is binding upon the parties. * * * To determine whether the limitation upon the commencement of the action is reasonable, the bond, the contract, and the facts of the particular case must be considered together."

[2] A reference to the case of *Ilse v. Aetna Indemnity Co.*, 55 Wash. 487, 104 Pac. 787, the case referred to in the complaint, discloses that the appellant failed because the court found that he procured the architect's certificate, upon which he waged his suit, by fraudulent means. It seems quite plain that the wrongful acts of the appellant, which vitiated the architect's certificate and defeated him in the first case, cannot be held a "reasonable excuse for delay" in the commencement of this action. The averment in the complaint, that the appellant "pursued his said remedy" in the first case upon the advice of counsel, means no more than that counsel assumed the integrity of the certificate.

[3] The appellant has cited a line of authorities which hold that a foreign corporation cannot avail itself of the statute of limitations, even where it had continuously transacted business within the state for the statutory period before the commencement of the action, and had property and officers therein. These decisions are based upon statutes similar to Rem. & Bal. Code, § 168, and they hold that a foreign corporation is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indemas;

at all times "out of the state." They are rested on the principle that a corporation has no legal existence out of the boundaries of the sovereignty where it was created, and "that it must dwell in the place of its creation, and cannot migrate to another sovereignty." Upon the authority of these cases, the appellant contends that the action was timely commenced. The cases are not in point. It must be remembered that our statute (Rem. & Bal. Code, § 168) is an exception to the general statute of limitations. Without this exception, the statute would run in favor of a foreign corporation to the same extent as a domestic corporation or a private individual.

"We need not consider the meaning of the statute as applied to a foreign corporation, as we are here dealing with a contract limitation where the respondent's sovereignty is disclosed, and no exceptions are named in the bond.

The judgment is affirmed.

ELLIS, PARKER, CROW, and CHADWICK, JJ., concur.

MILLER v. COMMERCIAL UNION ASSUR. CO., Limited.

(Supreme Court of Washington. Aug. 16, 1912.)

1. INSURANCE (§ 640*) — POLICY — REPUDIATION — ACTION FOR PREMIUM.

Where, in an action on an automobile policy, defendant claimed that plaintiff had never paid the premium, and sought by a cross-complaint to recover the same, and also denied that the policy was in force, such claims, though inconsistent, should be considered only to mean that defendant claimed the right to have the unpaid premium deducted from any judgment in plaintiff's favor, should the court sustain the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1600-1612, 1614-1624; Dec. Dig. § 640.*]

2. INSURANCE (§§ 255, 265*) — MISREPRESENTATION — WARRANTY.

Ordinarily, a misrepresentation of the assured will not affect the validity of the policy unless it is material to the risk, or by the terms of the application and policy has become an affirmative warranty, since, where the parties expressly stipulate that a representation shall be regarded as material, it ceases to be a representation and becomes a warranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 548, 560; Dec. Dig. §§ 255, 265.*]

3. INSURANCE (§ 264*) — WARRANTIES — EFFECT.

Warranties in insurance are of two kinds; affirmative, relating to and warranting the present or past existence of particular facts on the exact truth of which the inception of the contract of insurance depends, and if untrue will avoid the policy; and promissory, executory in character, warranting that something shall be done or omitted after the policy takes effect and during its continuance, which will avoid the

contract if the thing to be done or omitted be not done or omitted as warranted.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 558, 559, 562-566; Dec. Dig. § 264.*]

4. INSURANCE (§ 281*) — AUTOMOBILE POLICY — WARRANTIES.

In an application on an automobile fire policy, plaintiff warranted that the machine was new when purchased by him, and that it had cost him \$4,300, both of which statements were false. Held, that such statements were not mere representations, but warranties, the falsity of which avoided the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 597-600; Dec. Dig. § 281.*]

Department 1. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by William Miller against the Commercial Union Assurance Company, Limited. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Post, Avery & Higgins, for appellant. Curtiss & Bemele, of Spokane, for respondent.

CROW, J. This action was commenced by William Miller against Commercial Union Assurance Company, Limited, a corporation, to recover upon a fire insurance policy issued on an automobile owned by the plaintiff. The trial judge made findings upon which judgment in plaintiff's favor was entered. The defendant has appealed.

The policy was issued on June 25, 1910, and the automobile was destroyed by fire on July 5, 1910. Respondent made a written application, material portions of which read as follows: "To Commercial Union Assurance Company, Limited. * * * Insurance is wanted by Wm. Miller for the term of one year from June 25, 1910, at noon, until June 25, 1911, at noon, for the sum of \$2,000 upon the body, machinery and equipment of the automobile hereinafter described, which description is hereby made a warranty by the applicant. * * * Particulars and description of automobile: * * * Original cost to applicant, including equipment, \$4,300. Present value of automobile \$2,600. * * * State whether automobile was new or secondhand when purchased by applicant. New. If secondhand, state when purchased and give name and address of party from whom purchased. * * * State whether the automobile is fully paid for. Yes. State whether it is mortgaged or incumbered. No. * * * Dated at Spokane, Wash., 6/25, 1910. Wm. Miller, Applicant." Indorsed on the application, under the heading "Conditions of Policy," was the following stipulation, which was also contained in the policy: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sured in the automobile be not truly stated herein; or, in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss." The policy recited that: "Commercial Union Assurance Company, Limited, of London, England. In consideration of fifty and no/100 dollars, to it agreed to be paid by the insured hereinafter named, and of the statements made in the application for this insurance, which is hereby made a warranty and a part of this policy, does insure Wm. Miller, for the term of one year from the twenty-fifth day of June, 1910, at noon, to the twenty-fifth day of June, 1911, at noon, against loss or damage to the automobile hereinafter described, its body, machinery and equipment, while attached to and forming a part of said automobile. To an amount not exceeding two thousand and no/100 dollars. * * *

Respondent pleaded the issuance of the policy, payment of the premium, the destruction of the automobile by fire, respondent's compliance with all terms and conditions of the policy, and appellant's refusal to pay. In its answer appellant alleged that the statements of the application became and were a part of the policy; that they were untrue, in that the automobile was not new when purchased by respondent; that he was not its owner when the application was made; and that it was not free from incumbrance, all of which was unknown to appellant but was known to respondent. For a counterclaim and cross-complaint the appellant pleaded the issuance of the policy; that the premium had not been paid, and asked judgment therefor. In his reply respondent admitted that he made the written application, that its statements became and were a part of the policy, and that the automobile was not new when purchased by him; but alleged that appellant inspected the machine and knew its condition; that respondent's statements were not material to the risk; that appellant was not deceived; and that, although respondent at the time of making the application owed his vendor \$150 on purchase price, the machine had then been delivered to respondent, and no lien existed thereon. Replying to the cross-complaint, respondent admitted that he was indebted to appellant for the premium, and alleged that, at the time of the preparation of the complaint which was verified by one of his attorneys, he was not within the state of Washington, and that his attorneys by mistake alleged the premium had been paid. After the issues were completed, appellant moved for judgment on the pleadings for the premium and costs. Respondent filed an offer to confess the motion, provided the premium should be applied in reduction of his claim. Thereupon appellant moved the court for an order permitting it to amend its mo-

tion for judgment to read as follows: "Come now the defendant in the above entitled cause and moves the court for an order for a judgment on the pleadings that plaintiff take nothing herein and that defendant have judgment for its costs." Upon hearing, all of the motions were denied by Hon. E. H. Sullivan, one of the judges of the superior court. Thereafter the action was called for trial, without a jury, before Hon. J. D. Hinkle, another judge of the same court. Before any other proceedings were had, appellant's attorney made the following statement and request: "There is a thing in this case that your honor probably is not in a position to appreciate at this time. In all these pleadings you will observe that Mr. Curtis [counsel for respondent] consents that we take judgment for \$40 in this case, and we made a motion for judgment on the pleadings. That was before Judge Sullivan. During that argument we made a subsequent motion asking that the case be dismissed, although asking for the \$40. That is a matter of record here. Judge Sullivan, on account of the arguments that were made, probably took the view, or expressed himself at the time when that second motion was called to his attention, that that amended the counterclaim to be in the alternative. Now, if there is any doubt in your honor's mind about that—I have been acting on Judge Sullivan's opinion—if your honor has any doubt about that, I will make a motion dismissing that counterclaim. * * * In our cross-complaint we ask for \$40 due on the policy. We want the case dismissed, or else we want the \$40. In other words, we cannot claim there is \$40 due us, and at the same time say the policy is void." Upon objection of respondent's counsel, this request to dismiss the counterclaim was denied, and the trial proceeded upon the pleadings as drawn. The trial judge found the amount of respondent's loss, deducted the premium therefrom, and entered judgment for the remainder.

[1] Appellant contends that the policy was void by reason of the untruthful statements of respondent's application, that the statements were warranties which became a part of the policy, and that the trial court erred in not dismissing the action. Respondent insists that the representations or warranties were immaterial, that the appellant cannot by its answer declare the policy void for the purpose of defeating a recovery, and at the same time declare it valid for the purpose of collecting the premium, and that appellant has estopped itself from attacking the validity of the policy by seeking a recovery of the premium. It is apparent that the allegation of the complaint that the premium had been paid, when in fact, as respondent admits, it had not been paid, induced appellant to plead its nonpayment. It is further manifest, from the entire record, including

appellant's attempted correction of its motion and its offer to dismiss the cross-complaint, that appellant only desired to have the unpaid premium deducted from any judgment in respondent's favor, should the court sustain the policy. If appellant had collected the premium, and without tendering or returning it to respondent had attempted to avoid the policy, a different question would be presented. Respondent has in no manner been misled, as he has not paid the premium. While appellant's pleadings may be somewhat inconsistent, it is nevertheless apparent that it is not declaring the policy void for the purpose of preventing respondent's recovery, while asserting its validity for the purpose of collecting the premium. The trial court should have granted the motion to dismiss the cross-complaint. Appellant, without collecting the premium, denied its liability at all times prior to the commencement of this action. If the policy was void when the action was commenced, no contract then existed, and we cannot now hold that a new contract created by estoppel has since come into existence. Authorities cited by respondent in support of his contention are cases in which premiums had been collected from the assured, and in which the insurer questioned the validity of the policies while retaining the premiums and without refunding the same. No such facts appear in this action.

[2] The controlling question on this appeal is whether the policy was void by reason of untruthful statements contained in respondent's application. It is undisputed that his statements that the auto was new when purchased by him, that it was not a second-hand machine, and that it had cost him \$4,300, were all untrue. There was disputed evidence tending to show that other statements were untrue. Ordinarily a misrepresentation of the assured will not affect the validity of a policy unless it is material to the risk or, by the terms of the application and policy, has become an affirmative warranty. When the parties by the terms of their contract expressly stipulate that a representation shall be regarded as material, it ceases to be a representation only, and becomes a warranty. "Warranties differ from representations, then, in that falsity of a representation will defeat the contract only where it is material, as representations are merely inducements to the making of the contract, while in case of a warranty the statement is made material by the very language of the contract, so that a misrepresentation of a matter warranted is a breach of the contract itself. Therefore the falsity of a statement which is made a warranty will avoid the contract without regard to whether it can be considered as material in any way to the risk or the loss." 19 Cyc. 683, and cases cited. When a policy is issued on the faith of representations of the

assured as to existing facts, such representations become warranties, with the result that, if they be not strictly true as made, the policy without regard to their materiality will not take effect. The parties, having agreed upon the materiality of the statements warranted, are thereafter precluded from questioning their materiality. In *Holland v. Western Union Life Ins. Co.*, 58 Wash. 100, 108, 107 Pac. 868, 887, this court said: "The rule is that, when a representation made by an applicant for insurance is carried into a contract and expressly made a part of it, it becomes a warranty, and its materiality is settled by the agreement of the parties. *Elliott, Insurance*, § 102; *White v. Provident Sav. Life Assur. Soc.*, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427 [43 C. C. A. 270]. The difference in legal effect between a warranty and a representation is that the falsity in a warranty in any particular is fatal to a recovery upon the policy, whilst a representation to have that effect must refer to some fact material to the insurance, and it must be false or fraudulent. *Welge v. Cascade Fire & Marine Ins. Co.*, 12 Wash. 449, 41 Pac. 54; *Elliott, Insurance*, § 114."

In *Poultry Producers' Union v. Williams*, 58 Wash. 64, 66, 107 Pac. 1040, 1041 (137 Am. St. Rep. 1041), we said: "A warranty must be strictly true. *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427 [43 C. C. A. 270]. A representation need only be substantially true. *Missouri, K. & T. Trust Co. v. German Nat. Bank*, 77 Fed. 117 [23 C. C. A. 65]. The crucial distinction between a representation and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate." *Rice v. Fidelity & Deposit Co.*, *supra*."

Respondent contended, and the trial court held, that the representations contained in the application, which became warranties by agreement of the parties, were not material to the risk; that they in no way contributed to or caused the loss; and that they should not avoid the policy. The difficulty with this conclusion is that it ignores the fact that the parties have contracted and agreed that the representations *shall be material*, and that if untrue they *shall avoid the policy*. "One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is: Has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed." 1 May on Insurance (4th Ed.) § 163, p. 310.

[3] Warranties are of two kinds, affirmative and promissory. The former relate to and warrant the present or past existence of particular facts, upon the exact truth of which the inception of the contract of insurance depends, and if untrue will avoid the policy. The latter, which are of an executory character, warrant that something shall be done or omitted after the policy takes effect and during its continuance, and will avoid the contract if the thing to be done or omitted be not done or omitted as warranted. 1 May on Insurance (4th Ed.) § 157; 19 Cyc. 708. *Algass Co. v. Corporation Royal Exchange, etc.*, 122 Pac. 986.

[4] If the warranties now under consideration were of a promissory character, such as the warranty before this court in *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 58 Wash. 681, 108 Pac. 194, 28 L. R. A. (N. S.) 598, a case cited by respondent, a different question would be presented; but they are affirmative and not of a character to which the rule announced in the *Port Blakely Mill Co.* Case may be applied. The evidence shows that the representations or affirmative warranties were untrue, and that respondent knew they were untrue. The policy did not take effect, and cannot be enforced.

Respondent contends: (1) That the application was prepared by appellant's authorized agent; and (2) that appellant inspected the auto before issuing the policy. Without quoting the evidence, we state our contention that it fails to sustain either of these contentions.

The judgment is reversed, and the cause remanded, with instructions to dismiss.

CHADWICK, GOSE, and PARKER, JJ., concur.

(60 Wash. 474)

BROWN v. CITY OF BREMERTON.

(Supreme Court of Washington. Aug. 15, 1912.)

1. DEEDS (§ 100*)—EVIDENCE (§ 452*)—PAROL EVIDENCE—TECHNICAL TERMS—LATENT AMBIGUITIES.

Parol evidence is admissible to show the circumstances under which a deed was made, to define technical terms, and to explain latent ambiguities.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100;* Evidence, Cent. Dig. §§ 2093-2101; Dec. Dig. § 452.*]

2. EVIDENCE (§ 457*)—QUIETING TITLE (§ 10*)—RIGHT OF COMPLAINANT.

In a suit to quiet title, complainant must prevail, if at all, on the strength of her own title, and cannot recover on the weakness of her adversary's.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457;* Quieting Title, Cent. Dig. §§ 86-82; Dec. Dig. § 10.*]

3. DEEDS (§ 146*)—RESERVATION IN DEED—EFFECT—SHORE LINE.

A deed conveyed a tract of land to complainant by metes and bounds, "reserving and excepting a strip 30 feet wide off and along the northeast corner of the tract for a distance of 148.3 feet; such reserve strip along the shore line of the tract being for the purpose of a public road and outlet to the grantee over the same." There was a call in the deed "to the harbor limit," and another call "parallel to said harbor line." The inner shore line, or line of ordinary high tide, is not coincident with the government's meander line, and at ordinary high tide the water is from 8 to 8 feet in depth at the latter line. The inner shore line is approximately 100 feet from the meander line; and the outer shore line or line of ordinary low tide is from 200 to 300 feet distant from the latter line. Held that, since plaintiff's grantor had title to only one shore line, to wit, the inner, and the reservation having been made as a public road, the property reserved should not be construed as following the meander line, but rather the inner shore line.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 453, 454, 460-462; Dec. Dig. § 140.*]

Department 1. Appeal from Superior Court, Kitsap County; Lester Still, Judge.

Action by Mary M. Brown against the City of Bremerton to quiet title. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

F. W. Moore, of Bremerton, for appellant.
J. W. Bryan, of Bremerton, for respondent.

GOSE, J. This is an action to quiet title. There was a decree for the plaintiff. The city has appealed.

In August, 1900, Warren Smith and his wife conveyed to the respondent a tract of land by metes and bounds, containing 8.60 acres. The deed contained the following reservation clause: "Reserving and excepting a strip of land thirty (30) feet in width off of and along the northeast corner of said above-described tract of land for a distance of one hundred and forty-eight and three-tenths (148.3) feet; said reserved strip of land along the shore line of the above-described tract of land being for the purpose of a public road and outlet to grantee over same." There is a call in the deed "to the harbor limit," and another call "parallel to said harbor line." The inner shore line, or line of ordinary high tide, is not coincident with the government meander line. At ordinary high tide the water is from 6 to 8 feet in depth at the latter line. The inner shore line is approximately 100 feet from the meander line; and the outer shore line, or line of ordinary low tide, is from 200 to 300 feet distant from the latter line. The tract of land in controversy follows approximately the inner shore line. The court found that the reserved strip of land followed the meander line. The appellant contends that it follows the inner shore line. Measured upon the meander line, the distance call in the deed—148.3 feet—is correct. The inner shore line is approximately 39 feet longer.

- It is manifest from the facts stated that the respondent's grantors only had title to one shore line, viz., the inner one. The meander line lies between the two shore lines. If the respondent's grantors intended to use the words "harbor limit" and "harbor line" as the equivalent of meander line, it seems certain that they used the words "along the shore line" advisedly, and as meaning the inner shore line. If they intended to carry the description beyond the meander line, the same conclusion must follow. The reservation was made, as it recites, for the purpose of a public road. It is manifest that the grantors were not reserving a road upon the meander line, where the water has a depth of from 4 to 8 feet at ordinary high tide. It was their intention to reserve a usable roadway. Moreover, the evidence shows that the strip of land in question had been used for several years prior to the execution of the respondent's deed as a roadway, that it connected with a public resort, which the respondent's grantors were then carrying on; that they continued to use it until the decease of Warren Smith, which occurred in 1907 or 1908; that they expended money in keeping it in repair, and claimed it as a roadway. Evidence was offered by the respondent to the effect that Warren Smith, in his lifetime, offered the roadway to the city, if it would agree to maintain a bridge which spans a depression therein. The record shows conclusively that Smith, up to the time of his death, treated the tract in question as conforming to the reservation; and we think it is equally clear that the respondent, up to that time, entertained the same view. In May, 1909, the respondent leased a part of her land along the meander line for the term of three years, with an option of purchase to the lessee. This action was commenced in June, 1909. A short time before the commencement of the action, the respondent caused an obstruction to be placed across the road, which was immediately removed by the appellant. Aside from this obstruction, the roadway had been open and traveled by the public continuously for more than 10 years when the action was commenced. In February, 1906, Smith and wife conveyed to a third party a tract of land adjoining the respondent's land and bordering upon the meander line, reserving a strip of land 30 feet in width along the government meander line to be used for a public highway. The respondent argues that this deed is corroborative of her contention that the strip reserved in her deed also followed that line. The fact that the later reservation is along the meander line does not tend to show that the words "along the shore line" in the earlier reservation mean along the meander line.

[1] It is familiar law that parol testimony is admissible to show the circumstances un-

der which a deed was made, to define technical terms, or to explain latent ambiguities. 4 Am. & Eng. Ency. Law, p. 795; Sangfield v. Hall, 21 Wash. 371, 58 Pac. 250.

"The court must place itself as nearly as possible in the situation of the contracting parties at the time the deed was made, in order to ascertain their intent. The grant is to be construed with reference to the actual, rightful state of the property at the time of the execution, and the law assumes that the parties refer to this for a definition of the terms made use of in their deed; and that they are at least liable to make a mistake." 4 Am. & Eng. Ency. Law (2d Ed.) pp. 795, 796, subd. 3.

[2] The respondent must prevail; if she prevail at all, upon the strength of her own title. She cannot recover upon the weakness of her adversary's title. Hughes v. South Bay School Dist., 32 Wash. 675, 73 Pac. 778, 74 Pac. 333; George v. Columbia, etc., R. Co., 38 Wash. 480, 80 Pac. 767; Helm v. Johnson, 40 Wash. 420, 82 Pac. 402.

[3] To summarize, the respondent's grantors owned but one shore line. The reservation was made for a roadway, and the conduct of the parties to the instrument, together with the physical facts stated, makes it certain that the property in question is the property which the grantors intended to reserve, and which the grantee understood was reserved.

The appellant contends that the strip of land in controversy is a public street, both by dedication and by prescription. The view we take of the case eliminates this issue. That question can only be determined in a suit between the proper parties. The respondent is without title, and her suit must fail.

The judgment is reversed, with directions to dismiss the action.

PARKER, CROW, and CHADWICK, JJ., concur.

FALLS CITY MACHINERY & SUPPLY CO. v. GOODSTEIN et al.

(Supreme Court of Washington. Aug. 20, 1912.)

APPEAL AND ERROR (§ 1010*)—FINDINGS OF TRIAL JUDGE—REVIEW.

Findings of fact by the trial judge will not be reversed on appeal, if there is any testimony to sustain them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3979-3982; Dec. Dig. § 1010.]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by the Falls City Machinery & Supply Company against David Goodstein and others. Judgment for plaintiff, and defendants appeal. Affirmed.

L. L. Westfall, for appellants. Campbell & Goodwin and J. B. Campbell, all of Spokane, for respondent.

PER CURIAM. The only question involved is one of fact. Action was brought by plaintiff to recover the reasonable value of certain work done by it at the special instance and request of the defendants. The defense was that the parties had made an express contract, and that the demand was in excess of the contract price. The amount admitted to be due, less the amount of a counterclaim, was tendered. From findings and a judgment in favor of plaintiff, appeal is taken.

We are asked, because of certain testimony which is set out in the brief, to ignore the rule of practice, so often announced, that we will not disturb the findings of the trial judge, if there be any testimony to sustain it. But, taking the testimony relied on at its full worth, a careful reading of the record convinces us that there is still such conflict as to call for the application of the rule. It may be true that the minds of the parties never met. Certain it is that, whatever the decision of the lower court might have been, or that of this court may be, the losing party will still be unconvinced; for we are impressed with the good faith of all parties to this piece of litigation. It is just this result that makes the rule suggested almost imperative; and the court below having found for the respondent, and there being some evidence to sustain the judgment, we do, upon the principle announced, affirm the judgment of the lower court.

PRIDE v. CONTINENTAL CASUALTY CO.

(Supreme Court of Washington. July 30, 1912.)

1. INSURANCE (§ 360*)—PAYMENT OF PREMIUM—DEFAULT.

Where one insured under an industrial or accident policy, after giving the insurer an order upon his master to deduct the amount of the premium from his wages, drew the full amount of his wages before any deduction had been made, and then left the service of his master, the default bars any recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 913, 916-924; Dec. Dig. § 360.*]

2. INSURANCE (§ 654½*)—POLICY—CONSTRUCTION—EXTRINSIC MATTERS—"INDUSTRIAL INSURANCE."

An insurance policy which, by its terms, expired one year after issuance, unless renewed, and provided for the payment of weekly indemnity in cases of accident or injury arising from violent or external means, and a stipulated payment in case of death from those causes, is an industrial or accident policy, instead of a life policy; and so, in an action on such policy, the inhibitions of Rem. & Bal. Code, §§ 6155, 6159, respectively, providing that no policy of life or endowment insurance, except policies of "industrial insurance," shall be issued, unless it provides that the policy and application shall constitute the entire con-

tract, and that every policy, except industrial or those calling for premiums monthly or oftener, shall have attached thereto a correct copy of the application, and, unless so attached, it shall not be considered a part of the policy or be received in evidence, do not apply so as to exclude evidence of insured's assignment of his wages for the payment of monthly premiums, though such assignment was not made part of the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1674, 1686; Dec. Dig. § 654½.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Sue I. Pride against the Continental Casualty Company. From a judgment for defendant, plaintiff appeals. Affirmed.

O. C. Moore and John I. Melville, for appellant. Roche & Onstine, of Spokane, and Manton Maverick and M. P. Cornelius, both of Chicago, Ill., for respondent.

MORRIS, J. In this action appellant seeks to recover, as beneficiary in a policy of insurance issued to her son, Elmo Pride, covering death through "external violent and purely accidental means." The case was tried by the court, without a jury, and findings and judgment having been entered in favor of respondent, this appeal follows.

Elmo Pride was, on March 4, 1910, the day the policy was issued, an employé of the Spokane, Portland & Seattle Railway Company, as a roundhouseman, at Vancouver. The amount of the policy was \$1,000, and the annual premium \$20.40, which was to be paid in four monthly installments of \$5.10 each. To provide for the payment of this premium when due, Elmo Pride, on March 4, 1910, gave the respondent an order on the paymaster of the railway company, authorizing and requesting the railway company to pay these installments of premium to respondent, as they became due, and deduct them from his wages in the months of March, April, May, and June. This order gave the character and place of his service with the railway, as did the application, and provided that, in case of any change in his employment, either as to class of service or location, prompt notice should be given. It was also provided in the policy that the application and paymaster's order should be a part thereof; and that no recovery could be had upon the policy in case of loss incurred subsequent to a default in the payment of any installment of premium and prior to any reinstatement, which was also therein provided for. This paymaster's order was received by respondent on March 9th, and on March 11th the same was forwarded to the paymaster of the railway company for the collection of the first premium installment, which, under its terms, was payable from the March wages of Elmo Pride. In order to facilitate the collection of the installments of premium as they became due and payable under the policy and

paymaster's order, the respondent forwarded to the railway company what is called "Paymaster's Return List," giving the names of employes carrying policies, including that of Elmo Pride, with his occupation, location, head of his department, and the amount of the first installment of premium, payable from his wages for the month of March. This was received by the railway company on March 22d, and in the following month was returned to respondent, notifying it that no deduction could be made from the March wages of Elmo Pride, for the reason that Elmo Pride had quit the service of the railway company, and had drawn all the wages due him. Respondent during the month of April, in the exercise of the option given it in the policy, mailed a like return list to the railway company, and in due time was notified that no payments could be made, because Elmo Pride was no longer in its service. Respondent thereupon marked the policy as lapsed. No further effort was made to collect the premium.

The facts as to the employment of Elmo Pride with the railway company seem to be about these: He was employed as a round-house laborer for 20 days in March, for which service he was, on March 22d, paid the whole amount then due him, and on the same day he quit the service of the railway company. Subsequently he worked 2 $\frac{1}{11}$ days in March in the same capacity, when he again quit the service, receiving his pay in full on April 1st. He worked 3 days in April in the same capacity, quitting April 19th, and being paid in full. On May 1st he again entered the service of the railway company as a bridge builder, and continued to so work until his death on June 7th from cause within the terms of the policy, if it was then in force. No notification was given of these various changes in employment, as provided in the policy.

[1] Upon these facts the court below found in favor of respondent, and, in our judgment, its ruling should be sustained. There could be no question in the mind of Elmo Pride as to the failure to pay his installments of premium. He knew they were to be paid out of his wages. He knew the amount to be paid and when, and with such knowledge he, in each instance, quits the railway company's service before it could deduct the premium from his wages, and draws all that was then due him. He knew the premium installments were not paid out of wages earned by him in March, April, or May, and that it was impossible for the agent he had empowered to make such payments on his behalf to do so, for the reason that he had demanded and received all sums earned by him. His default was deliberate and intentional, with full knowledge of all the circumstances, and his beneficiary must abide its consequences.

[2] The chief assignment of error upon which appellant contends for a reversal is error of the court below in receiving the ap-

plication and paymaster's order as evidence, and in admitting evidence of officers of the railway company and of respondent respecting the nonpayment of premiums. This objection is based upon sections 6155 and 6159, Rem. & Bal. Code. The first of these sections provides that: "No policy of life or endowment insurance shall be issued or delivered in this state until * * * nor shall such policy, except policies of industrial insurance where the premiums are payable monthly or oftener, be so issued or delivered after January 1, 1910, unless it contains in substance the following provisions: * * * 3. A provision that the policy and the application therefor shall constitute the entire contract between the parties, and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, unless a copy of such statement is contained in or attached to the policy and that no such statement shall be used in defense to a claim under the policy unless it is contained in a written application; and a copy of such application shall be indorsed upon or attached to the policy when issued." Section 6159 contains the following provision: "Every policy, except industrial or those calling for premiums monthly or oftener, shall have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence."

These sections are said to be decisive of the error contended, because neither the application nor the paymaster's order was attached to the policy. These sections in no way affect the right of recovery upon the policy in suit. This policy is neither a life nor endowment policy, within the meaning of the law, but falls within the exception as an industrial or accident insurance policy. By its terms it expires one year after issuance, unless renewed; and, while it covers loss of life from "external, violent and purely accidental means," and is therefore in one sense an insurance on life, in which the payment of the insurance money is contingent upon loss of life, it is nevertheless evident that it is not such a life insurance policy as was contemplated by the Legislature in the enactment of these two sections. It contains provisions for the payment of a weekly indemnity in case of accident or injury arising from numerous violent or external means. It refers to the industry and special class of employment the assured was engaged in at the time. It makes provision for his inability, because of injuries from purely accidental means, to engage in any labor or occupation. It is, in every sense of the term, a policy of industrial insurance, as contemplated by the Legislature in excluding such policies from the provisions of the law. If this is not industrial insurance, we fail to appreciate what character of insurance should be so designated. If the Legislature had in mind any distinction between life insurance

and industrial insurance, as these terms are used in ordinary understanding, and it is evident from making the latter class of insurance an exception to the rules governing the former class that such was the intention, then it must be evident that this policy falls within the exception, or it would be impossible to indicate to a person of ordinary understanding what was meant by the expression "industrial insurance," as distinguished from straight life or endowment insurance. These views, as applied to a like distinction in similar statutes, are supported by *National Life & Acc. Ins. Co. v. Lokey*, 106 Ala. 174, 52 South. 45; *Standard Life & Acc. Ins. Co. v. Carroll*, 88 Fed. 507, 30 C. C. A. 253, 41 L. R. A. 194; *National Acc. Soc. v. Dolph*, 94 Fed. 743, 38 C. C. A. 1; *Fidelity & Casualty Co. v. Dorough*, 107 Fed. 389, 46 C. C. A. 364; *Mutual Reserve Life Ins. Co. v. Dobler*, 137 Fed. 550, 70 C. C. A. 184.

This policy is further within the exception, in that it provided for monthly payments of premium. The paymaster's order, neither within the contemplation of the law nor of the parties, could have been attached to the policy, as it must be surrendered to and retained by the railway company as its authority and justification for retaining the monthly payments from the wages of Elmo Pride and forwarding them to respondent for the benefit of the assured. It was therefore competent, under any interpretation of the law, for the officials of the railway company to testify to the receipt of this order and the reasons why it was not complied with.

We therefore concur in the findings of the lower court; and its judgment is sustained.

MOUNT, ELLIS, PARKER, and FULLERTON, JJ., concur.

In re GREENLEAF'S ESTATE.

DRUMMOND et al. v. EVANS.

(Supreme Court of Washington: Aug. 16, 1912.)

WILLS (§ 259*)—NUNCUPATIVE WILLS—TIME FOR PROOF.

Under Acts 1854, p. 316, § 25 (Rem. & Bal. Code, § 1331), which prohibits proof of a nuncupative will, unless it be offered within six months after the testamentary words were spoken, testimony is inadmissible to establish such a will, unless offered to a court of probate within that time; petitioner not being entitled to excuse delay in such proof on the ground of pleas interposed, since immediate proof might have been made under Rem. & Bal. Code, §§ 1297, 1302.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 598-599½; Dec. Dig. § 259.*]

Department 1. Appeal from Superior Court, Okanogan County; E. K. Pendergast, Judge.

In the matter of the estate of Gardner Greenleaf, deceased. Petition by Stanley R. Evans to probate a nuncupative will.

From an order admitting the will to probate, Grace G. Drummond and others appeal. Reversed, with directions.

Smith & Gresham, for appellants. A. W. Barry, of Riverside, and Neal & Neal, of Condonally, for respondent.

GOSE, J. Gardner Greenleaf died in Okanogan county, in this state, on July 31, 1910. On August 31st following, one Stanley R. Evans filed his petition in the superior court of Okanogan county, wherein he alleged that the deceased, on the day preceding his death, made a nuncupative will in favor of the petitioner, and prayed that the will be admitted to probate; that he be appointed executor thereof; and that citation issue to the next of kin of the deceased that they might contest the will if they thought proper. The will was reduced to writing on the 29th day of August, 1910, and was made a part of the petition. On the 8th day of September, an order was entered, directing that citation issue to the parties named in the order, the next of kin of the deceased, and on the same day the clerk of the court issued the citation. On the 20th day of September, an order was entered, reciting that the return of the sheriff showed that none of the parties could be found in Okanogan county, and that the affidavit of counsel for the petitioner showed that each of the parties was a nonresident of the state, and directing that citation be served by publication. On the 28th day of November, the next of kin appeared specially and moved to quash the citation. On the same day the petitioner moved for an order directing the clerk of the court to amend the citation by affixing the seal of the court thereto. On the 3d day of January, the latter motion was granted, and on the day following an order was entered, directing that citation issue to the next of kin, requiring them to appear before the court on the 30th day of January, 1911, at the hour of 10 o'clock a. m., and fixing that time for hearing the petition, proof, and contest of the will. On the date of the last order, the clerk issued the citation as directed. On the return day of the order, the petitioner not appearing, on the motion of counsel for the next of kin, an order was entered by the court commissioner, dismissing the petition and denying the probate of the will. On the 4th day of April, upon the motion of the petitioner, the last-named order was vacated, presumably upon the ground that a demurrer to the petition was pending when the order was made. On the same day an order was entered, overruling the demurrer and setting the hearing on the petition for the 10th day of May. The hearing was had upon that day, and more than nine months after the will was spoken. The demurrer is not in the record, and we are therefore

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indices

not advised as to the grounds upon which it was based.

After the first witness for the petitioner was sworn, and before the introduction of evidence, counsel for the next of kin objected to the admission of any evidence in support of the proffered will, on the ground that no proof of its pronouncement had been offered within six months after the testamentary words were spoken. The court received the evidence and, at the conclusion of the hearing, entered an order admitting the will to probate. The mother and sister, the only heirs of the deceased, have appealed, and contend that, under the statute, the evidence of the speaking of the will must be offered within six months after speaking the testamentary words. The respondent contends that the filing of the petition for the probate of the will within the six months is the offering of proof, within the meaning of the statute.

The law of this state pertaining to the execution and proof of both written and nuncupative wills was enacted in 1854. Laws 1854, p. 313 et seq. This statute, page 315, § 23 (Rem. & Bal. Code, § 1330), provides the method of making and proving a nuncupative will. Section 25 of the same statute (Rem. & Bal. Code, § 1331) provides the time within which proof shall be received of the pronouncement of such a will. This section is as follows: "No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, be first committed to writing, and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper." The intention of the Legislature could not be more clearly expressed. It means that the testimony in support of the will shall not be received, unless it be offered to a court of probate within six months after the testamentary words have been spoken. It will be observed that the word "petition" is not used. It seems too clear to require elucidation that the word "proof" was used as the legal equivalent of testimony or evidence. A reference to other sections of the act conducts the mind indubitably to this view. Section 17 (Rem. & Bal. Code, § 1297) provides that, when "any will" is exhibited to be proven, the court may immediately receive "the proof." Section 20 (Rem. & Bal. Code, § 1300) provides that in certain contingencies "proof" shall be taken of the handwriting of the testator, and of the witnesses dead, insane, or whose residence is unknown. Section 21 (Rem. & Bal. Code, § 1301) provides that, when all the subscribing witnesses are dead, insane, or the residence unknown, the court shall "take and receive proof" of the handwriting of the testator and subscribing witnesses. Section 22 (Rem. & Bal. Code, §

1892) provides that all the "testimony" adduced in support of the will shall be reduced to writing, signed by the witnesses, and certified by the judge of probate. A reading of these several sections makes it as plain as written language can make it that the words "proof" and "testimony" are used interchangeably. The title of the act is "An act relating to wills," and the act embraces both written and nuncupative wills, and provides who may make them, how they shall be made, and how they may be proved and admitted to probate. This court had occasion to consider the question of the relation of the several sections of the statute to each other, and their application to nuncupative wills in *State ex rel. Stratton v. Tallman*, 25 Wash. 295, 95 Pac. 545, and it there held that Rem. & Bal. Code, § 1307, providing for the contest of a will within one year after its probate or rejection, applied to such a will. The fallacy of the respondent's contention is made more apparent by reading the petition with the evidence. The evidence shows that the petitioner was not present when the alleged will was spoken, and that his petition is based solely upon information gathered from other persons. Moreover, the rule obtains in this state, as elsewhere, that such wills must be strictly proved. In *re Miller's Estate*, 47 Wash. 258, 81 Pac. 967, 18 L. R. A. (N. S.) 1062, 125 Am. St. Rep. 904, 14 Ann. Cas. 1163.

We have thus far treated the question as if it were an open one in this state. However, despite the ingenious and attractive argument of counsel to the contrary, we think the construction we have given the statute was squarely announced in *In re Sullivan's Estate*, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895. In that case a petition was filed for the probate of a nuncupative will. On the same day a citation was issued, directed to the widow and next of kin, citing them to appear on the same day, and reciting that the petition would be heard upon that day. The citation was filed on the same day, with the return of the officer that, after diligent search, he was unable to find the parties named in the citation in his county. Thereupon and on the same day the court heard testimony and entered an order admitting the alleged will to probate. This was done within six months after the testamentary words were spoken. After holding that the order admitting the will to probate without service of citation was void, and after observing that the petition for the probate of the alleged will was filed within the time required by statute, and that the alleged words were reduced to writing and proof offered within the required time, the court said: "The statute does not require that the citation shall necessarily be issued and served within six months after the testamentary words are

spoken; but it does require that proof shall be offered within that time. We think, therefore, that respondent proposed the will for probate and offered her proof within the required time, and that she has not lost her opportunity to have her petition and proofs considered by the court. The argument that the court there used the word "proof" as the equivalent of "petition" seems to us a strained construction of language that is so clear that it leaves the mind free from doubt as to what the court intended to hold.

We have stated the record at some length, because the respondent contends that the probate of a nuncupative will is in its nature a probate in solemn form; and that, if he was delayed in the introduction of his evidence in support of the will more than six months after the speaking of the testamentary words in consequence of the several pleas of the appellants, they cannot profit by the delay. This argument is answered by the statute. Rem. & Bal. Code, § 1207, provides that, when a will is exhibited to be proven, the court may immediately receive the proof; and section 1302 provides that all the testimony adduced in support of the will shall be reduced to writing, signed by the witness, and certified by the judge. Under these provisions, it was competent for the respondent to make his proof; that is, present his testimony in support of the proffered will, have it reduced to writing, signed by the witnesses, and certified by the judge at the time he exhibited it in written form to be proven, or at any time thereafter "within six months after speaking the testamentary words." He could then have caused citation to be issued to the widow or next of kin of the deceased, so that they could contest the will if they thought proper. A similar argument was made in *Martinez v. De Martinez*, 10 Tex. Civ. App. 661, 48 S. W. 532. The petitioners there sought to evade the time limit fixed in the statute for the probate of a nuncupative will by showing that the appellee, by negotiations for a compromise, and later by secreting herself, so that she could not be cited in time to probate the will within six months from the time the testamentary words were spoken, prevented them from complying with the statute. The court said that to hold that the fraud of the appellee would excuse a compliance with the statute would be to "legislate or interpret into the statute something not contained therein." For the reasons stated, the court erred in admitting the alleged will to probate.

The judgment is reversed, with directions to enter an order rejecting it.

CROW, CHADWICK, FULLERTON, and PARKER, JJ., concur.

REINHART et al. v. CANYON COUNTY et al.

(Supreme Court of Idaho, July 15, 1912.)

(Syllabus by the Court.)

1. HIGHWAYS (§ 95*)—HIGHWAY DISTRICTS AND OFFICERS—STATUTORY PROVISIONS.

Section 15 of the highway district law (Sess. Laws 1911, p. 121) provides that the highway commissioners in a highway district shall constitute the highway board and shall have, except as provided in section 64 of said act, exclusive general supervision and jurisdiction over all highways within the district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.*]

2. HIGHWAYS (§ 95*)—HIGHWAY DISTRICTS AND OFFICERS—STATUTORY PROVISIONS.

Section 17 of said act provides that in respect to all highways included within such district, the power and jurisdiction of the highway board shall be exclusive, except as provided in section 64 of said act.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.*]

3. HIGHWAYS (§ 95*)—HIGHWAY DISTRICTS AND OFFICERS—STATUTORY PROVISIONS.

Section 64 has reference to the powers of municipal corporations included within the boundaries of a highway district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.*]

4. HIGHWAYS (§ 95*)—HIGHWAY DISTRICTS AND OFFICERS—STATUTORY PROVISIONS.

Section 16 of said act is identical with section 887a, as added by chapter 80 of the Laws of 1911 (Sess. Laws, p. 138), and said chapter amends the general road and bridge laws under which the county commissioners operated.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. § 95.*]

5. COUNTIES (§ 178*)—BONDS—POWER TO ISSUE.

Section 1962 (Rev. Codes) provides, among other things, that when the interests of the county require it, and the board of county commissioners deem it for the public good to bond the county for the construction, or repair of roads or bridges and the indebtedness or liability of the county that may be created for the construction or repair of such roads or bridges exceeds the income or revenue of the county for that year, the board of county commissioners may issue bonds of the county as provided in section 1960, provided the issuance of such bonds is authorized by a vote of two-thirds of the qualified electors of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.*]

6. COUNTIES (§ 184*)—BONDS—CONSTRUCTION.

Section 1963 provides, among other things, that the board must cause to be levied annually upon all of the taxable property of the county, in addition to other authorized taxes, a sufficient sum to pay the interest on all such bonds. Held, that the provisions of said sections construed together show that the Legislature intended such bonds should be binding obligations upon all of the property in the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 285-288; Dec. Dig. § 184.*]

7. COUNTIES (§ 174*)—TAXATION—PURPOSES—HIGHWAYS.

Section 37 of the highway district act provides that the county may levy a road tax for general road purposes on all the property within the county including the highway district

therein, and said tax is apportioned by the provisions of said section.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 264, 265; Dec. Dig. § 174.*]

8. HIGHWAYS (§ 122*)—HIGHWAY DISTRICTS—TAXATION.

Under section 42 of said highway district act, the provisions of sections 37, 38, 40, and 41 of said act, except the first sentence of section 37, do not apply to any taxes levied, assessed, or collected within any highway district to meet the payment of the bonds issued by the county or other political corporation within said county.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.*]

9. HIGHWAYS (§ 122*)—HIGHWAY DISTRICTS—TAXATION.

Section 65 of said highway district act, when construed by itself, has two purposes: First, to place in the highway district board the exclusive power to levy and apply the road, bridge, and highway taxes within the district except in respect to general county taxes, the distribution of which taxes is provided for by section 37 of said act; and, second, to protect without change the method of levying taxes to pay bonds issued prior to the organization of the highway district, and from the language used in said section 65, considered in connection with section 87, the right of highway districts to levy and apply taxes within the district relates to general levies for road purposes, and not to special levies made to meet the payment of bonds for the construction of bridges, issued by the county.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.*]

10. COUNTIES (§ 174*)—BONDS—CONSTRUCTION OF BRIDGES.

The board of county commissioners has the power to issue county bonds for bridges built in the county outside of a highway district and to levy taxes on the entire county for the payment of such bonds, provided it is determined that that portion of the county included in a highway district is benefited by the building of such bridges.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 264, 265; Dec. Dig. § 174.*]

11. HIGHWAYS (§ 119*)—CONSTRUCTION—APPORTIONMENT OF EXPENSES.

Section 16 of said highway district act and section 887a, Rev. Codes, as added by Sess. Laws 1911, p. 168, provide that in case the construction, maintenance, repair, or improvement of any highway or portion thereof within a county and not included within a highway district would also be a benefit to such district, the highway board of the district and the board of county commissioners have power to contract each with the other for a division and apportionment of the cost of such construction, etc., and in case they fail to agree the proper action may be brought therefor in the district court.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 357; Dec. Dig. § 119.*]

12. COUNTIES (§ 192*)—TAXATION—POWER TO TAX.

In such a case the board of county commissioners has the power and authority to levy the tax upon all of the property within the county for the payment of such bonds and the interest thereon.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.*]

13. COUNTIES (§ 183*)—BONDS—VALIDITY.

The failure of said boards to adjust said indebtedness would, in no manner invalidate

the bond issue, as the validity of the bonds does not depend upon such an adjustment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275-281, 283, 284; Dec. Dig. § 183.*]

14. COUNTIES (§ 1*)—ORGANIZATION—HIGHWAY DISTRICT.

The political subdivision of the state recognized by our Constitution as a county is none the less a county because of the organization of a highway district therein.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 1; Dec. Dig. § 1.*]

15. HIGHWAYS (§ 90*)—COUNTIES (§ 174*)—HIGHWAY DISTRICTS—BONDS.

Under the provisions of said highway district act, the district may issue highway district bonds for certain highway purposes within such district, and the county may issue its bonds for bridge or other highway purposes, where such improvement is a benefit to all parts of the county.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. § 90;* Counties, Cent. Dig. §§ 264, 265; Dec. Dig. § 174.*]

Appeal from District Court, Canyon County; Carl A. Davis, Judge.

Action by Otto G. Reiphart and others against Canyon County and others. From a judgment for plaintiffs, defendants appeal. Modified.

J. A. Elston and R. B. Scatterday, both of Caldwell, and Richards & Haga, of Boise City, for appellants. Rice, Thompson & Buckner, of Caldwell, and F. A. Hagelin, of Nampa, for respondents.

SULLIVAN, J. This action was brought by the respondent, who is a qualified elector and taxpayer of Canyon county and a resident of the Nampa highway district, to enjoin Canyon county and the board of county commissioners thereof from issuing and negotiating certain bridge bonds of said county, and enjoining the defendants from entering into a contract for the sale of such bonds for the construction of bridges across the Payette river in Canyon county.

The case was tried by the court upon substantially the following evidence or facts: On February 8, 1911, a petition was presented to the board of county commissioners of said county, signed by the required number of taxpayers of the road district in which such proposed bridges were to be constructed, petitioning for the construction of bridges across Payette river in said county at Fruitland, New Plymouth, and Letha. Due and legal notice of the hearing of said petitions was given, and on March 14, 1911, the board met in regular session, and, after hearing testimony as to the necessity therefor, found the construction of such bridges necessary. The county surveyor was directed to prepare proper plans and specifications for such bridges. Thereafter upon proper notice the board received bids for the construction of such bridges, and on June 20, 1911, accepted the bids of Forbes & Co. for the erection of such bridges, for the sums of \$15,795, \$15,875, and \$15,960, respectively, subject to a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bond election. On August 5, 1911, the issuing of such bonds was submitted to the voters of the entire county. After canvassing the votes on August 9, 1911, the board found that the question of bonding the county had carried, and that the board was authorized to issue and sell bonds of the county for the purpose of constructing said bridges, and caused notice to be published for the sale of said bonds. On the 7th of April, 1911, a petition was filed with the clerk of the board of county commissioners praying for the organization of the Nampa highway district in accordance with chapter 55, Sess. Laws of 1911, p. 121. An election was held on April 29, 1911, pursuant to notice given, which resulted in favor of the organization of such highway district, and on May 8, 1911, the Nampa highway district was declared duly organized and is now a legally organized and existing highway district. The evidence shows that said bridges, when constructed, will be situated entirely without the boundaries of said highway district but within the boundaries of Canyon county. It is alleged in the complaint that the board of county commissioners will sell and negotiate, and are about to sell and negotiate, such bonds, and that no proceedings have been had between the highway board of said district and the county commissioners for a division and apportionment of the cost of construction of such bridges, and that the issuance and sale of said bonds will subject the property of the respondent and others similarly situated to the burden of increased taxation. The evidence shows, and the court found, that the income or revenue of said county was insufficient to pay the current expenses of the county for the year 1911, and that at the time the petitions for said three bridges were presented and during that entire year the county was indebted over \$30,000 in outstanding warrants on account of the road and bridge fund, and that the indebtedness proposed to be incurred by these bonds exceeded the income or revenue of the county available for road and bridge purposes for the year 1911. The evidence also shows that the county commissioners intended to levy the same rate of taxation upon the property of the highway district as upon the remainder of the county outside of the district in making the levies and assessments for the payment of said bonds.

Upon the evidence thus introduced, the trial court entered judgment to the effect that the said bridge bonds were legally issued and denying plaintiff's prayer for an injunction restraining the commissioners from selling, issuing, and negotiating said bonds. But said judgment restrained the county commissioners from applying to the payment of said bonds any of the taxes assessed and collected within the Nampa highway district in an amount exceeding 5 per cent. of the amount of taxes so collected in said district, and from levying or collecting

taxes within the district for the payment of said bonds except the said 5 per cent. From said judgment this appeal is taken.

Several errors are assigned, but the main question presented for determination is: Has the board of county commissioners the power to bind the property and levy taxes against the property within a legally organized highway district for the payment of bonds issued by the county after the organization of such highway district, the proceeds to be used in the construction of a bridge within the county but without the boundaries of such highway district?

It is conceded by respective counsel that a county is a public corporation and a legal subdivision of the state, and that a highway district is a public corporation within a county, and that highways consist of roads and bridges.

We will first consider the power and authority given to highway districts under the Session Laws of 1911, found at page 121. That act provides for the formation of such districts, and provides that such public corporation may exercise the public functions of a county that had theretofore been exercised by the board of county commissioners, viz., the laying out, abandoning, and constructing of highways, and that when a highway district has been organized the highway board of such district takes over all the powers of said board of county commissioners in so far as they relate to highways within the territory composing the highway district. In other words, the highway board is substituted for and takes the place of the board of county commissioners with reference to highways within the territory embraced in the district, and it would appear that the power of the board of county commissioners ceases so far as such district highways are concerned.

[1] Section 15 of said highway act (Sess. Laws 1911, p. 127) provides that the highway commissioners in a highway district shall constitute the highway board and shall have, except as provided in section 64 of said act, exclusive, general supervision and jurisdiction over all highways within their district.

[2] Section 17 of said act provides as follows: "In respect to all highways included within such district, the power and jurisdiction of the highway board shall be exclusive, except as provided in section sixty-four of this act."

[3] Section 64 has reference to the powers of a municipal corporation included within the boundaries of a highway district.

[4] Section 16 of said highway district act is identical with section 887a, as added by chapter 60 of the Laws of 1911 (Sess. Laws, p. 168). Said chapter amends the general road and bridge law under which the county commissioners operated. Under the provisions of sections 1962 and 1963, Rev. Codes, the board of county commis-

sioners is given certain power in regard to bonding the county for the construction or repair of roads or bridges.

[5] Section 1962 provides, among other things: "When the interests of the county require it and the board of commissioners of the county deem it for the public good to bond the county * * * for the construction or repair of roads or bridges * * * and the indebtedness or liability of the county that may be created by the bonding, funding or refunding aforesaid, * * * for the construction or repair of roads or bridges, * * * exceeds the income or revenue of the county for that year, the board of commissioners may issue bonds of the county as provided in section 1960 * * *"—provided the issuance of such bonds is authorized by a vote of two-thirds of the qualified electors of the county.

[6] Section 1963 provides that: "The board must cause to be levied annually, upon all the taxable property of the county, in addition to other authorized taxes, a sufficient sum to pay the interest on all bonds disposed of. * * * Should the tax for the payment of interest on any bonds issued under the provisions of this article, at any time not be levied or collected in time to meet such payment, the interest must be paid out of any moneys in the county general, or current expense, fund. * * *" Those provisions construed together show that the Legislature intended that such bonds should be binding obligations upon the whole county unless such intention is shown to have been modified by the said highway district act of 1911.

[7] Section 37 of said highway district act provides that the county may levy a road tax for general road purposes on all the property in the county including the highway district therein, which tax is apportioned by the provisions of said section.

[8] Section 42 of said highway road district act provides as follows: "The provisions of sections 37, 38, 40 and 41 hereof, except the first sentence of section 37, shall not apply to any taxes levied, assessed or collected within any highway district to meet the requirements of any bonds issued by the county or by any city, town, village, highway district or other body politic or subdivision." It appears from that provision, by implication, at least, that the board of county commissioners shall levy taxes throughout the entire county to meet the bond obligations of the county. It is provided that the provisions of sections 37, 38, 40, and 41, except the first sentence of section 37, shall not apply to taxes levied for the payment of bonds. That clearly makes the first sentence of section 37 applicable to taxes levied "to meet the requirements of any bonds issued by the county," and the first sentence of said section 37 includes highway districts. The Legislature intended

the county commissioners to levy taxes for the bonds of the county on all property of the county including property within a highway district. Let us, then, consider section 37 in connection with section 65 of said highway act.

[9] Section 65, when considered by itself, refers especially to section 37 and seems to have two purposes: (1) to place in the highway board "the exclusive power to levy and apply the road, bridge and highway taxes within the district except in respect to general county taxes, as provided in said section 37 hereof"; and (2) to protect without change the method of levying taxes to pay bonds issued prior to the organization of a highway district. From the language used in section 65, considered in connection with section 37, it seems clear that this right of a highway district to levy and apply taxes within the district relates to general levies for road purposes, and not to special levies made to meet the payment of bonds for the construction of bridges issued by the county. We think this view is sustained when sections 37 and 65 are construed together in connection with section 42 of said act. Section 42 provides that section 37, except the first sentence thereof, and sections 38, 40, and 41, "shall not apply to any taxes levied * * * within any highway district to meet the requirements of any bonds issued by the county. * * *" This language shows that the first sentence of section 37 does not apply to any taxes levied within any highway district to meet the requirements of any bonds issued by the county. It is evident that the first sentence of section 37 does not apply to any taxes levied within any highway district to meet the payments on bonds issued by the county, as it provides "taxation for road and bridge purposes" by the board of county commissioners under general laws shall be uniform upon the same class of subjects within the limits of the territory of the county, including without change or discrimination all territory included within any highway district."

[10] The Legislature evidently intended by that provision that the levy provided for should be uniform on the same class of property in the county within and without a highway district situated in the county, and when this provision for such uniformity is made applicable by the language of section 42, to wit, "to any taxes levied within any highway district to meet the requirements of any bonds issued by the county," it is clear that it was the intent that the county should issue county bonds for bridges built in the county outside of the highway district and levy taxes on the entire county outside of the highway district and the portion of the county included within such highway district to meet the payments on bonds issued under the provisions of said

sections 1962 and 1963, Rev. Codes. Those sections have not been repealed by the highway district act, and are still in force so far as the powers of the board of county commissioners are concerned.

[11] By enacting section 16 of the highway district act (Laws 1911, p. 129), the Legislature no doubt intended that where bridges and road improvements are made under the authority conferred upon the board of county commissioners in territory not included within a highway district, and it appears that such improvements are for the benefit of such highway district as well as the territory of the county not included within the highway district, and that the cost of construction, maintenance, repair, or improvement, if borne wholly by the territory excluded from the highway district, would be an injustice or an unreasonable burden thereon, in such case the highway district and the board of county commissioners are given power to contract each with the other for a division and apportionment of the cost of such construction, maintenance, repair, or improvement, and, in case the boards cannot agree, then an action might be brought for the purpose of settling and adjusting such costs; and where such improvement is made by the highway district and benefit results to territory outside of such highway district and the burden is unreasonable to the district, then in such case the highway board and the commissioners may agree as to the portion or portions which shall be paid by the highway district and the portion outside of the highway district, and if an agreement cannot be reached, then the costs may be adjusted by an action. It was intended by the Legislature that both the district and the portion outside of the district and within the county should proportionately bear the burden of improvements made within the respective territory consisting of a highway district and also in the county outside of the district, in proportion to the benefits where the burden would be unreasonable to the territory making the improvement.

In the case at bar the bonds in controversy were voted by the electors of the entire county, including both the territory within and without the highway district, and the payment of such bonds and the interest accruing thereon is to be raised by a fund arising from an assessment made by the board of county commissioners on all assessable property within the entire county included without and within the highway district; and the question as to whether or not the county should reimburse the highway district because the construction of such bridges, for which the bonds were voted, was not a benefit to the highway district, is to be determined as provided by section 16 above referred to. The particular manner of apportionment or the basis of determining the

benefits or burdens, as provided in section 16, is not involved in this action, except that such provisions do not affect the validity of the bonds involved. When a controversy arises under section 16 and the facts are found, either by agreement or suit, the court will be better able to construe said section.

[12] We think it is clear, under the provisions of said highway district act and the statute concerning the issuance of bonds for the construction of bridges, that in a case like the one at bar the board of county commissioners has the power and authority to levy the tax upon all of the property within the county for the payment of such bonds and the interest thereon.

[13] While it is true an adjustment has not been made between said district and that portion of the county not included within the district, that would not invalidate the bond issue, as the validity of the bonds would not depend upon such adjustment. While said section provides for such adjustment, it does not specify the time when such adjustment must be made; but it clearly contemplates that the adjustment should be made at some proper time. Such adjustment or the time when it must be made certainly cannot affect the validity of the bonds. If either of said boards should refuse to act and perform the duties imposed on them by law, the statute provides a method by which they may be compelled to act, and in case they cannot agree upon a proper adjustment, then a proper action may be maintained in the district court. The refusal to act or the nonaction of either or both of said boards could not affect or impair the validity of the bonds.

[14] It seems to us that to sustain the contention of respondents to the effect that Canyon county must issue bonds covering only that portion of the county situated outside of, and not included in, the highway district, and let the highway district provide for the payment of its proportionate part of the bonds, would be to hold that such bonds would not be county obligations; that is, the bonds would not be an obligation of the whole county. It certainly will not be contended that the political division recognized by our Constitution and statute as a county is any less a county because of the organization of a highway district therein.

[15] Under the provisions of the highway district act, the Legislature intended that such a highway district could issue bonds for certain highway purposes within such district, and that the county could issue its bonds for highway purposes in cases like that at bar where the improvement is without the district but within the county; that is, where the territory of the entire county is benefited by the improvement, and it is clear to us that the adjustment of the proportional part that each should pay would not in any manner affect or impair the valid-

ity of any bonds issued by the highway district for purposes of improvement within the district, or county bonds issued for improvements that benefit the entire county.

We therefore conclude that the judgment of the district court must be modified, wherein it was decreed that the defendants be restrained from applying to the payment of said bonds any of the taxes assessed and collected within the Nampa highway district in any amount exceeding 5 per cent. of the amount of taxes so collected in said district, and from levying or collecting taxes within the district for the payment of said bonds except said 5 per cent.; and that judgment and decree be entered in accordance with the views expressed in this opinion. Costs are awarded to appellants.

STEWART, C. J., and AILSHIE, J., concur.

DOUGLAS v. DOUGLAS et al.
(Supreme Court of Idaho. July 15, 1912.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE (§§ 248½, 249*)—COMMUNITY PROPERTY—STATUTORY PROVISIONS.

Under the statute of this state (section 2679, Rev. Codes), "all property owned by the husband before marriage, and that acquired by gift, bequest, devise or descent is his separate property"; and under section 3060, Rev. Codes, "community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either."

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 887, 888, 889-892; Dec. Dig. §§ 248½, 249.*]

2. HUSBAND AND WIFE (§ 262*)—COMMUNITY PROPERTY—PRESUMPTION—BURDEN OF PROOF.

Under the community property laws of this state, whenever, after marriage, the husband purchases real estate within this state, a prima facie presumption arises that such property is community property, and such presumption may be overcome by the husband assuming the affirmative and burden of proof and showing as a matter of fact that such property was purchased with his separate property or estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

3. HUSBAND AND WIFE (§ 246*)—COMMUNITY PROPERTY—WHAT LAW GOVERNS.

Personal property acquired during coverture is governed and controlled by the law of the matrimonial domicile, and, if the title thereto and property therein was vested in the husband under the law of the domicile, it will be presumed everywhere to be his property, and the same is true of any property that was the separate and individual property of the wife under the law of the matrimonial domicile.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 878; Dec. Dig. § 246.*]

4. HUSBAND AND WIFE (§ 246*)—COMMUNITY PROPERTY—WHAT LAW GOVERNS.

Where husband and wife during coverture accumulated property in a state where the community law did not exist and where property accumulated and acquired during coverture

vests absolutely in the husband, and such property or the proceeds thereof is brought into the state of Idaho and here invested in real property, the property so acquired will be the separate property of the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 878; Dec. Dig. § 246.*]

5. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES.

Where no proof is shown to the contrary, the presumption arises in the courts of this state that the community property law prevails in a sister state, the same as it prevails in this state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

6. HUSBAND AND WIFE (§ 246*)—COMMUNITY PROPERTY—RELEVANCY—LAWS OF OTHER STATES.

In inquiring into and ascertaining the law of a sister state with reference to the title and ownership of property acquired by husband and wife in that state during coverture, the courts of this state do not make such inquiry and investigation for the purpose of executing a foreign law within this state, but rather to ascertain the status of the foreign law as a probative fact in ascertaining and establishing the title and ownership of such property at the time it is brought into this state.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 878; Dec. Dig. § 246.*]

7. EXECUTORS AND ADMINISTRATORS (§ 329*)—SALE OF PROPERTY.

A probate court has no jurisdiction or authority in the administration of an estate of a decedent to order or confirm the sale of real estate which belongs to some one else, and the title to which is vested in another, and which property did not in fact or law belong to the estate being administered.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1342, 1350-1364; Dec. Dig. § 329.*]

Appeal from District Court, Twin Falls County; C. O. Stockslager, Judge.

Action by Thomas J. Douglas against Mary E. Douglas and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

James H. Wise, of Twin Falls, for appellant. Longley & Hazel, of Twin Falls, for respondents.

AILSHIE, J. On about the 12th day of May, 1897, the appellant, Thomas J. Douglas, was a resident of Otero county, Colo., and there intermarried with Margaret V. Douglas, and thereafter the two continued to live together as husband and wife in the state of Colorado until the 25th day of February, 1908, on which date they removed from Colorado to Idaho. Between the date of their marriage and their removal to Idaho and while they were husband and wife they acquired and accumulated real, personal, and mixed property which amounted to the sum of \$13,050 at the time of their departure for Idaho. During this time they were engaged in the farming business; the wife discharging the usual and ordinary household duties, and the husband conducting the farming business. The wife had no separate property of any kind or character

recognized as such under the laws of Colorado. Upon arriving at Twin Falls, Idaho, the husband invested this money in real estate. They continued to live in Idaho until the time of the death of Margaret V. Douglas, the wife of appellant, which occurred on the 25th day of October, 1909. She left surviving her husband and her minor children, Mary E. Douglas, Robert M. Douglas, and Kenneth Douglas. Administration was had on the estate of Margaret V. Douglas, and, among other things, the inventory returned one-half of this real estate as community property and subject to administration under the laws of Idaho. The administration proceeded on the theory that this was community property, and an order was subsequently made for the sale of this property, and a sale was made. Thereafter the husband, Thomas J. Douglas, concluded that this was not community property but his separate property, and he was thereupon suspended as administrator of the estate, and a special administrator was appointed, and appellant thereupon made a motion to have this property stricken from the inventory on the ground that it was not community property, but his separate property. This motion was sustained by the probate court. Thereafter the appellant instituted this action for the purpose of quieting his title to the whole of the property on the ground that it was his separate estate.

[1] We are called upon in this case to determine whether the property purchased by the appellant on his arrival here from Colorado became his separate property or the community property of himself and wife. Under the provisions of section 2679, Rev. Codes, "all property owned by the husband before marriage, and that acquired by gift, bequest, devise or descent is his separate property"; and section 2680 defines the status of all property acquired after marriage by either husband or wife, and section 3060 defines community property as follows: "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either."

It will be observed from the foregoing provisions of the statute that the community property law prevails in this state, and it will therefore afford us very little light or information to examine or review authorities coming from states where the common-law rule prevails with reference to the property relations between husband and wife. It seems to be conceded by counsel on both sides of this case that the community property law does not prevail in Colorado and did not prevail at the time that appellant and his wife acquired this property and departed from the state. Upon the trial of the case the appellant offered to introduce a part of the dissenting opinion in *Schuler v. Henry*, a Colorado case reported in 42 Colo. 367,

94 Pac. 360, 14 L. R. A. (N. S.) 1009, which quotes with approval from D. & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688, to the effect that the wife acquires no right or interest in any property accumulated by her labor and services in the performance of the usual and ordinary household duties, and that such services belong to the husband. We shall not go into this question, however, because it is conceded that the property accumulated in Colorado by appellant and his wife was the separate property of the appellant there.

[3] Various principles of law are discussed by respective counsel pro and con as bearing upon this question. It is urged, for instance, that the marital relation in Colorado amounted to a contract, and that this property was acquired under that contract, and that to allow the wife an interest in the property in this state would be a violation of the contract entered into in another state. On the other hand, it is contended that under the law of Idaho the accumulations of the husband and wife after marriage are community property in which the two spouses are equally interested, and that to inquire into the laws of Colorado which vest the absolute title in the husband and enforce such law in Idaho is contrary to all legal principles, in that it amounts to executing a foreign law within our own jurisdiction. It is not perceived that either of these contentions is well founded in this case for reasons which we will hereafter give. It is a well-established rule that personal property acquired during coverture is governed and controlled by the law of the marital domicile. This seems to be based upon the theory that movables have no situs, or rather that they accompany the person everywhere. *Kraemer v. Kraemer*, 52 Cal. 305; note to *Rush v. Landers*, 57 L. R. A. 353; note to *Brookman v. Durkee*, 12 L. R. A. (N. S.) 921. On the other hand, real property is governed by the law of its situs. *Rush v. Landers*, 107 La. 549, 32 South. 95, 57 L. R. A. 356, and note.

[2] Then we have this situation: That real property is purchased in this state by a married man and during the existence and continuance of the marital relation. The prima facie presumption at once arises under our statute that this property was community property. The man who purchased it, however, and on whom the burden of showing that it is not community property rests, resists and contests the claim that such property is community property, and in doing so shows that it was purchased wholly with personal property which was at the time his separate and individual estate.

[4] In doing so, he finds it necessary to prove the laws of the state in which he accumulated this personal property and from which he brought it in order to show that

it was his separate and individual estate and that his wife, the other member of the community, had no interest in such property.

[6] It is not, therefore, a question of enforcing and executing a foreign law in this state, but it is merely a question of ascertaining what the foreign law was as one of the probative facts in establishing the ownership of the property.

[5] We start into the investigation in Idaho confronted with the statute which says that all property acquired by husband and wife, or either, during marriage, when not acquired as separate property of either, is community property, and the presumption, in the first instance, is that the laws of Colorado are the same as the laws of this state. *Maloney v. Winston Bros. Co.*, 18 Idaho, 757, 111 Pac. 1086. This presumption, however, is subject to be rebutted by competent proof. The appellant succeeds in this proof by showing that there was no community property law in Colorado when he accumulated this property, and that such accumulations were the sole and separate property of the husband under those laws. By this means, the title and ownership to this property is fully and clearly established, and we find that, when appellant departed from the state of Colorado with this property, it was his separate property, and of course the mere crossing the state line into Idaho could not divest him of his title or vest that title in someone else. It would take something more than the mere crossing of the state line to transfer the title to property he had with him. He shows then that he immediately invested that money in this particular real estate in Idaho. The mere fact of investing this money could not of itself change the title or transfer the right of property from him to some one else. This is merely an exchange of one class of property for another, and it is well settled that investing one kind or class or specie of property in another kind or class does not change the character of the title or right of ownership, and that the title by which the property was held and governed will continue the same. *Thayer v. Clarke* (Tex. Civ. App.), 77 S. W. 1050. Such property, therefore, as the real estate here involved purchased in the manner this was purchased, with the separate property of the husband, does not fall within the class of "property acquired after marriage" referred to and defined in section 2680, supra.

This question has been considered by a number of courts where the community law prevails. *Kraemer v. Kraemer*, 52 Cal. 302, is a case where the husband and wife had accumulated property in Illinois which, under the laws of Illinois, became the separate property of the husband, and had removed to California, and the husband had invested it in real estate in the latter state, where the community property law prevails and under which the wife was entitled to one-half in-

terest therein. The court held that the mere act of investing the husband's separate property accumulated in the state of Illinois in property in the state of California did not change the nature of the ownership or of the title by which the property was held, and that it would still remain the separate property of the husband. The syllabus to that case says: "If husband and wife acquire personal property in one state and then remove to another state with the same, the law of the state where they lived when the property was acquired governs as to whether it is separate or community." This case was cited with approval in *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12. It was again cited, approved, and followed in *Estate of Burrows*, 136 Cal. 113, 68 Pac. 488. In the *Burrows* case, a marriage took place in the state of Kansas, and the parties there accumulated considerable property. The state of Kansas, however, had no community property law, and in that state the husband is the absolute owner of all property acquired and accumulated during coverture. The parties moved to California, and there the property was invested, and the court held that the property acquired in California was held by the same title and ownership as that with which it was purchased. The court said; "All he had in Kansas belonged to him and was his separate property when he arrived in California, no matter whether it was acquired in Kansas before or after marriage. * * * He started from Kansas with money which was wholly his; I fail to see how the ownership was or could be changed by its removal here."

The community property law prevails in Texas, and in *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290, the Supreme Court had under consideration a similar question where property had been accumulated by husband and wife in Massachusetts where the community property law does not prevail. The husband thereafter removed to Texas and invested the money in property in the latter state. The question arose as to whether under the community laws of Texas the wife acquired a community interest in the property. The court, among other things, said: "Lands in Texas, purchased by a married man, after moving there, with money which he earned in another state while a citizen thereof, under the laws of which the money was his separate property, are not community property." The court in that case was presented with the same proposition that is presented here, namely, that they were called upon to enforce the laws of a sister state within the borders of Texas. The court answered that question as follows: "It is suggested that this view involves the enforcement of the laws of a sister state by a Texas court in the disposition of property here situated. But not so. We have merely ascertained the law of Massachusetts as a fact in determining the quality or extent of

the title to money acquired in Massachusetts by a citizen or citizens of that state, and thereafter brought into and invested in this state. It may seem that Massachusetts, the boasted center of advanced thought, should long since have discarded the rule invoked in behalf of L. B. Blethen, and relegated it to its place among the rejected barbarisms of the common law. But, whatever may be our opposition to the common law in this particular, and the extent of our admiration for the rule of the civil law, so firmly embedded in the hearts and jurisprudence of the Texas people, that the fruits of the joint effort of husband and wife shall be shared equally between them, the power of the people of Massachusetts to determine for themselves the conditions upon which her citizens may acquire and hold property within her own borders must be conceded, and we have no power to alter the status of property fixed and vested by such laws before its introduction into this state. We have simply determined the character of L. B. Blethen's title to the money with which the lands in controversy were purchased as a fact, and applied thereto the law of Texas." The Blethen Case was followed and approved by the Court of Civil Appeals of Texas in *Thayer v. Clarke*, 77 S. W. 1050.

A somewhat similar principle of law was enunciated by the Supreme Court of Louisiana in *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563, where the civil law prevails from which the community property law was derived.

The community property law likewise prevails in the state of Washington, and in *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914, 12 L. R. A. (N. S.) 921, 123 Am. St. Rep. 944, 18 Ann. Cas. 839, the Supreme Court of that state held that: "Where money acquired in the course of trade in another state is the separate property of the husband there, it will continue to be his property when brought into this state, as will property purchased here with it, whether real or personal, notwithstanding Ballinger's Ann. Codes & St. § 4490, providing that property acquired by a husband after marriage, otherwise than by gift, bequest, devise, or descent, is community property, since a contrary construction would destroy vested rights." To the same effect, see *Elliott v. Hawley*, 84 Wash. 585, 76 Pac. 93, 101 Am. St. Rep. 1016. The *Brookman-Durkee* Case has been cited with approval in *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 687, and *Alaska Banking & Safe Deposit Co. v. Noyes*, 64 Wash. 672, 117 Pac. 492.

[7] It has been further argued in this case that, after an order of sale by the probate court had been made of this property on the theory that it was community property and the sale had been made and confirmed, the judgment became *res adjudicata* under the authority of *Clark v. Rossier*, 10

Idaho, 348, 78 Pac. 358, 8 Ann. Cas. 231, and that an action will not thereafter lie in the district court questioning the title conveyed under the probate sale. As was said by this court in *Miller v. Mitcham*, 21 Idaho, 741, 123 Pac. 941, "probate courts have exclusive, original jurisdiction in the settlement of estates of deceased persons, and it is within the jurisdiction of those courts to determine who are the heirs of a deceased person and who is entitled to succeed to the estate and their respective shares and interests therein. The decrees of probate courts are conclusive in such matters. A probate court, however, does not have jurisdiction to determine adverse claims or an adverse title to real estate, except in so far as such questions arise between the heirs or devisees of an estate and are necessary to be determined in the administration of the estate." In other words, a probate court has no authority in the administration of an estate to order and confirm the sale of real estate which belongs to some one else and which did not in fact or law belong to the estate being administered. A decree in such a case could not and would not be conclusive or *res adjudicata* against the owner of such property unless he became a party to the proceeding and participated in the litigation and allowed the judgment to become final under the statute. In such a case he might be estopped raising the same question.

In this case it does not appear that appellant is urging his rights to the detriment of any one who relied upon the probate proceeding, or that the question here involved was litigated or attempted to be litigated in that proceeding. It is true that it was assumed that this was community property at the time of the administration; but no one acquired any right or interest under the probate proceedings which will be adversely affected by this decree so far as appears from the record. We conclude, therefore, that the probate proceedings are not a bar to this action, nor do they estop the appellant here from asserting his rights.

The judgment should be reversed, and it is so ordered, and the cause is remanded, with direction to take further proceedings in accordance with the views herein expressed. Costs awarded in favor of appellant.

STEWART, G. J., and SULLIVAN, J., concur.

(23 Idaho, 328)

In re RECEIVERSHIP OF GREAT WESTERN BEET SUGAR CO.

CANNON v. HEWITT.

(Supreme Court of Idaho. July 15, 1912.)

(Syllabus by the Reporter.)

1. RECEIVERS (§ 186*)—SALES—DISCRETION OF COURT.

Where a public sale has been made by a receiver, in compliance with an order of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

court, of property in his hands as such receiver, under notices requiring a cash payment on the day of the sale, and a bid is made within the terms of the sale, but the intending purchaser is unable to secure sufficient funds immediately with which to make such cash payment, it is a reasonable exercise of discretion on the part of the district judge to extend the time within which such payment shall be made, where no injury is done to any one by failure of the purchaser to pay at once the sum due on his bid.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 236-238; Dec. Dig. § 136.*]

2. RECEIVERS (§ 133*)—SALES—DISCRETION OF COURT.

A trial judge in equity proceedings, exercising authority over a sale of property in the hands of a receiver appointed by such court, has discretionary power to modify all orders affecting such sale by subsequent orders.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 229; Dec. Dig. § 133.*]

3. RECEIVERS (§ 136*)—SALES—PAYMENT OF BID—EFFECT OF DELAY.

At a public sale of property by a receiver, the mere failure of a successful bidder to immediately make the payment on his bid required by the terms of the sale does not destroy the right of the receiver to demand or accept such payment later, where the rights of others are not injuriously affected by such delay.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 236-238; Dec. Dig. § 136.*]

4. JUDICIAL SALES (§ 32*)—VACATION—INTEREST OF PERSONS SEEKING VACATION.

In order to justify setting aside a judicial sale on behalf of one attacking it on the ground of alleged irregularities in the conduct of such sale, the person attacking such sale should allege and establish injury to himself resulting from the irregularities complained of.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 69; Dec. Dig. § 32.*]

5. JUDICIAL SALES (§ 32*)—VALIDITY—ETOPPEL TO QUESTION.

One who has acquiesced in an irregularity in the conduct of a judicial sale at the time thereof, and does not show affirmatively that he has been injured thereby, should not afterwards be heard to question its validity on the ground of such irregularity.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 69; Dec. Dig. § 32.*]

Appeal from District Court, Elmore County; Edward A. Walters, Judge.

Action by O. E. Cannon, receiver of the Great Western Beet Sugar Company, against Henry Hewitt, Jr., a lienholder, for confirmation of a receiver's sale. From an order confirming the sale, the lienholder appeals. Affirmed.

J. B. Eldridge and Chas. F. Reddoch, both of Boise, for appellant. Sullivan & Sullivan and R. Garland Draper, all of Boise, for respondent.

DAVIS, District Judge. On October 29, 1909, O. E. Cannon was appointed receiver of the assets of the Great Western Beet Sugar Company by the district court of the Fourth judicial district, and on November 10, 1911, the judge of said court authorized such receiver to sell all the property of said company in order to pay its debts. The receiver

thereupon fixed December 15, 1911, as the date of such sale, and gave due notice thereof; but on December 1, 1911, Henry H. Hewitt, Jr., the holder of a lien against said property and appellant herein, obtained a writ of prohibition from this court, restraining said receiver and the judge of the district court from proceeding further under said order pending a hearing of said matter and decision relative thereto by this court, and said sale was thereupon postponed until December 28, 1911. Prior to said date, this court quashed said writ and refused to further prohibit said sale. But at the request of R. G. Smith, an attorney for appellant herein, for time within which to investigate said matter, and to endeavor to induce others to join him in a compromise settlement of the claims against said company, the date of said sale was deferred, and was reset for January 5, 1912. No settlement being made by the interested parties, an auction sale of said property was held on said date, and a considerable number of people appeared, two of whom submitted bids in excess of the minimum amount of \$56,546.79, fixed by the court as the lowest sum that could be accepted. L. G. Bradley, an agent of Hewitt, was present at said sale, but declined to bid on said property, and the bid of Harry Watkins for \$56,547.79, being the highest bid offered, was accepted by the receiver, and the property was struck off to him. But when he was called upon on that day to pay the 25 per cent. cash required to be paid at the time of the sale by the terms of the order issued by said court authorizing said sale, Watkins was unable to make the payment, and asked for a little time within which to secure the money. The receiver thereupon consulted the judge of the district court, who directed said receiver to allow Watkins a couple of days within which to pay the \$14,136.95 then due.

Thereafter said L. G. Bradley resumed negotiations with the attorney for the receiver and others for a compromise settlement of the claims against said company, and, in order to afford an opportunity for Watkins to raise said money, either through a compromise settlement with Hewitt and other claimants, or otherwise, the judge of the district court directed that payment thereof be not required by the receiver until further orders of the court. Hewitt and the others interested in the negotiations were still unable to agree upon a settlement, and Watkins procured the necessary money from James H. Brady and made the payment of 25 per cent. of his bid of January 23, 1912, and was given a certificate of sale for said property. The receiver thereupon filed his return, and prayed for an order confirming said sale, and a day was set for a hearing thereon. The appellant herein thereafter filed a motion to set aside the proceedings of the receiver in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the matter of said sale, and prayed that another sale be ordered.

The district court overruled appellant's objections to the confirmation of said sale, and made an order, on February 10, 1912, approving and confirming the same, and granting Watkins further time within which to make the additional payment of \$42,410.87, and about a month later the final payment of the full purchase price was made.

The appeal herein is prosecuted by Hewitt to determine the validity of the order of the trial court in overruling his objections to said proceeding and confirming the sale of said property.

[1] The principal question raised is as to whether, or not the district judge had authority or right to authorize the receiver to grant further time to the purchaser at such sale within which the 25 per cent. cash payment should be made, although the notices of sale stated that such amount should be paid on the date of sale.

Unquestionably it is the duty of a receiver to make any sale, authorized by the district court, exactly according to the terms of the order authorizing such sale, and he should promptly collect any cash payment required. In equity proceedings a district judge has a wide discretion in exercising authority necessary to protect all interests; and, where a sale has been made under notices requiring a cash payment on the date of the sale, and a bid is made within the terms of the sale, and the intending purchaser is unable to secure sufficient funds immediately with which to make such cash payment, it is a reasonable exercise of discretion on the part of a district judge to extend the time within which such payment shall be made, where no injury is done to any one by failure of the purchaser to pay at once the sum due on his bid.

[2] The law appears to be well established that a trial judge in equity proceedings, exercising authority over a sale of property in the control of the court, has discretionary power to modify all orders affecting such sale by subsequent orders. *Fid. Ins. Trust & Safe Dep. Co. v. Roanoke Iron Co.* (C. C.) 84 Fed. 752; *Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; *Magann v. Segal*, 92 Fed. 252, 34 C. C. A. 323; 24 Cyc. 26, 84; *Fowler v. Krutz*, 54 Kan. 622, 38 Pac. 809; *Godchaux v. Morris*, 121 Fed. 482, 57 C. C. A. 434.

Freeman on Void Judgment Sales, at pages 88 and 89, says: "It is sometimes said that a sale made under a decree must pursue the directions therein contained; that a departure from these directions renders the sale void. But to invoke this rule the departure must be of a very material character, and must, we think, be a departure which has not been approved by a decree of confirmation entered in the court which ordered and had supervision of the sale. In truth, a court is not absolutely bound by the terms

of its order or decree respecting the mode of sale. It may, though the sale is directed by it, refuse confirmation if it appears that the mode was one calculated, under the circumstances, to result in a sacrifice of the property; that such result has been realized; and that a new sale in a different mode may be more equitable. If the court has power to direct the terms of the sale in the first instance, it may change them afterwards; and if an officer or other agent of the law, or of the court, in making a sale, departs from the directions of the decree, the court may, nevertheless, by confirming the sale, ratify his action, provided, always, that the terms so ratified are such as the court had power to impose in the first instance."

[3] It does not necessarily follow that the modification of the conditions required by the order authorizing a sale made by the court issuing such order, after the sale was made, results in converting such sale into a private sale, where such change consists simply in extending the time of payment. Where all requirements are complied with prior to the sale, the purchaser at such sale is bound on his bid, and the seller can be compelled to deliver the property; and in case the bidder cannot readily perform his legal obligation, or is unwilling to do so, the seller has a legal right to proceed against him. And the mere failure of the bidder to immediately make the payment necessary on his bid does not destroy the right of the seller to require or accept such payment later, especially where the rights of others are not injuriously affected by such delay.

[4] In this case the appellant makes no showing of any nature whatever as to any injury resulting to him by the delay in the collection of the amount due on the bid made by Watkins; nor does he make any claim that a larger sum could be secured for the property sold, should a resale be ordered. And, while it is argued that the sale was for an inadequate consideration, there is nothing in the record to substantiate that contention. In order to justify setting aside a sale on behalf of a person attacking it, he should allege and establish injury to himself resulting from the irregularities complained of. 17 Am. & Eng. Enc. Law, 965.

Under these conditions, it is purely a legal question as to whether or not the district judge had the authority to make the order extending the time of payment, since, if he had any discretion whatever in the matter, in the absence of a showing that he improperly exercised such discretion, his order should be sustained.

[5] The appellant in this case caused two extensions of time prior to sale, and was represented by an agent at the place of sale on the date thereof, and was acquainted with all the facts connected therewith. By negotiating through an agent for the purchase of the title secured by Watkins, having

full knowledge of his failure to make the cash payment required at the time, and knowing of the extension granted to Watkins by the court, the appellant may reasonably be said to have acquiesced in the conditions of which he is now complaining. And one who has acquiesced in an irregularity in the conduct of a sale, where he cannot show affirmatively that he has been injured thereby, should not afterwards be heard to question its validity on the grounds of such irregularity. *Sawyer v. Hentz*, 74 Ark. 324, 85 S. W. 775; 24 Cyc. 38; *Maquoketa v. Willey*, 35 Iowa, 323; *In re Sheets Lum. Co.*, 52 La. Ann. 1337, 27 South. 809; *Hartshorne v. Reeder*, 3 Ohio Dec. (Reprint) 109; *Atcheson v. Hutchison*, 51 Tex. 223; *Blanks v. Farmers' Loan & Trust Co.*, 122 Fed. 849, 59 C. C. A. 59.

The law and the equity of the case seems to be, therefore, as determined by the district court; and the judgment of the lower court is affirmed, with costs to respondent.

STEWART, C. J., concurs. SULLIVAN, J., sat at the hearing, but took no part in the decision.

(22 Idaho, 390)

STATE v. YTURASPE

(Supreme Court of Idaho. Aug. 9, 1912.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 137*)—PRELIMINARY PROCEEDINGS—EXAMINATION—COMPLAINT.

Where a complaint was filed before a magistrate, charging the defendant in the name of Luis Trespi, and such defendant was committed under the name of Lewis Uterspi and an information was filed in the district court by the prosecuting attorney, charging said defendant with the same crime in the name of Luis Yturaspé, and upon arraignment in the district court, as provided by law, he answered that Luis Yturaspé was his correct name, and it appears from the record that the person against whom the information was filed is the same person who was examined before the committing magistrate and committed, and that the offense was the same, the information should not be quashed upon the ground that the defendant never had a preliminary examination.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

2. CRIMINAL LAW (§ 211*)—PRELIMINARY PROCEEDINGS—COMPLAINT.

Under the provisions of section 7509, Rev. Codes, a complaint upon which a defendant is arrested and brought before a magistrate upon arraignment is not required to state the true name of the defendant, and neither is the defendant required to disclose his correct name; but such defendant may be prosecuted, either under a fictitious name, or his true name, as appears by the evidence, and if the defendant is charged by a fictitious name, and his true name is disclosed, then his true name should be inserted instead of the fictitious name; but if the true name is not disclosed, and the fictitious name is used as the name of the defend-

ant, such fact does not render such examination void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 420-430, 431; Dec. Dig. § 211.*]

3. CRIMINAL LAW (§ 236*)—PRELIMINARY EXAMINATION—RECORDS—SUFFICIENCY.

The provisions of section 7576, Rev. Codes, as to the holding of an examination and the taking of testimony and certifying the same by the magistrate should be substantially complied with, and the certificate of the magistrate should show that the evidence taken by the stenographer in shorthand is certified by the stenographer, as required by section 4, and that the same is true and correct; if taken in writing, it must be subscribed and sworn to by the witness; and where a witness has given testimony, under the statute, upon preliminary examination, the testimony of such witness should be subscribed by the witness and sworn to before the magistrate, and, after all the evidence has been taken, then the magistrate, under the statute, is required to make a final certificate, certifying that the requirements of this section of the statute have been complied with.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 489-491; Dec. Dig. § 236.*]

4. ASSAULT AND BATTERY (§ 92*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence in this case examined, and held sufficient to support the verdict of the jury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 137-139; Dec. Dig. § 92.*]

5. ASSAULT AND BATTERY (§ 50*)—CRIMINAL LIABILITY—ELEMENTS OF OFFENSE—"ASSAULT."

Under the provisions of section 8727, Rev. Codes, an "assault" consists, not only in an unlawful attempt to commit a violent injury upon the person of another, but such unlawful attempt to commit a violent injury must be coupled with the present ability to commit such injury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 70; Dec. Dig. § 50.*]

For other definitions, see Words and Phrases, vol. 1, pp. 532-533; vol. 3, p. 7532.]

6. ASSAULT AND BATTERY (§ 56*)—CRIMINAL PROSECUTION—INSTRUCTION—"ASSAULT"—"DEADLY WEAPON."

An instruction of the court to the jury upon a charge of assault, "that a mere threat or menace to do violence, without any overt attempt to do violence, is not an assault; that an apparent effort to do violence, without the existence of a present ability at the time to do the violence apparently attempted, would not be an assault; and that a gun is not a deadly weapon, within the meaning of the statute, unless it is loaded; consequently in this case, in order that you may find the defendant guilty, you must find beyond a reasonable doubt that he pointed and aimed a loaded gun at the complaining witness, James A. Percy, within a distance at which the gun, if discharged, could have committed a violent injury upon the person of the complaining witness, and that the defendant unlawfully attempted to commit such injury by means of such gun"—is correct.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 80, 81; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1353-1356; vol. 3, p. 7627.]

7. ASSAULT AND BATTERY (§ 56*)—CRIMINAL RESPONSIBILITY—ELEMENTS OF OFFENSE—INTENT.

Upon a prosecution for assault, if the evidence shows that the gun pointed at the as-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

assaulted party is unloaded, although threats are made, there is an absence of an intent to inflict a bodily injury, because the party charged can have no intent to inflict bodily injury, knowing at the time the gun is drawn that the same is unloaded, and that no injury can be inflicted because of the inability to discharge the same. This rule means necessarily that the person must have an intent and also a present ability to commit the injury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 80, 81; Dec. Dig. § 56.*]

(Additional Syllabus by Editorial Staff.)

8. CRIMINAL LAW (§ 1144*)—APPEAL—REVIEW—PRESUMPTIONS.

Where the record made by the committing magistrate upon a preliminary examination and transmitted to the clerk of the district court, upon which the information was filed, is not in the record on appeal, it will be presumed that the record was properly certified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3018-3037; Dec. Dig. § 1144.*]

9. CRIMINAL LAW (§ 829*)—INSTRUCTIONS.

In a prosecution for assault, an instruction that, in order to find defendant guilty, the jury must find that the gun pointed by defendant at the complaining witness was a loaded gun, and that there was an attempt by defendant to discharge it, was sufficiently covered by an instruction that, in order to find defendant guilty, the jury must find that he pointed and aimed a loaded gun at the complaining witness within a distance at which the gun, if discharged, could have committed a violent injury upon the complaining witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

10. CRIMINAL LAW (§ 829*)—INSTRUCTIONS.

In a prosecution for assault, a request to instruct that the complaining witness' reputation for peace and quietude in the community was bad may be considered as evidence that the complaining witness, and not the defendant, was the aggressor, was sufficiently covered by an instruction that the testimony as to the character of the complaining witness for peace and quietude was admitted to assist in determining whether he gave the defendant reasonable cause to apprehend such danger as to justify the defendant in drawing his gun on him on the ground of self-defense, as defined in the instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from District Court, Ada County; John F. MacLane, Judge.

Luis Yturaspe was convicted of assault with a deadly weapon, and appeals. Affirmed.

Perky & Crow, of Boise, for appellant. D. C. McDougall, Atty. Gen., and J. H. Peterson and O. M. Van Duyen, Asst. Attys. Gen., for the State.

STEWART, C. J. On June 5, 1911, the prosecuting attorney of Ada county filed an information in the district court, charging "that Luis Yturaspe is accused by this information of the crime of assault with a deadly weapon, which said crime was com-

mitted as follows: That said Luis Yturaspe, on or about the 29th day of April, 1911, in the county of Ada, in the state of Idaho, did then and there willfully, unlawfully, and feloniously commit an assault upon the person of one James A. Percy with a deadly weapon, to wit, a certain rifle then and there loaded with powder and leaden bullets. * * *

On the 9th day of June, 1911, the defendant was arraigned upon said information, and, upon inquiry from the court whether the name by which he was informed against was his true name, he replied that it was, and upon said date the court fixed June 10, 1911, as the time for the defendant to plead to the information. On that date the defendant appeared with his counsel and filed a motion to quash and set aside the information, and this motion was overruled.

This motion is based upon a number of grounds. There are, however, only three grounds urged upon this appeal: First, that the defendant has never had a preliminary examination, because the complaint filed in the justice's court before whom the examination was held, charges an offense against one Luis Trespi, and not this defendant; second, that the depositions upon which the information is based do not show that a public offense or crime was committed by the defendant, but, on the contrary, show that the defendant against whom the testimony was taken was Lewis Uterspi, and not this defendant; third, that a portion of the depositions upon which the information is founded is not certified by the magistrate before whom the preliminary examination was had, and that such witnesses were witnesses for the defendant at said preliminary examination.

As a part of such motion, there is an affidavit attached, made by defendant's counsel, which states: "That the criminal complaint on which the information against said defendant is founded and based charges an offense against one Luis Trespi, and against no other person; that the depositions on which the information is based do not contain any evidence against said defendant by name."

The case was tried to a jury and evidence taken, and a verdict was rendered by the jury, finding the defendant, Luis Yturaspe, guilty of assault with a deadly weapon. A motion for a new trial was made and overruled, and an appeal was taken from the judgment, and also from the order overruling the motion for a new trial.

[1] The first error alleged is that the trial court erred in overruling the motion to set aside the information. There is no contention on the part of counsel for appellant that the defendant, who was informed against and tried under the name of Luis Yturaspe, and who in answer to the inquiry of the court, as provided by the statute, replied

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that such was his true name, is not the person against whom the complaint was filed in the justice's court under the name of Louis Trespi, and who was committed under the name of Lewis Uterspi; and, in the absence of affirmative showing that the appellant, Luis Yturaspe, is not the same person as Louis Trespi or Lewis Uterspi, who was charged in the complaint filed before the magistrate, and who waived the preliminary examination, this court will assume that the information was filed against the same person charged in the magistrate's court and committed to the district court. The fact that the defendant was charged and committed under a fictitious or erroneous name would be no reason for quashing or setting aside the information, where it also appears that the information stated the true name of the defendant, and also the same name given and stated by the defendant to be his true name, upon the court making inquiry of the defendant, under the statute, as to whether the name stated in the information was his true name. Section 7690, Rev. Codes, provides: "When a defendant is indicted by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered it must be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment." The mere fact that the appellant was charged before the magistrate by the wrong name would not prevent the holding of a preliminary examination, for the purpose of discovering the truth or falsity of the charge made against the person brought before the magistrate for such preliminary examination, or prevent the magistrate, at any time during the proceedings, from correcting the name and substituting the correct name for the fictitious and erroneous name.

[2] The complaint filed with the magistrate holding the preliminary examination, under the provisions of section 7509, Rev. Codes, is required to contain the allegation, in writing, that the person has been guilty of some designated offense. When the defendant is brought before the magistrate upon arraignment, the magistrate is required to inform the person of the charge made against him and his right to counsel, and the magistrate is then required to hold the examination, and at the examination the magistrate is required to read to the defendant the depositions of the witnesses examined on taking the information, and witnesses may be examined; and after such examination, if it appears from such examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate issues his commitment to the district court. There is nothing in the statute prescribing the proceedings requiring that the complaint charging an offense before the magistrate shall state the true name of the defendant, or that the

defendant shall give his true name. So, before a magistrate on a preliminary examination, a party may be charged with a crime under any name, and when the true name of the defendant is discovered, if disclosed, it may be inserted in place of the fictitious name. The appellant in this case was certainly not denied any constitutional or legal right by reason of the fact that the defendant, whose true name is Luis Yturaspe, was charged by information with an offense under the name of Luis Yturaspe, when it also appears that the defendant was charged before the magistrate, in a written complaint, with the same offense under the name of Louis Trespi, and committed under the name of Lewis Uterspi.

The similarity of the names, though differently spelled, used as the name of the defendant before the magistrate and in the complaint and in the commitment, and also in the information filed in this case, would lead an ordinary person, unfamiliar with the pronunciation of such names, to pronounce them as the same, and the similarity of such names is sufficient to invoke the doctrine of *idem sonans*. We do not believe that the defendant was in any way prejudiced by reason of the fact that he has been called by a different name in the procedure leading up to the filing of the information, inasmuch as it affirmatively appears that the person of the defendant was intended each time such name was used.

[3] The second ground urged on this appeal, that the court erred in overruling the motion to quash, for the reason that the committing magistrate failed to certify all the depositions or all of the testimony taken before him, cannot be sustained. The record made by the committing magistrate upon the preliminary examination and transmitted to the clerk of the district court, and upon which the information was filed, is not in the record, and it will be presumed that the same was properly certified. *People v. Grundell*, 75 Cal. 301, 17 Pac. 214.

[3] Section 7578, Rev. Codes, provides: "In all cases which must afterward be investigated by the grand jury, or prosecuted by information, the examination must be taken, unless the person charged with the offense shall waive his right to such examination, and cannot be unreasonably delayed by either party and the testimony must be reduced to writing by the magistrate, or under his direction, and authenticated in one of the following forms: * * * 4. The evidence, if taken by a stenographer in shorthand, shall be transcribed by the stenographer and certified to as true and correct; if taken in writing it must be subscribed and sworn to by the witness, or if he refuses to sign it, his reason for refusing must be stated in writing as he gives it. 5. It must be signed and certified by the magistrate."

This provision of the statute is mandatory

in the sense that an information charging a person with a crime cannot be filed against a person without an examination held under the provisions of this statute. *State v. Braithwaite*, 3 Idaho (Hask.) 119, 27 Pac. 731. And the provision with reference to holding such examination and the taking of the testimony and certifying the same by the magistrate should be substantially complied with.

This question was considered by this court in the case of *State v. Clark*, 4 Idaho, 7, 35 Pac. 710, and this court said: "It is true the order of commitment was not indorsed on the depositions, as required by section 7579 of the Revised Statutes; but that does not deprive the order of commitment of its validity. The order was reduced to writing, and entered in the official docket of the magistrate. That was sufficient. * * * The failure of the committing magistrate to indorse the order of commitment on the depositions taken on the preliminary examination does not deprive the order of its validity, or affect any substantial right of the defendant. * * * Informalities or irregularities in the proceedings will not render them invalid, unless they actually prejudice the defendant, or tend to his prejudice, in respect to a substantial right." And in considering the certificate of the magistrate this court said: "There was a substantial compliance with the law."

The certificate required under the provisions of section 7576 is not in the record, and in the absence of such showing the court will presume that the magistrate made the certificate required by the statute. There is, however, in the record a bill of exceptions, which contains the testimony of one witness, to which is attached a certificate of the magistrate, and in that certificate the magistrate certifies that "the foregoing annexed deposition of Walter Thompson, a witness sworn and examined in behalf of said plaintiff, the said state of Idaho, was taken in the presence of Luis Yturaspe, the defendant in the above-entitled cause, at my office in said precinct on the 8th day of May, A. D. 1911, and that said defendant, Luis Yturaspe, was confronted with said Walter Thompson, the said witness, in my presence, then and there sitting as a court to hear the examination in said cause, during the time said witness Walter Thompson was testifying and his said deposition was being taken; and that said defendant, Luis Yturaspe, had then and there an opportunity to cross-examine and question said Walter Thompson, witness in behalf of said plaintiff, the said state of Idaho, upon all matters brought out on the examination in chief. That before said witness Walter Thompson testified in said cause and his said deposition was taken, he, the said witness, in behalf of said plaintiff, was by me, in the presence of Luis Yturaspe,

said defendant, duly sworn to tell the truth, the whole truth, and nothing but the truth; I then and there having the power and lawful authority to administer said oath in that behalf. That the said deposition was taken in shorthand, and thereafter transcribed, and I certify that the annexed deposition is a true and correct record of the testimony given by said witness."

The statute above does not require that the magistrate shall attach a separate certificate to the testimony of each witness. It does, however, require that the evidence taken by the stenographer in shorthand be certified by the stenographer, as required by subdivision 4, and that the same is true and correct; if taken in writing, it must be subscribed and sworn to by the witness; and, where a witness has given testimony under this statute upon preliminary examination, the testimony of such witness should be signed by the witness and sworn to before the magistrate; and, after all the evidence has been taken, then the magistrate, under the statute, is required to make a final certificate, certifying in such certificate the compliance with the requirements of this section of the statute. *State v. Clark*, 4 Idaho, 7, 35 Pac. 710. The only inference that can be drawn from the showing in this case is that the magistrate made a separate certificate to the evidence of each witness, as is shown to have been done by the testimony of the witness Thompson; and, if such certificate was made with reference to the other witnesses, the record would be complete, and the certificates sufficient under the statute. Whether all the evidence was certified up does not appear, because the complete record of the preliminary examination is not before us.

The next error assigned is the sufficiency of the evidence to support the verdict. It appears from the evidence that on the 29th of April, 1911, the appellant was in the employ of the Highland Live Stock Company as foreman, and in charge of the handling of different bands of sheep owned by the Highland Live Stock Company, which were being trailed from the corral and ranch of the company to the mountains, after the marking of the lambs after lambing. While the appellant was marking lambs at the ranch, he was informed by one of the herders, who came to the corral, that some men with dogs had set upon the bands of sheep that were being trailed, and that there was danger of two bands of sheep being mixed, and that such sheep were at such time in the neighborhood of the ranch of James A. Percy; that upon this information being received by the appellant he and three men in his employ got on their horses, some of them armed with rifles and six-shooters. There is a conflict in the evidence as to just what rifles or six-shooters these parties carried; but it is apparent that at least two of them had rifles. These three men rode from the corral, where

they were marking lambs, up to the ranch owned by the Highland Live Stock Company, where they stopped for a short time for one of the party to saddle his horse, which he had been riding barebacked. They then proceeded up the road in the direction of the sheep, and after they passed up the road they passed the Arrow stage, which was going in the same direction. After the passage of the stage, they turned off to the right of the road in the direction of the scattered band of sheep. The appellant had with him a rifle, which he carried in his hand. James A. Percy and his brother, Walter Percy, were repairing a fence up the road, about a quarter of a mile from the point where the appellant and the men accompanying him turned to the right to go up to where the sheep were. The appellant and the men with him rode up to the right of the road, after leaving it, until they came within hailing distance of James Percy and his brother, Walter Percy, and a man named Donnelly, who were working about 50 feet to the left of the road, repairing a fence upon the property of the Percys. James Percy shouted to the appellant to come down. The appellant, after receiving the above request, and the men with him turned and rode down to the point near where the Percys were. At that time James Percy was advancing across the ditch in the direction of the road, carrying a hammer in his hand, and the evidence is somewhat conflicting as to what took place at that time.

Gard, the stage driver, testifies that the appellant and the three other parties with him passed the stage he was driving, and afterwards he saw them again up at Percy's, and heard a good deal of language and abuse, and he says: "The defendant and three others, who were with him, reached the point where the Percys were about the same time I did. There was another gentleman, with his rifle leveled at the Percys, besides the defendant. I could not swear his rifle was cocked; but he had it leveled on him at that time. The defendant had a gun or rifle leveled on Percy several minutes. Another party had a rifle leveled at Percy. The other parties, who were armed with six-shooters, were off on the ground. I saw the defendant and the other parties, after they passed me, until they arrived at the point where the Percys were. I was in sight of all of them all the time. They traveled at a pretty fast gait after they passed me. The defendant leveled the gun on Percy; he held it in a position to shoot. I don't know whether he held it to his shoulder; held it up like that. I heard Percy call to the defendant. When he rode up, he had not done anything."

Patrick Mullen, a passenger on the stage driven by Gard, testifies that he saw the defendant in Highland Valley, and the defendant and three others were riding pretty

fast, and rode up higher than the road on the hill and turned down and made a short cut in front of the stage and made a halt. "I saw James Percy at the fence. When the defendant and the others rode down, two of them had guns pointed, and two others got off their horses. The parties appeared angry, of course. The horses of two of them who leveled guns at Percy were side by side, and I saw the Percy boys coming at a quick walk towards them, and the two others got off, seemingly to hold them back, and they kept their guns pointed until the man who done the talking ceased, and they drove away. We just got there together. When we got up there and stopped, the Percys were up about to where the defendants were. I thought as he came forward—but I am not certain what he said; I know he talked. I think I heard him say, 'You go back into that hole.' I think I heard that word. I am not certain; my best recollection is he said to Percy, 'You get back into that hole.' The Percys kept on advancing towards the defendant up to the time he pointed the gun at them; the guns were pointed at that time. They came forward a little after the guns were pointed at them."

Aaron Donnelly, who was working with the Percy brothers, testifies that Percy did not have any gun or weapon with him. "Walter Percy did not have any gun or weapon. James Percy was on his ranch or land at the time the defendant and his party rode up there. The defendant and those with him on horseback ran right up there in a rush where the Percy boys were; they stopped suddenly. The Percys did not go away from the fence; they stayed right at the fence. They were working on it. I don't think there was any ditch there towards the road. I don't know of any, if I remember right. I was about 150 or 175 yards away. I could hear the Percys talking. I couldn't understand any of the conversation; I was too far off. I didn't hear the Percys shout and attract my attention. When the defendants reached the road, the Percys were still mending fence, and the stage came up about that time."

Walter Percy testifies: "What attracted my attention to the defendant that day was that he came over there and drew a gun on my brother. I was there when he drew the gun. Those three other men, his brother, and these other two fellows accompanying him at the time. They came on horseback, with rifles; two of them had rifles, and two of them had six-shooters. They came at a pretty lively gait. Before the defendant and the parties with him came there, we were building fence, a barb wire fence—rebuilding it, fixing it up. Donnelly was working there that day. I observed that the defendant cocked the gun at the time he held it on my brother. At that time he said—he threw his gun down on him and told him to throw

up his hands and said, 'You son of a bitch, I will shoot you'—something of that kind. He threw his gun down on him and cocked it at the same time. It was a Winchester rifle. At the time he cocked the gun and leveled it on my brother, he said he came to shoot him, and threw the rifle down on him, cussing. He done a good deal of cussing; called him a son of a bitch, and said he had come there for that purpose, and he had his gun with him. One of the parties who got off their horses made a rush at me with his quirt, going to hit me with it. I backed up and raised the shovel up—I had a shovel in my hand—and he stepped back. He made a rush at me, and said, 'I will get you some of these ———.' I just raised the shovel, and he stepped back. My brother, James Percy, when the parties rode up, had a hammer in his hand, and I had a shovel; we were fixing the fence. My brother nor I had any other weapon there with us. I observed the stage drive up there on that day. I was acquainted with the parties who were on the stage. I judge the party who got off the horse, who accompanied the defendant, was off about 15 or 20 feet from me when he got off his horse and made the attempt to strike me. When the defendant and the other parties were approaching my brother on horseback, my brother hollered to Luis, as they were coming that direction, something about the sheep being in there. He said to Luis, 'I want to see you a minute, Luis.' My land lies on both sides of the road with reference to the way the parties were coming; the road goes through my land. I said my brother had shouted to Luis to come over there; that he wanted to speak to him; but the defendant was coming in our direction when he shouted. He was upon the hill, kind of coming in an angling shape round the hill. He was probably 100 yards or more away. The defendant rode right across the road, and the minute he got across the road he threw his gun down on him. My brother at that time had a hammer in his hand, nailing the staples, and I had a shovel in my hand. My brother was again the fence, nailing staples. I stated he stepped across the gully, along the fence, and he walked up the fence and went across the gully and met the defendant, and the defendant threw the gun down on him. The stage was there at that time. The defendant was right in front of the leaders just below the road when he did this, right in front of the stage, and he cocked his gun. I heard it click. Was, I judge, about 15 or 20 feet from him when I heard it click. Walter Thompson was there at that time on horseback. He came up just as the stage stopped. The defendant spoke to my brother; told him to throw up his hands. I couldn't say that he told him to stop, too. He said, 'Throw up your hands.' He didn't say, 'Stay right there.' Didn't say, 'Go back into that hole.' Didn't say anything of that kind, only cussing him. I noticed certain

parties on the stage. I noticed Mr. Gard and Mr. Mullens. They were right there when this affair happened, right there. I mean the stage come right there in the road. Luis sat right on his horse right below the road, right in front of the leaders."

James Percy, the complaining witness, among other things, testifies that he was acquainted with the defendant, had known him for five or six years, and saw him on the 29th of April, 1911. He was riding along the road by the fence he was fixing. There were with him three other men that were employed by him; they were traveling horseback. "At that time the defendant threw his gun on me, his Winchester; him and another man that was with him. The two parties at that time leveled their guns at me. I observed that the defendant cocked his gun at that time. I couldn't say that the other fellows did; but Luis did his. He cocked it with his finger when he threw it to his shoulder; he just pulled the trigger back. The other party who pointed his gun was right alongside of the defendant; the horses standing side by side. I didn't observe whether the other party's gun was loaded or cocked, or not. I did not have any gun with me on that day. I was about 10 feet from the defendant about the time he had his gun in his hand, and on horseback, pointed at me. I spoke to the defendant when he was riding down the hillside towards me. I saw him coming along the hillside, and saw that he had a rifle in his hand, and I spoke to him then, when I saw him coming in that way. I told the defendant I wanted to see him. I did not shout. This was when he was probably 100 or 150 feet away coming directly towards me. I stepped across that ditch. It is a little ravine. It has no ditch to it. It is just a little ravine; and I stepped across it. I had a hammer in my hand. I held the hammer the same as any man would hold a hammer, in my hand, right by the handle. I came towards the defendant. I stepped across the ravine towards him. The defendant, at that time, was right at the road; he came right across the road. He probably came a foot or two across the road. I heard the gun cocked; heard it click. I was away from the stage the length of a four-horse team when the gun was cocked. It was a Winchester rifle. I don't know how long the defendant remained pointing his gun at me, probably 10 minutes, something about like that. He kept it at his shoulder all the time; kept it pointed directly at me; kept it cocked with his finger on the trigger. I didn't hear any report, if he shot it. I saw him ride off."

Walter Thompson testifies that he was riding along the road when he saw the defendant and the other parties riding, and saw them stop at the ranch, and that they got some guns, and then they rode on. "I observed the defendant and the parties who were with him after they left the ranch. I

seen them at the right at the fence line of James Percy, a little west of the Percy ranch—of the residence of the Percy ranch. I observed that the defendant had a gun, rifle, pointed towards James Percy, like this, which was cocked. At the time the defendant rode up there, just at the time he rode up, I wasn't there until just a minute or two after he rode up; but when I did ride up they were stopped, and then I heard him make a statement. They were quarreling over the range. He made kind of threatening statements, and all kinds of language. He threatened to kill him; that is what he said."

The defendant in the case testified, among other things, that he was marking lambs at the corral, and there were with him Roman Bariassara, Timoteo Obelta, and Urbano Obelta and the sheep herder, who was herding the bunch. "I went up the road that morning after they let me know what was going on. When I got this information, I told the other boys helping me: 'You fellows come up with me and stop those fellows driving them sheep. If we don't, they will have them mixed.' And they said: 'Yes; we will go.' First we went up past the ranch. When we passed the ranch, we stopped at the ranch and got a saddle. One of them was riding bareback. We were going fast when we were going up to the ranchhouse. I went in the direction of the sheep after I left the road. I know James A. Percy there, the prosecuting witness. When I first saw him, I been pretty near a quarter of a mile from him. I did not go over where he was, I was going in the direction of the sheep. He says, 'Luis!' I didn't understand anything else. I didn't notice him wave his arms. When he yelled 'Luis,' I just turned around and went down where he was. When I got in by the road, he quit his fence—working on the fence—coming towards me, passed a little washout, and came across that; he come right fast to me. At that time Percy came straight to me, and when he got about 25 or 30 feet I told him, 'You stop, please.' He was coming on here; then I had my gun, and I told him, 'You hold your hands up.' I was afraid he had something in his hands, and I didn't know what it was; had it behind him. He raised his hands, and I saw it was a hammer. I saw the stage pass—passed the stage on the road; and the stage came there about three or four minutes after we got there, I think. As to what took place, just as I said, he stopped, I took my gun down, and he tried to get in around after something; and I don't know who the other party was after, that told him to stay back. He said: 'I 'aint got anything, I 'aint got no gun here.' He went on and got something, nails or something, and went to the fence; then he was talking, and he was right there at the fence, and I start in talking to him, and I told him to quit driving my sheep out in the free range; he didn't have any busi-

ness to do that; and if he got anything to do agin them, he can do it by the law. And then he turn again to his fence. I told him to quit driving my sheep; he didn't have any business to do that. He told me I didn't have any business to keep those sheep there. He owned this land. I says: 'Well, you own that land; but I got to have some country to go through with the sheep.' I had a little Winchester rifle; it wasn't loaded. I did not say, 'You son of a bitch, I will kill you.' I never said, 'I will shoot you.' I am positive I did not use that language. James Percy did not say anything to me before I told him to stop. The first time I told him to stop he didn't do it. After a couple of steps more, I told him to hold his hands up, because I was afraid of him."

Roman Bariassara testified that he was one of the party who was with the defendant on April 29th. "After we reached the place where the men were fixing the fence, Mr. Percy, the man here, was coming towards Luis, and Luis told him to stop. Percy, at that time, had some object or some tool in his hand. I could not tell, when I first saw him, what he had in his hand. Luis told him to raise his hands or stop, and then pointed the gun at him."

Urbano Obelta testified to practically the same state of facts as the previous witness, and likewise Timoteo Obelta.

There is some evidence as to the bad reputation of the prosecuting witness. This is the material and essential evidence that was introduced as to what took place leading up to and at the time the assault is alleged to have occurred.

[5-7] The trial court instructed the jury:

"That a mere threat or menace to do violence, without any overt attempt to do violence, is not an assault; that an apparent effort to do violence, without the existence of a present ability at the time to do the violence apparently attempted, would not be an assault; and that a gun is not a deadly weapon, within the meaning of the statute, unless it is loaded; consequently in this case, in order that you may find the defendant guilty, you must find beyond a reasonable doubt that he pointed and aimed a loaded gun at the complaining witness, James A. Percy, within a distance at which the gun, if discharged, could have committed a violent injury upon the person of the complaining witness, and that the defendant unlawfully attempted to commit such injury by means of such gun.

"You are instructed that a loaded gun is one that has powder and a missile in the barrel thereof, so that if the hammer was cocked, and the trigger pulled, the gun would be discharged. The mere fact that the rifle held by the defendant had cartridges in the magazine does not make it a loaded rifle."

These two instructions were evidently based upon the provisions of section 6727,

Rev. Codes, which provides as follows: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

It would seem, by the provisions of this statute, that it was the intention of the Legislature in defining the crime of assault that the offense should consist, not only in an unlawful attempt to commit a violent injury upon the person of another, but that such unlawful attempt to commit a violent injury must be coupled with a present ability to commit such injury. Applying this statute to the evidence, and under the instructions of the trial court given to the jury, it was necessary for the jury to find from the evidence that the appellant made an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of the prosecuting witness, the person named in the information. The appellant contends that the evidence wholly fails to show that the drawing of the gun upon the prosecuting witness and the threatening to shoot him was an assault, because the only evidence introduced in the case with reference to the ability to commit the injury shows the gun was unloaded at the time it was drawn and the threat made. The only direct evidence, as we have shown, with reference to whether the gun was loaded at the time it was drawn, and the threat made is the statement made by the defendant, while upon the witness stand, that the gun was not loaded. No other witness testified with reference to whether the gun was or was not loaded. If the statement made by the defendant was true, and the gun was in fact not loaded, then the assault, though unlawful, was not coupled with a present ability on the part of the defendant to commit the injury.

The state of California has a statute identical with that of this state; and in construing that statute the Supreme Court of that state, in a well-considered decision rendered by the court in the case of *People v. Sylva*, 143 Cal. 62, 76 Pac. 814, says: "That the defendant, while standing in the hall of the house, at a distance of over 15 feet from Pistolesi, pointed a gun at him, in a position indicating an intention to shoot, saying to Pistolesi, 'I will shoot you if you don't get out of the house,' and that at that time the deputy sheriff, who was near Pistolesi, closed the door. This constituted the only assault that was made, and these facts are substantially admitted by the defendant in his testimony. There was no attempt to use the gun as a weapon, otherwise than by firing it, and it was not in fact fired. The only serious dispute concerning any evidence in the case was over the questions whether or not the gun was loaded, and whether or not there was any attempt to discharge it. Under these circumstances, it must be conceded that, if the gun was not loaded, there was no assault, either with a deadly weapon or

otherwise. Pointing an unloaded gun at another, accompanied by a threat to discharge it, without any attempt to use it, except by shooting, does not constitute an assault. There is in such a case no present ability to commit a violent injury on the person threatened, in the manner in which the injury is attempted to be committed."

The rule announced in *People v. Sylva* has been also announced in the following cases: *State v. Napper*, 6 Nev. 113; *State v. Godfrey*, 17 Or. 300, 20 Pac. 625, 11 Am. St. Rep. 830; *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42; *Klein v. State*, 9 Ind. App. 365, 36 N. E. 763, 53 Am. St. Rep. 354; *State v. Sears*, 86 Mo. 169; *Fastbinder v. State*, 42 Ohio St. 341; *McConnell v. State*, 25 Tex. App. 329, 8 S. W. 275; *Underhill on Evidence*, §§ 352, 353, 354. All these cases clearly announce the rule to be that if the evidence shows that the gun pointed at the assaulted party is unloaded, although threats are made, there is not only an absence of a present ability to commit violent injury, but there is also an absence of an intent to inflict a bodily injury, because the party charged can have no intent to inflict bodily injury, knowing at the time the gun is drawn that the same is unloaded, and that no injury can be inflicted because of the inability to discharge the same. This rule of law necessarily means the proof must show an intent and also a present ability. We think that the above is the correct rule of law, notwithstanding the fact that there are cases holding that the pointing of a rifle at another, with a threat to use it, is of itself evidence of intent to inflict a violent injury and evidence of ability to commit such injury.

[4] This brings us to a consideration of the question whether the evidence is sufficient to justify the jury in concluding that the rifle, drawn by the appellant upon the prosecuting witness, was loaded. In arriving at the conclusion that the rifle was loaded, the jury had a right to consider all the facts and circumstances of the case. The jury had a right to take into consideration the fact that the appellant was informed that persons were using dogs and chasing sheep trailing from the corral where the appellant was working up to the mountains, and the appellant's actions upon such information, and the calling to his assistance other parties and their equipment with firearms in going from the corral to the place where the sheep were, and the manner in which they proceeded there, and their approach to the place where the prosecuting witness was, and the opportunity of the appellant and the other parties to observe the fact that the prosecuting witness was engaged upon his own lands in a civil and quiet way, and that upon their approach the prosecuting witness came in their direction, and in doing so had no dangerous or deadly weapon upon his person, and that the

prosecuting witness made no threats against the appellant or any other person, nor exhibited any dangerous or deadly weapon, or showed any disposition to assault or in any way injure the appellant or any of those accompanying him. There is no conflict whatever in the evidence that the prosecuting witness, at the time the gun was drawn and the threat made by the appellant, in no way provoked the appellant, or made any threats or offered any insult to the appellant, or in any way intimidated or aggravated the appellant, or made any demonstration, or manifested any intent to do any injury to the appellant or those associated with him. The appellant drew his gun upon the prosecuting witness and commanded him to throw up his arms, and made the threat that he would shoot him.

There is but one conclusion, however, that can be drawn from the facts of the appellant from the time he first received the information and started to the place where the sheep were, and that is that the appellant was excited and angry, and left his place prepared to make a violent assault, and that this condition of mental anger evidently existed from the time he left the corral until the instant when the defendant raised his gun and directed it toward the prosecuting witness and threatened to shoot him; the malice and feeling clearly appear, and that it was the intention of the appellant to execute his threat at the time he drew his gun. The appearance of the stage, however, at that moment, and the persons present, may have checked his recklessness and prevented the consequences that might follow. The conduct of the appellant on that occasion, and the language used, was such as cannot be justified by the law. The only conclusion that the prosecuting witness or the jury could arrive at was that the appellant was looking for trouble, and that he was ready to do his share of the fighting when he drew his gun upon the prosecuting witness, and that he was the aggressor.

Considering all these facts and circumstances, and the motive and purpose of the appellant from the time he left his corral to the time he pulled the gun on the prosecuting witness, the only reasonable and common-sense view that can be taken of such facts and the inference drawn therefrom establishes the conclusion that the gun was loaded; and the jury had a right to act upon these facts and circumstances and conclude that the statement made by the appellant that the gun was not loaded was not true. We do not think that this court would be justified in saying that the bald statement of the appellant that the gun was not loaded is sufficient to overcome the evidence offered on the part of the state, showing facts and circumstances and the acts and conduct of the appellant.

It is apparent, when the evidence is care-

fully examined, that there was no hostile action on the part of the prosecuting witness which induced or justified the defendant in drawing the gun and making the threat to shoot, or that the acts of the prosecuting witness were of such a nature as to justify the defendant in acting in the manner in which he did act, in self-defense. The testimony of the persons who were on the stage and persons disinterested in any controversy between the defendant and the prosecuting witness, is all to the effect that the defendant and those accompanying him were armed and mounted, and that they rode rapidly down to the place where the prosecuting witness was, and that at that time the prosecuting witness was engaged in mending his fence on his own premises, and that there was no hostile demonstration or angry words or threats on the part of the prosecuting witness; and with such conditions existing the assault made by the defendant was certainly unprovoked and unjustifiable.

Mr. Underhill on Criminal Evidence, in section 6, lays down the general rule, which has been approved by this court in *State v. Levy*, 9 Idaho, 483, 75 Pac. 227, as follows: "Circumstantial evidence alone is enough to support a verdict of guilty of the most heinous crime, provided the jury might believe, beyond a reasonable doubt, that the accused is guilty upon the evidence. No greater degree of certainty in proof is required where the evidence is all circumstantial than where it is direct; for in either case the jury must be convinced of the prisoner's guilt beyond a reasonable doubt. They are bound by their oath to render a verdict upon all the evidence; and the law makes no distinction between direct evidence of a fact and evidence of circumstances from which the existence of the fact may be inferred. * * * The first duty of the jury is to determine carefully upon all the testimony as stated by the witnesses whether the incriminating circumstances, from which they may infer guilt, are proved beyond a reasonable doubt. No general rule can or should be laid down as to what constitutes proof of circumstances in any particular case. Each case is a rule unto itself, and is to be determined upon its peculiar circumstances."

It is perfectly apparent that the appellant was enraged toward the prosecuting witness from the time he left the corral up to the time he pulled the gun upon the prosecuting witness, and that he drew the gun in a way to indicate that the gun was loaded, because, if the gun was not loaded, then his statement that he would shoot the prosecuting witness had no meaning whatever. His declaration at that time to the prosecuting witness was a clear and positive declaration that the gun was loaded, and that fact contravenes his statement upon the witness stand; for the jury had a right to conclude that when he made such latter statement he

was not telling the truth, especially in view of that statement and the other facts and circumstances of the case. All the facts and circumstances had a tendency to prove that the gun was loaded; and it was with the jury to say whether this evidence satisfied their minds beyond a reasonable doubt. Whether the gun was loaded was a question of fact for the jury; and in deciding this question the jury had the right to determine the credibility of the witness. We think there were facts and circumstances sufficient to justify the implied finding that the gun was loaded. *People v. Montgomery*, 15 Cal. App. 315, 114 Pac. 792; *John Crow v. State*, 41 Tex. 468.

[8] It is urged upon the part of the appellant that the trial court erred in refusing to give an instruction, requested by the appellant, as follows: "Before you are entitled to find the defendant guilty, you must find from the evidence, beyond a reasonable doubt, that the gun pointed by defendant at James A. Percy was a loaded gun, and that there was an attempt on the part of the defendant to discharge it." The substance of this instruction was given by the court in the instruction to the jury, as follows: "Consequently in this case, in order that you may find the defendant guilty, you must find beyond a reasonable doubt that he pointed and aimed a loaded gun at the complaining witness, James A. Percy, within a distance at which a gun, if discharged, could have committed a violent injury upon the person of the complaining witness, and that the defendant attempted unlawfully to commit such injury by means of such gun." It will thus be seen that the instruction given tells the jury that they must find beyond a reasonable doubt that the defendant pointed and aimed a loaded gun at the complaining witness, which is, in substance, the same as the instruction requested by the defendant.

[10] During the trial witnesses were produced by defendant, who testified to the general reputation of the prosecuting witness in the community in which he resides for peace, and such witnesses testified that it was bad. This evidence is somewhat indefinite, and the defendant requested the court to give to the jury the following instruction: "The fact, if it be a fact, that James A. Percy's reputation for peace and quietude in the community where he lived was bad may also be considered by you as evidence tending to show that said Percy, and not the defendant, was the aggressor." This instruction was refused by the trial court; but the court did give to the jury the following instruction: "The testimony offered as to the character of the complaining witness for peace and quietude is admitted for the purpose of assisting you in determining whether or not the complaining witness gave the defendant reasonable cause to apprehend such danger as to justify the defendant in draw-

ing his gun on him, if he drew his gun on him, on the ground of self-defense, as defined in the foregoing instructions. But if you find from the evidence that the defendant was the aggressor, and sought the complaining witness and drew his gun upon him without any hostile demonstration on account of aggression on the part of the complaining witness, then such testimony as to the character of the complaining witness is immaterial, and affords no excuse to the defendant for drawing his gun upon him, if he did in fact so draw his gun."

A comparison of these two instructions clearly shows that the trial court instructed the jury that the evidence with reference to the character of the prosecuting witness should be considered as tending to show whether the prosecuting witness or the defendant was the aggressor, and, if the defendant was the aggressor, then the evidence was not material. But it was material for the jury to consider, in determining the question as to whether the prosecuting witness or the defendant was the aggressor; and that was the essence of the request in the instruction requested by counsel for defendant. For this reason the court committed no error in refusing the request of the defendant.

The judgment, therefore, is affirmed.

SULLIVAN, J. (concurring in the general conclusion). I am unable to concur in some of the conclusions drawn from the evidence by Chief Justice STEWART. The evidence does not show that the appellant knew who the parties were that were dogging and running his lambs and ewes. That fact was reported to him, and, having two bands of lambs and ewes in that vicinity, he did not want the bands mixed, and took three of his men and went immediately to find the sheep. He did not know at that time who had been dogging and running his sheep, and the evidence does not show that he knew where the complaining witness was until said witness called to him, when he was from 100 to 300 yards away and going in another direction. The complaining witness called to him and told him he wanted to see him, and he then turned and rode down in the vicinity of the complaining witness; and before he got to him the complaining witness left the fence that he was fixing, and with a hammer in his hand went across a ditch some 30 or 40 feet to meet the defendant. The evidence shows that at that time the defendant was on his horse and in the highway. The complaining witness continued to advance toward the defendant until he arrived to within about 10 feet of him; and defendant, knowing the fighting reputation of the complaining witness, according to his testimony, threw his gun on him and told him to stop, and not to come nearer. The complaining witness himself testified as fol-

lows: "I was about 10 feet from the defendant about the time he had his gun in his hand, and on horseback, pointed at me. * * * I called the defendant because I wanted to talk to him. I was at the fence when I called, and then, when he came down towards me, I stepped out towards the road over from the fence. I stepped across that ditch. It is a little ravine. It has no ditch to it. It is just a little ravine; and I stepped across it. I had the hammer in my hand. I held the hammer the same as any man would hold a hammer, in my hand, right by the handle. I came towards the defendant. * * * The defendant, at that time, was right at the road. I came right across the road; he probably came a foot or two across the road." This is a part of the testimony of the complaining witness, and it shows that he had called the defendant, and then proceeded with his hammer in his hand toward the defendant to within about 10 feet of him, and then the defendant threw his gun down on him and told him not to come nearer.

A witness on behalf of the state, by the name of Thompson, testified, among other things, as follows: "Percy [the complaining witness] was standing there when the defendant was holding his gun on him. They were talking back and forth. I said they were rather abusing each other, * * * and the defendant was holding him back with a gun." Why holding him back with his gun? Because he was advancing on him. The evidence shows that the reputation of Percy was bad for peace and quiet; that he appeared to be of a fighting disposition; and having called the defendant down to where he was, and proceeded toward him with a hammer in his hand to within 10 feet of defendant, before he threw his gun down on him, indicates, to my mind, that the defendant did only what any prudent man would do to protect himself under the facts and circumstances shown by the evidence. According to Percy's own testimony, the defendant was not more than a foot or two out of the main traveled road, on his horse, and Percy was advancing on him with his hammer, and had arrived within 10 feet before the defendant made any demonstration toward him whatever. And Thompson, a disinterested witness on behalf of the state, testified that they (defendant and complaining witness) stood there, talking back and forth, with the defendant holding the complaining witness off with a gun. It must have appeared to that witness that the complaining witness was desirous of getting nearer than 10 feet to defendant, else there would have been no necessity of holding him off with his gun. He certainly could have talked to defendant at a distance of 10 feet.

The Chief Justice states in his opinion that the only conclusion that the prosecuting

witness or the jury could arrive at was that the defendant was looking for trouble. I do not think any such conclusion can reasonably be drawn from the evidence. The defendant knew the character of the complaining witness; and he knew if he let him approach nearer than 10 feet with a hammer in his hand he might knock him off his horse before he could get out of his reach, or before he could level his gun on him. In my view of the evidence, it does not matter whether the gun was loaded or not; for the defendant would have a right, in self-defense, to stop the complaining witness from coming nearer than 10 feet by drawing his gun on him, if he were coming to him with a hammer in his hand. In this case I think it a violent presumption that the gun was loaded, in the face of the positive testimony of the defendant that it was not loaded, but that he used it as he did to prevent the defendant from coming any nearer to him.

It is surprising to me, from all of the evidence contained in the record, that the jury should find the defendant guilty. The jury must have concluded that the complaining witnesses and other witnesses for the state, as well as the witnesses for the defense, did not testify to the truth, as the evidence shows that the complaining witness advanced within 10 feet of the defendant, and that defendant was holding him off with his gun, thus preventing him from coming within striking distance with the hammer.

However, since the question was presented to the jury whether the defendant acted in self-defense in repelling a threatened injury, and they found against him on that point and recommended him to the mercy of the court, I am inclined to concur, and do concur, in affirming the judgment.

... AILSHIE, J., concurs.

WALBRIDGE et al. v. ROBINSON, State Engineer.

(Supreme Court of Idaho. July 3, 1912.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 3*)—TITLE—PUBLIC OWNERSHIP.

Under the provisions of the Constitution, art. 15, § 1, and section 3240, Rev. Codes, all the waters of the state, when flowing in their natural channels, including the waters of all natural springs or lakes within the boundaries of the state, are declared to be the property of the state.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 1; Dec. Dig. § 3*]

2. WATERS AND WATER COURSES (§ 3*)—TITLE—PUBLIC OWNERSHIP.

The title to the public waters of the state is vested in the state for the use and benefit of all the people of the state under such rules and regulations as may be prescribed from time to time by the lawmaking power of the state, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

such title is held by the state in its sovereign capacity as the representative of all the people.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 1; Dec. Dig. § 3.*]

2. WATERS AND WATER COURSES (§ 3*)—POLICE POWER—NEGATIVE COMMUNITY.

The courts and text-writers uniformly class wild animals, fish, game, gas, light, air, and water in the same category as things of "the negative community," or the property of no one, and subject to the regulation and control of the state in its sovereign capacity.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 1; Dec. Dig. § 3.*]

4. WATERS AND WATER COURSES (§ 5*)—APPROPRIATION—POWER OF STATE.

The state has a right to forbid and prohibit the appropriation and diversion of its public waters for application and use beyond the confines of the state and within the jurisdiction of another state.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 5.*]

5. STATUTES (§§ 174, 175*)—CONSTRUCTION—EXTRATERRITORIAL APPLICATION.

Statutes are intended to apply and be confined in their operation to persons, properties, and rights which are within the territorial jurisdiction of the lawmaking power; and one who claims the benefit of such laws for either person or property beyond the territorial jurisdiction of the lawmaking power must rest such claim upon a statute granting such extraterritorial right.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 254, 266; Dec. Dig. §§ 174, 175.*]

6. STATUTES (§ 238*)—CONSTRUCTION—PRESUMPTION.

No presumption arises, from a failure of the state through its legislative authority to speak on the subject, that the state intends to grant any right, privilege, or authority under its laws to be exercised beyond its jurisdiction.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 319; Dec. Dig. § 238.*]

7. WATERS AND WATER COURSES (§ 10*)—APPROPRIATION OF WATER RIGHTS—EXTRATERRITORIAL RIGHTS.

The state of Idaho has not granted the right to appropriate and divert the waters of this state for application to any beneficial use beyond the confines of the state.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 10.*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Alfred G. Walbridge and another for writ of mandamus to compel A. E. Robinson, State Engineer, to give notice and grant a certificate of completion of diversion work. From a judgment granting the writ, defendant appeals. Reversed.

Herbert Wing and J. H. Peterson, both of Boise, for appellant. S. H. Hays and Martin & Cameron, all of Boise, for respondents.

AILSHIE, J. This is an appeal from an order granting a writ of mandamus. On the 9th of November, 1909, respondents made application to the state engineer for a permit to appropriate water from Bear creek, which is a branch of the Clearwater river

situated in Idaho county. This application was made for the diversion of waters to be carried beyond the watershed of Bear creek and applied to the purposes of irrigation in the state of Montana. The permit was subsequently issued and was numbered 5,494. Prior to the issuance of this permit, a similar permit had been granted to one George F. Weisel for the diversion of waters from Bear creek to be carried across the line and used in the state of Montana, and permit No. 5,445 had been issued. Subsequent to the issuance of these permits, a contest was filed by the respondents, and after a hearing the state engineer refused to take any action on the matter or grant any relief to either of the parties, upon the ground that in issuing the permits he had exceeded his lawful authority in attempting to grant a right for the diversion of the waters of this state to be applied to a beneficial use in another state. Thereafter the respondents herein represented to the state engineer that they had constructed their diversion works, as required under the application and permit, and were prepared to make proof of completion of the work as required by law, and asked that notice be given of the hearing and that they be given a certificate of the completion of their works. The state engineer refused to give notice or take any action in the matter, on the ground that he had no legal authority to grant such a certificate. This suit was thereupon instituted.

The question here arises as to whether a lawful appropriation and diversion of the waters of this state can be made for application to a beneficial use in another state. First of all, it should be remembered that Bear creek is not an interstate stream. It is located wholly within the state of Idaho and does not reach into the state of Montana, and so no question of the appropriation and diversion of the waters of an interstate stream for use either in this state or in a neighboring state arises in this case. We desire at the outset to also observe that whatever may be said in this opinion shall not be understood or construed as passing upon or indicating any view of this court on the question of the right to divert the waters of a stream in this state and carry it beyond the watershed of that stream and apply it to a beneficial use outside of and beyond such watershed.

[1] The state engineer, acting under authority of the state, has prosecuted this appeal. He contends that, under the Constitution and laws of Idaho, the waters of the state belong to and are owned by the state, and that the state holds the title to all the public waters in common for the benefit of all its people. In support of this contention, counsel cite section 1 of article 15 of the Constitution, which provides that "the use of all waters now appropriated, or that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law," and section 3240 of the Rev. Codes, which provides that "all the waters of the state when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state, are declared to be the property of the state." It is further contended that this latter declaration of the statute is only a written expression of what the law has always been with reference to the public waters of a state.

Freund, in his work on the Police Power of the state, at section 417, seems to entertain this view, and in discussing similar statutes in other states says: "Such declaration is expressive of what is believed to be the law, and does not intend to make new law."

[2] We think it is clear that the title to the public waters of the state is vested in the state for the use and benefit of all the citizens of the state under such rules and regulations as may be prescribed from time to time by the lawmaking power of the state. This is not, however, an interest or title in the proprietary sense, but rather in the sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity.

[3] The interest which an individual or the state may have in such things as water and gas and wild animals has received special consideration from courts and text-writers on account of the tendency of these things to escape beyond the power of control or possession or management of any particular person and without the volition of the one who claims to be the owner. They have, nevertheless, been classed together by most of the authorities.

Mr. Wiel, in his work on Water Rights (3d Ed. § 33), says: "In the negative community there is a still more familiar member, namely, animals *feræ naturæ*; with which, also, running water has been compared (even so far as to name it accordingly a 'mineral *feræ naturæ*'), and which likewise become private property by capture. In the first place, wild animals are, by settled law, members of the negative community; they are nobody's property while wandering at large; and in the next place, running water is compared to animals *feræ naturæ* since the days of the Roman law. In the Institutes the law of wild animals follows under the same title as that above quot-

ed concerning aqua profluens, saying: 'Likewise wild animals, birds and fishes, since before capture belonging to no one, after capture belong to him who captures them.'"

In *Westmoreland v. De Witt*, 130 Pa. 235, 18 Atl. 324, 5 L. R. A. 731, the Supreme Court of Pennsylvania says: "Water and oil, and still more strongly gas, may be classed by themselves, * * * as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner."

In *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 1068, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 85, Justice Temple, speaking of the ownership in water, said: "The members of the community have a common interest in the water."

In *Commissioners v. Withlers*, 29 Miss. 21, 64 Am. Dec. 128, the court, speaking of the relative rights of the individual and state to water, light, and air, said: "It is difficult to understand how a person can be said to have property in water, light, or air, of so fixed and positive a character as to deprive the sovereign power of the right to control it for the public good and general convenience. Such a right exists as to individuals, and it cannot be interfered with by them; but the state, in virtue of her right of eminent domain, has the paramount right to control and dispose of everything within her limits, which is not absolute and exclusive private property, to the promotion of the public good."

It will be found that the authorities quite uniformly class wild animals, fish, water, gas, light, and air as things of the "negative community;" on the property of no one, and that they are consequently *res communes* and subject to the regulation and control of the state in its sovereign capacity.

The case of *Gear v. State of Connecticut*, 181 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, is one of the most illuminating cases in this country on the power of the state to deal with wild game, and the question determined is there stated as follows: "The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state, is to confine the use of such game to those who own it, the people of that state. The proposition that the state may not forbid carrying it beyond her limits involves therefore the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common without at the same time permitting the citizens of other states to participate in that which they do not own." This proposition was denied and refuted by the court, and it was held in that case that the state had absolute power and authority in the matter and might forbid the shipment of any of its game, even after reduced to private ownership, beyond

the confines of the state. This case has been repeatedly cited and followed by the courts of this country, as may be seen in Rose's notes to this case. 12 Notes U. S. Reports, and vols. 3 and 5, Supp.

The Geer Case was followed by this court in *Sherwood v. Stephens*, 13 Idaho, 399, 90 Pac. 345, and it was there said by the court that "the ownership acquired in game or fish is not such an ownership as one acquires in chattels or lands, but is merely a qualified ownership, and that the possession of fish and game is at all times subject to such regulations as the Legislature may see proper to make."

[4] There is no doubt in our minds but that the state in its sovereign capacity is the owner of the waters flowing in the stream thereof and may exercise its authority over the same. If the foregoing propositions be correct, the state has the right to prohibit the diversion of the waters of its streams for use outside of and beyond the boundaries of the state. In other words, as said by the Supreme Court in *Geer v. Connecticut*, supra: "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose."

Respondents lay special stress on *Bean v. Morris*, 221 U. S. 485, 31 Sup. Ct. 703, 55 L. Ed. 821, while appellant places equal reliance on *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560. It should be observed that *Bean v. Morris* is dealing with an interstate stream which is the particular subject that we said in the outset we were not dealing with in this case. The question decided in that case arose out of a dispute between *Morris* and *Bean* as to priorities of appropriation of the waters of a tributary to the Big Horn river flowing through both Wyoming and Montana. The court held that, since both Wyoming and Montana were carved from the arid region, and the law of priority of appropriation prevailed in that territory prior to the formation of the states, the court would assume, in the absence of a showing to the contrary, that the states still intended that priority of right by appropriation and diversion should prevail on interstate streams irrespective of state boundary lines.

The *Hudson County Water Co. Case* was dealing with the waters of the Passaic river, a stream situated wholly within the limits of the state of New Jersey. The court held that the state might prevent the diversion of the waters of that stream to a point beyond the limits of the state, and that riparian proprietors could not lawfully contract with a water company so as to authorize such company to pipe the waters of the stream into the state of New York. The court likened that case in principle to the case of *Geer v. Connecticut*, ubi supra, and

held that the state might retain its natural resources for the benefit of its own people and might prohibit their being transported beyond its territorial jurisdiction. Among other things, the court said: "We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

[5] The question here to be determined then is: Has the state of Idaho through its lawmaking body authorized the appropriation and diversion of the waters of this state for application to any beneficial use in another state? It is conceded in the outset that there is no express legislation to that effect. It is contended by the appellant that, in the absence of a positive statute authorizing such a thing or conferring such a right, the right does not exist, and that no presumption arises, that the state by its silence intends to permit the diversion and use of its waters beyond its jurisdiction. The respondents, on the other hand, contend that no provision of the Constitution or statute expressly prohibits the carrying of water from this state into another state and there applying it to a beneficial use, and that to do so is therefore no violation of any provision of the Constitution or statute. These propositions call for a consideration of the nature of state legislation, both as to the class of subjects to which it applies and the jurisdictional limits in which it can be executed. Black on Interpretation of Laws, p. 91, says: "Prima facie, every statute is confined in its operation to the persons, property, rights, or contracts, which are within the territorial jurisdiction of the Legislature which enacted it. The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect." Endlich on Interpretation of Statutes, p. 233, announces the same principle. Cooley on Constitutional Limitations (7th Ed.) p. 176, says: "The legislative authority of every state must spend its force within the territorial limits of the state." The Supreme Court of the United States, in *Hilton v. Guyot*, 159 U. S. 113, 18 Sup. Ct. 139, 40 L. Ed. 95, says: "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."

[6] In the light of these authorities and

the fundamental reason and principle of justice on which they rest, it would seem necessary for any one, who claims a right under the laws of a state which right is to be exercised beyond the jurisdiction thereof, to rest such right upon some specific legislative grant or authority. In the case at bar, a right is urged to enjoy the use of state property or a natural resource of the state beyond the jurisdictional borders of the state and within the confines of another state. A gift or grant of state property or a public franchise, or a right which must emanate from the sovereignty representing the whole people, ought not to arise by mere inference or failure of the sovereignty to speak on the subject. On the other hand, a failure to speak on the subject or to confer the right in specific terms ought to be construed in favor of the state and against those claiming the right.

Endlich, on Interpretation of Statutes (1888) p. 497, says: "It is a settled presumption, in the construction of statutes, that the Legislature does not, without express declarations or clear and unmistakable manifestation of intent, mean to be understood as giving away any public right or stripping the state of any part of its prerogative." To the same effect, see Black on Interpretation of Laws (1896) p. 109.

[7] In this case it is sought to compel the state engineer to issue to the respondents a certificate showing their compliance with the statute and their right to the use of the waters of Bear creek in applying them to agricultural lands and for agricultural purposes in the state of Montana. The statutes of this state, authorizing the appropriation and diversion of waters and the granting of permits by the state engineer, confer upon the state the right to control the use of such waters, to supervise the distribution by water commissioners, to establish rates, to control the method of distribution, prevent waste and wrongful diversions and obstructions of the flow thereof, etc. Sections 3268 to 3283, 3284 to 3293, 3294 to 3298, and 7144 to 7149, Rev. Codes. It is at once apparent that the state has no means by which it can enforce or execute the provisions of the above-cited sections of the statute beyond its borders; and, if the right here contended for were recognized and conferred, the power of regulation and control of that right would be wholly gone so far as it is to be exercised beyond the confines of the state. It was suggested on the oral argument that some of the irrigation states have reciprocity statutes on this subject, and in such a case we can conceive how laws of one state might be executed in another. In other words, if the right to appropriate and divert waters of this state to be used in another state were recognized and conferred upon the condition that the authority of this state

may be exercised in the regulation and control of the right in the state in which the use is to be had and that the state of Montana had accepted the conditions of the statute by reciprocal legislation, then this state could execute and enforce the above-mentioned provisions of the statute. As the matter stands, however, we are clear that there is no authority for the diversion and appropriation of the waters of this state for application to a beneficial use in another state.

The underlying principle on which this holding must rest was recognized by this court in *Washington Water Power Co. v. Waters*, 19 Idaho, 595, 115 Pac. 682, which was a proceeding in condemnation. It was there contended, among other things, that condemnation proceedings could not be had in this state for the purpose alone of serving a public use in another state. In speaking of that, this court said: "Condemnation could evidently not be had in this state for the purpose alone of serving a public use in another state; but where the use for which the condemnation is sought is a public use in this state, and will serve the citizens of this state, * * * the fact that it may incidentally also benefit the citizens and industries of a neighboring state will not defeat the right of condemnation." The discussion in that case turned on the question of a "public use," and in this case the question involved is a "beneficial use" to be exercised beyond the confines of this state. It is clear to us that the legislation of a state is primarily dealing with people and business and uses within the jurisdiction of the state; and wherever the benefit of such legislation is claimed beyond the confines of the state, either for person or subject-matter, some provision in the statute should be found specifically extending the legislation for those purposes and objects.

The judgment of the district court must be reversed, and it is so ordered, and the cause is remanded, with direction to dismiss the proceeding. Costs awarded in favor of appellant.

STEWART, C. J., and SULLIVAN, J., concur.

BELLEVUE STATE BANK v. COFFIN.
(Supreme Court of Idaho. July 2, 1912.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 80*)—TRANSACTIONS BETWEEN BANKS—RELATION OF PARTIES.

Where B. S. Bank pays I. S. Bank, upon solicitation of I. S. Bank, a sum of money to be used by the latter in the ordinary course of business, to be paid back in the future upon the latter bank receiving a shipment of money from another source, such payment of money is a loan, and such transaction creates the re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lation of debtor and creditor between such banks.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

2. BANKS AND BANKING (§ 80*)—FOLLOWING TRUST FUNDS—IDENTIFICATION.

Where money is loaned by one bank to another upon false representations which amount to fraud upon the bank loaning the money, the contract of loan may be rescinded upon the ground of fraud, and such loan becomes a trust fund in the hands of the bank or its assignee, and, like any other fund, if it can be traced and is capable of identification, it may be recovered from the assignee of the bank, and is a prior claim as against the general creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

3. TRUSTS (§ 356*)—FOLLOWING TRUST FUNDS—IDENTIFICATION.

It is a well-known rule of equity that an owner of property who has been defrauded of the possession or ownership of the same may recover such property from the person who has secured it, and that the title of such property does not pass to the taker, but is held in trust, and that the owner has a superior right to such property as against the creditors of the taker; and, where it has been used or converted by the taker, the owner of such property should also have a superior right to the value of the same whenever it can be recovered, without causing a reduction in the pro rata distribution of the remaining assets among creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529-538; Dec. Dig. § 856.*]

4. BANKS AND BANKING (§ 80*)—FOLLOWING TRUST FUNDS—IDENTIFICATION.

Where it is shown that I. S. Bank borrows money from B. S. Bank upon false representations, and at a time when the I. S. Bank was insolvent, and used said money so borrowed in the ordinary course of business in paying checks, and the evidence fails to show that the estate of the bank was in any way bettered or augmented by reason of the application of such borrowed money, and in the absence of a showing that such money can be traced into specific property or money, such B. S. Bank cannot have its claim against the estate of I. S. Bank in the hands of the receiver declared a prior claim to other general creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

5. BANKS AND BANKING (§ 80*)—FOLLOWING TRUST FUNDS—IDENTIFICATION.

Where an insolvent bank procures a loan from another bank upon false representations, and such money is to be used in the ordinary course of business of the insolvent bank, and the transaction results in nothing more than an exchange of creditors or the mere cancellation of one liability and the assumption of another, and the money is used in the discharge of an indebtedness, such facts alone are not sufficient to show that the assets of the bank borrowing such money have in any way been increased, or that there has been a betterment of the estate or its assets, or that such estate or its assets have in any way been improved or rendered more valuable.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

Ailshie, J., dissenting.

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by the Bellevue State Bank against H. N. Coffin, receiver of the Idaho State Bank. From a judgment for defendant, plaintiff appeals. Affirmed.

Richards & Haga, of Boise City, for appellant. Sullivan & Sullivan, of Boise City, for respondent.

STEWART, C. J. On August 25, 1910, Leo Cramer, president and representative of the Idaho State Bank, a banking corporation organized under the laws of the state of Idaho and doing business at Hailey, Idaho, called upon the Bellevue State Bank at Bellevue, Idaho, and informed C. W. Wilson, cashier of said bank, that the Idaho State Bank had a shipment of \$5,000, which shipment should have arrived on the train reaching Hailey on that day, and by reason of such shipment not arriving the Idaho State Bank was in need of \$2,500 in currency for temporary use until said shipment should arrive, which should be on the following day, and that said Idaho State Bank would upon the arrival of said shipment return said \$2,500. Upon this statement the Bellevue State Bank, through its cashier, C. W. Wilson, turned over to Leo Cramer, for the use of the Idaho State Bank, \$2,500 in currency. This currency was placed in the Idaho State Bank and used by said bank in the ordinary course of business until the 31st day of August, 1910, when the bank was closed and a receiver appointed therefor. This currency was used with other cash for the purpose of paying checks drawn by depositors, and when the receiver took charge of the bank there was in the bank \$643.76, of which \$85 was in currency, and no part of which could be identified as a part of the \$2,500 obtained by the Idaho State Bank from the Bellevue State Bank. After the bank failed on the 31st day of August, 1910, H. N. Coffin, the respondent, was appointed receiver of the Idaho State Bank, and this action was brought demanding that the \$2,500 obtained by the Idaho State Bank from the Bellevue State Bank be decreed a trust fund and that the claim of the appellant be decreed to be prior to the claims of all the general creditors and claimants of the Idaho State Bank. The cause was tried to the court, and the court found the facts substantially as stated herein. From this state of facts the court found as conclusions of law the following: "(1) That said Bellevue State Bank did not become, nor is it now, a prior or preferred creditor of said Idaho State Bank in said sum of \$2,500 or any part thereof, over or above any of the other claimants or depositors, or the creditors of said bank. (2) That the defendant is entitled to a judgment for his costs and disbursements herein." Judgment was entered for defendant. From this judgment this appeal is taken.

The only question assigned as error and urged upon this appeal is the conclusion of law that the money received from the Bellevue State Bank by the Idaho State Bank did not constitute a trust fund to be repaid to appellant in preference to the depositors and general creditors of said bank.

[1] It is the contention of appellant that the currency or fund which was delivered by the Bellevue State Bank to the Idaho State Bank never at any time became the property of the Idaho State Bank, and that no title ever passed from the Bellevue State Bank to the Idaho State Bank, and that the relation of debtor and creditor did not and never existed by reason of the procurement of said currency or fund through false representations which amounted to a fraud. While the respondent contends that, upon the payment of the \$2,500 by the Bellevue State Bank to the Idaho State Bank under the agreement as shown by the facts in this case, there immediately arose between the Idaho State Bank and the Bellevue State Bank the relation of debtor and creditor, and by reason of such relation no superior or better right was vested in the Bellevue State Bank to the assets of the Idaho State Bank than that of other general creditors of said bank.

We think it is a general principle of law that a general deposit of money with a bank transfers the title of the money so deposited from the depositor to the bank, and creates the relation of debtor and creditor between the bank and the depositor. *Notes to Plano Mfg. Co. v. Auld*, 86 Am. St. Rep. 777. When money is paid by one bank to another bank to be used by the latter in the ordinary course of business, to be paid back in the future upon the latter bank receiving a shipment of money from another source, as shown by the facts in this case, there can be no reason why the same rule of law does not apply. The transaction is certainly the equivalent to a deposit in so far as creating the relation of debtor and creditor. It is a money loan or a payment by the Bellevue State Bank to the Idaho State Bank upon a promise to repay, not with the same money but with other funds, an equal amount at a future date. This certainly creates the relation of debtor and creditor. In this case, by the payment of the money, the title passed to the Idaho State Bank and became its property, and was dealt with as it saw fit, and was used in its ordinary course of business in paying debts and depositors, and that was the purpose for which the fund was to be used at the time the same was secured, and it specifically created the relation of debtor and creditor.

In the case of *Mut. Acct. Ass'n v. Jacobs*, 141 Ill. 261, 31 N. E. 414, 16 L. R. A. 516, 33 Am. St. Rep. 302, the Supreme Court of Illinois says: "Where money is deposited in a bank without any understanding that the identical money shall be returned, but only

that a like sum of lawful money shall be repaid, the deposit is general, the bank is permitted to use the money in its business, and the relation of debtor and creditor is created by the transaction."

"In the case of *Leaphart v. Com. Bank*, 45 S. C. 563, 23 S. E. 939, 33 L. R. A. 700, 55 Am. St. Rep. 800, the Supreme Court of South Carolina says: "A deposit of money made with a bank corporation, or association, to be used by it for the purpose of making profit therefrom, with an agreement on its part to repay the amount with interest, becomes at once the property of the depositee, and creates at once the relation of debtor and creditor between the depositee and depositor, with nothing in the nature of a trust or fiduciary character in or growing out of the transaction."

There is no difference in principle between the case at bar, where currency or other money is loaned or advanced by one bank to another which is insolvent for use in the borrowing bank, and a case where a depositor leaves his money with the bank a short time before it suspends. *Corn, etc., Bank v. Solicitors, etc., Co.*, 188 Pa. 330, 41 Atl. 536, 38 Am. St. Rep. 873.

[2] While this rule is well recognized by the authorities, there is another principle of law which is equally well settled, and that is: That the receipt of deposits by a bank known to be insolvent by its officers is a fraud upon the depositor, and renders the bank or its assignees trustees ex maleficio, and the deposit is a trust fund recoverable by the depositor. In such cases the title does not pass to the bank, but it takes title through fraud and by contract voidable for that reason at the election of the depositor. "The keeping the bank open, and the conducting of its business in the usual manner, constitutes a representation to its customers of the solvency of the bank upon which they had a right to rely; and if the bank was known to be insolvent by the officers who were charged with its management, the concealment of that fact from a person about to make a deposit would constitute a fraud upon him. It is upon this ground, and not upon the theory that the bank does not take title to such deposit, that such deposits are uniformly held recoverable by the depositor." *Notes to Plano Mfg. Co. v. Auld*, 86 Am. St. Rep. 794.

The above citation contains a collection of the leading cases upon this question, and renders it unnecessary to cite in this opinion all of such cases. We, however, refer to *Perry on Trusts & Trustees* (6th Ed.) § 171; *Pomeroy's Equitable Jurisprudence* (3d Ed.) § 155.

In the case of *Blake v. State Savings Bank*, 12 Wash. 619, 41 Pac. 909, the Supreme Court of Washington quotes with approval from *Cragle v. Hadley*, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9, as follows: "The bank acquires title to the money, drafts, or

checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business. The further rule that one who has been induced to part with his property by the fraud of another, under guise of a contract, may, upon discovery of the fraud, rescind the contract, and reclaim the property, unless it has come to the possession of a bona fide holder, is equally well settled, and does not at all depend upon the character of the wrongdoer, whether a corporation or a natural person.

* * * The right to a restoration in such case may be defeated by the acts or acquiescence of the defrauded party, or because the property has lost its identity and cannot be traced, or other persons have innocently acquired interests in ignorance of the fraud." And the court concludes: "It will be seen from this quotation from that case that what the court really decided was that the reception of deposits by a bank under the circumstances stated was such a fraud upon the depositor as gave him a right to rescind the contract of deposit, and reclaim the drafts or their proceeds, which, in that case, were easily distinguishable from the other assets of the bank. The conclusion of the court would no doubt have been different if the money had 'lost its identity,' and could not be traced."

In *Corn, etc., Bank v. Solicitors, etc., Co.*, 188 Pa. 324, 41 Atl. 537, 68 Am. St. Rep. 873, the Supreme Court of Pennsylvania says: "The trust company was insolvent * * * when the transaction took place and it received the plaintiff's money, and the officers of the company were aware of its condition. Keeping its doors open on that day was, whether unintentional or not, a representation to the public of solvency. Whether they still hoped on that day by some means to recuperate and avoid closing is not material; the fact of insolvency on that day remained. There is no difference in principle between this transaction and that of a depositor who leaves his money with the bank a few hours before it suspends. The acceptance of the money under such circumstances is a fraud upon the depositor, and if it has not been used or mixed with the common funds and can be identified, he can maintain replevin for it."

In *Wasson v. Hawkins* (C. C.) 59 Fed. 233, Justice Baker discusses a similar question and holds that the title acquired by the bank to the money and checks deposited under such circumstances would be voidable at the election of the depositor, who could bring suit to recover his deposit without any previous demand. The bank would become a trustee ex maleficio and would hold the deposit for the use of the depositor subject to his right of reclamation.

We do not think it necessary to quote any further decisions upon this subject, for we are satisfied that the rule is that where money is deposited in an insolvent bank known by its officers to be hopelessly insolvent, or

money loaned by one bank to another bank upon false representations which amount to fraud to the bank loaning the money, the contract may be rescinded upon the ground of fraud, and such deposit becomes a trust fund in the hands of the receiver of the bank, and, like any other fund, if it can be traced and is capable of identification, it may be recovered from the assignee of the bank and is a prior claim as against general creditors. 86 Am. St. Rep. 794, 800, 801.

[4] The question then arises: Was there actual fraud, effectuated by the acts and representations of Cramer upon behalf of the Idaho State Bank in procuring the money from the Bellevue State Bank? Am. & Eng. Ency. of Law, vol. 14, p. 21, defines "actual fraud" as follows: "Actual fraud is where a person intentionally deceives another by words or conduct for the purpose of inducing him to part with property or to surrender some legal right; and thereby accomplish his purpose. It involves the element of dishonesty of purpose or evil design. This is the first class of fraud in Lord Hardwicke's classification above referred to."

In the case of *Barnes v. Crawford*, 115 N. C. 76, 20 S. E. 386, the court quotes from Webster as follows: "An intentional perversion of the truth for the purpose of obtaining some valuable thing or promise from another." Many other definitions of fraud may be found in *Words & Phrases*, vol. 3, p. 2943.

In the light of the above definition of fraud, it is apparent that the money loaned to the Idaho State Bank by the Bellevue State Bank was procured upon false representations made by Cramer to Wilson. The representation made by Cramer that the Idaho State Bank was short in cash was certainly true at the time it was made, but the representation that a shipment of currency was expected and did not arrive, and that it would arrive, and upon arriving the amount advanced by the Bellevue State Bank to the Idaho State Bank would be returned, was absolutely false and based upon no facts whatever, and certainly was the inducement which led Wilson to advance the money to Cramer. Because it was so procured, such fund became a trust fund in the hands of the bank, and such trust fund may be recovered from the receiver of the bank if it can be traced and is capable of identification. The right to recover therefore in this case is upon the ground that the representations made by Cramer to Wilson upon which the fund was secured constituted a fraud upon the Bellevue State Bank, and not upon the ground that the bank did not take title to such property.

[5] It is a well-known rule of equity that the owner of property who has been defrauded of the possession and ownership of such property may recover the same from the person who has secured such property, and that the title of such property does not pass to the taker, but is held in trust, and that the

owner has a superior right to such property as against the creditors of the taker; and, where it has been used or converted by the taker, the owner of such property should also have a superior right to the value of the same whenever it can be recovered without causing a reduction in the pro rata distribution of the remaining assets among creditors.

In the case of *Frelinghuysen v. Nugent* (C. C.) 36 Fed. 239, Judge Bradley of the federal court states the rule as to the right to recover trust funds or property as follows: "Formerly the equitable right of following this misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried."

It would be useless to attempt to distinguish and apply the different decisions of the courts in cases where the owner of property or money, which has passed into the possession of another through misrepresentation and fraud, attempts to recover such property or money, and how far the owner is required to go in showing the identity of the property or money, and impose upon it the character of a trust, for the reason that the rule announced in these cases is controlled wholly by the particular facts and circumstances of each case, and the various cases relating to this subject show the distinction made by the courts and the rules declared in the various classes. Many cases are collated in the notes to the case of *Lowe v. Jones*, 192 Mass. 94, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, and annotated in *Annot. Cases*, vol. 7, p. 558, and also in the notes to the case of *Plano Mfg. Co. v. Auld*, 86 Am. St. Rep. 769.

[8] An examination of these various cases leads us to believe that the true rule governing the particular facts of this case is that, if the transaction results in nothing more than an exchange of creditors or the mere cancellation of one liability and the assumption of another, or if the money was used in the discharge of an indebtedness, such facts alone are not sufficient to show that the assets of the trustee or its assignee have been increased by such transaction, and therefore there has been no betterment of the estate, and such assets have not been

improved or rendered more valuable and are in no way impressed with the trust. *Insurance Co. v. Caldwell*, 59 Kan. 156, 52 Pac. 440; *Bradley v. Chesebrough*, 111 Iowa, 126, 82 N. W. 472; *District Township of Eureka v. Farmers' Bank*, 88 Iowa, 194, 55 N. W. 342; *Moore v. Chesebrough* (Iowa) 81 N. W. 469; *Kansas State Bank v. First State Bank*, 9 Kan. App. 839, 61 Pac. 888; *Sunderlin v. Mecosta County Sav. Bank*, 116 Mich. 281, 74 N. W. 478; *Sherwood v. Milford Bank*, 94 Mich. 78, 53 N. W. 923; *In re Seven Corners Bank*, 58 Minn. 5, 59 N. W. 633; *Midland Nat. Bank v. Brightwell*, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 606; *Frank v. Bingham*, 58 Hun, 580, 12 N. Y. Supp. 767; *Freiberg v. Stoddard*, 161 Pa. 259, 28 Atl. 1111; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 35; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383 (overruling *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287); *Thuenamler v. Barth*, 89 Wis. 381, 62 N. W. 94; *Dowle v. Humphrey*, 91 Wis. 98, 64 N. W. 815; *City Bank of Hopkinsville v. Blackmore*, 75 Fed. 771, 21 C. C. A. 514; *Beard v. Independent District of Pella City*, 88 Fed. 375, 31 C. C. A. 562; *Lowe v. Jones*, 192 Mass. 94, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 554, supra; 5 *Thompson's Corporations* (1st Ed.) § 7103; *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Byrne v. Byrne*, 113 Cal. 294, 45 Pac. 536; *Shute v. Hinman*, 34 Or. 578, 56 Pac. 412, 58 Pac. 882, 47 L. R. A. 265; *Board v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; *Bayer v. Am. Trust & Sav. Bank*, 157 Ill. 62, 41 N. E. 622; *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570.

From an examination of the authorities applicable to the facts of this case we think the safe and proper rule of law to apply to such facts is that, when a bank secures a deposit or borrows money from another bank and procures such deposit or loan upon false representations which amount to fraud, and such money is confused with other currency in the possession of the bank borrowing such currency, and such mingled currency is all disposed of by the bank in the discharge of debts and in the ordinary course of business of said bank, and the bank is insolvent and goes into the hands of a receiver, the depositor or person who loans the currency cannot recover the same or the value thereof out of the assets, such as real estate owned by the bank at the time of the failure, or from money collected by the receiver on notes in the bank.

In the cases where it is held that a recovery can be had to be paid from the entire assets of the insolvent bank, it is also held that there must be some identification of either the same property or of particular property or money on hand into which the particular money was converted, or to secure

which said money was commingled with other money or property in securing such money or property and in such cases a recovery is allowed out of the money or property so secured.

Counsel for appellant in this case base their claim on the principles announced by this court in the cases of *State v. Thum*, 6 Idaho, 323, 55 Pac. 858, *First Nat. Bank v. Bunting & Co.*, 7 Idaho, 27, 59 Pac. 929, 1106, and *State v. Bruce*, 17 Idaho, 1, 102 Pac. 831, 134 Am. St. Rep. 245. These cases were dealing with the question of recovery upon a claim made for public money, deposited in a bank that became insolvent. Those cases in no way discussed the right of a private person to recover money deposited in a bank or loaned to a bank, even though such deposit was made or loan procured by fraud, and by reason of which the fund loaned or deposited became a trust fund.

In *State v. Thum*, this court said, "Public money deposited by a public officer in a bank becomes a trust fund, and not part of the estate of the bank, and in case of the insolvency of the bank, its receiver must treat such fund as the property of the true owner, and not of the bank," and found "the position of the state in this case is unlike that of an ordinary depositor in a bank." There was no discussion in that case with reference to tracing the fund.

In the case of *First Nat. Bank v. Bunting* the deposit was of public funds and made by a public officer, and it was held in that case that the deposit was a special deposit under the laws of the state. The question of identification of the fund was in no way discussed by the court. So in neither one of these cases did this court enter into or announce any rule which should govern the right to recover from a bank a sum of money deposited at the time the bank was insolvent, and that such recovery could be had out of the general assets of the estate as against other creditors against such bank.

In the case of *State v. Bruce*, 17 Idaho, 1, 102 Pac. 831, 134 Am. St. Rep. 245, this court had under consideration a claim and lien made by the state for a prior claim and lien upon the assets of a bank upon deposits made by the state treasurer. The court held that the money deposited by the state treasurer was the property of the state and that the bank knew that fact at all times it was dealing with the fund, and notwithstanding the fact that the fund deposited went into the general funds of the bank and was paid out from day to day together with the general deposits upon the checks, still the lien should be attached to the general assets of the bank. In that discussion, however, the court was speaking with reference to money deposited in the bank without authority of law, and under such circumstances the money so deposited could in no way become a part of the general assets of the bank, and

the bank accepted and held such money as a special deposit and as a trustee of such fund, and in such case the fund could not become a part of the general assets of the concern, even though the state was unable to identify the particular fund in any particular kind of money or property of said bank. The rule announced in that case was with reference to the particular kind of deposit made in that case, and it was not necessary for the court to announce a general principle which would bind a depositor or person loaning money to an insolvent bank in a contest where the general creditors' rights were called in question and affected, as in the present case. The statement made: "We fail to see what difference it can make in point of fact, reason, or law whether the money was used in buying bonds, mortgages, and other paper to add to the general assets of the bank, or in discharging the debts of the bank. In either event, it adds to or appreciates the body and value of the bank's assets. If the money is used to-day to pay the bank's debts, and it suspends business to-morrow, the indebtedness of the bank to-morrow will be just as much less than it would otherwise have been as the amount paid out represents"—was based upon the authority of *Myers v. Board of Education*, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263, and cases referred to in that case.

We are inclined to think, however, that this rule is a little too broad to be applied to the facts involved in this case, and that it should be limited to the extent referred to above in this discussion, and under the rule as announced in the cases heretofore cited.

We think the correct rule is stated in *Insurance Co. v. Caldwell*, 59 Kan. 156, 52 Pac. 440, as follows: "The fund itself, or something into which it has gone, and which stands as its representative, must be or hand, subject to identification, and separable from the general assets, in order to charge the assignee with the trust; or, if the fund has been so commingled with the general assets as to be incapable of identification or tracing, the estate which came to the assignee must have been augmented or bettered in an appreciable and tangible way, in order to charge it with the trust. The mere saving of the estate, by the discharge of general indebtedness otherwise payable out of it, or the payment of the current expenses of the business, is not an augmentation or betterment of the estate, within the meaning of the rule. If the estate has not been increased by specific additions to it, or if what previously existed has not been improved or rendered more valuable, it has not been impressed with the trust claimed."

Applying this rule to the facts of this case, it is clear that the money received by the appellant from the respondent in no way increased the assets of the Idaho State

Bank by specific additions, or improved or rendered more valuable the assets of said bank or augmented or bettered the assets. The mere fact that the money paid debts or other obligations of the bank, and thereby decreased its indebtedness, was beneficial to the creditors for the reason that the assets would not have to be reduced in paying such debts, and thereby reduce the share that would go to each of the creditors, is not an answer to this question, for at the time such checks were cashed and such money was dispersed the bank was insolvent, and the persons who received such money upon such checks in payment of such debts received the full amount of their claims to the extent of payment, while the other general creditors will not be able to receive proportionately such full payment when their claims are paid, and thereby are injured by reason of such fund being so dissipated.

The assumption included within the statement made by this court in the Bruce Case, that because the trust fund was used in the payment of indebtedness of the bank and in the ordinary course of business that the estate of the bank was augmented and bettered, without a showing that such money can be traced into any specific property or money, is not justified by the facts shown in this case, and neither did the court so find. In fact, in the present case there is no proof and no finding to the effect that the estate of the bank was in any way bettered or augmented by reason of the application of the trust fund; and because of that we think the judgment should be affirmed. Costs awarded to respondent.

DAVIS, District Judge, concurs.

ALLSHIE, J. (dissenting from opinion and affirming judgment on other grounds). I am not able to agree with the views which seem to be entertained by the Chief Justice with reference to this case. The facts of the case are quite simple; indeed, the evidence is very brief. In order, therefore, to make clear the conclusion I reach on the question of the trust relation sought to be established, I will quote at length from the evidence of the cashier of the appellant bank (and his evidence is not disputed and covers the whole transaction). After the formal questions and answers, his testimony is as follows: "Q. What took place there between you and Mr. Cramer? A. Mr. Cramer came to me and said that he had shipped out about \$4,000 to Ketchum to Thomas Reed, and it had left him a little short, and that he had a shipment on the road and needed a little money until his shipment came in. Q. How much of a shipment did he state? A. He said it was on the road at that time and would— Q. How much of a shipment? A. \$5,000. Q. And did he say in what form? A. He said it was a shipment of currency.

Q. What did he state he would do? A. He said that if I would let him have some money he would return it in currency when his shipment came in. Q. And did you let him have the currency? A. Yes, sir. Q. How much did you let him have? A. \$2,500. Q. And when did you see him again? A. I do not think it was until the 31st of August. Q. When did you call at the defendant's bank, if at all, after the 25th? A. On August 29th. Q. And whom did you meet there? A. Mr. Cutts; Mr. Cramer was not there. Q. And what took place? A. I asked him if he could return the \$2,500, and he said that he could not, that the shipment had not arrived, but he thought it would be in on the evening train. Q. What position did he hold with that bank? A. He was the assistant cashier, I believe. Q. When next did you go again, if at all? A. The next day I called at the bank again. Q. And who did you see? A. I saw Mr. Cutts again. Q. And what took place on that occasion? A. He told me that the shipment had not come yet, but he was sure that it would be in on the 30th on the train. Q. And did you go there again, if at all? A. On the 31st. Q. And who did you see? A. I went in to see Cutts and I asked if Cramer was there— Q. And what else did you say? A. I asked for Cramer, and he was out, and I waited two or three hours for him and he finally came and went back into the back room, and I asked him if I could see him a few minutes, and he said: 'Yes, sir; in a few minutes.' And he never came back out at all." On cross-examination the same witness testified that, after making this loan to Cramer, he did not communicate with Cramer or the Idaho State Bank or have any word from them until the 31st day of August, the day on which the Idaho State Bank failed. He also testified on cross-examination: "Q. When were you to receive this money back? A. It was to be returned as soon as the shipment of money came in. Q. Was it to be brought down to you the next day? A. I do not think so. I do not think there was any arrangement of that kind. Q. There was no arrangement of that kind made at the time when he got the money and told you he had a shipment coming in that would be there on the 25th or 26th? A. No, sir; I do not think so."

In other words, the witness admits that there was no definite understanding as to just when and how the payment should be made; whether it should be brought down to the bank by Cramer or an officer of the bank in currency, or whether it should be sent to the bank by remittance in the ordinary and due course of banking business, or an officer of the Bellevue bank was to call at the Idaho State Bank and get the money. I recite the foregoing for the purpose only of illustrating the fact that this was an ordinary loan made by the Bellevue

State Bank to the Idaho State Bank, and that it was made under no other or different arrangements or conditions from any other ordinary loan. It is admitted by all parties that this was in fact a mere loan from the one bank to the other, and that the relation of debtor and creditor immediately arose. *Leapheart v. Commercial Bank*, 45 S. C. 563, 28 S. E. 939; 68 L. R. A. 700, 55 Am. St. Rep. 800; *Mutual Accident Ass'n v. Jacobs*, 141 Ill. 261, 31 N. E. 414, 16 L. R. A. 516, 33 Am. St. Rep. 302. It is contended, however, that in some fictitious and imaginary way the relation of debtor and creditor, which is clearly established, was subsequently, and after the money was all paid out and expended by the Idaho State Bank, converted into a trust relation; and that the Idaho State Bank after it had expended this money became a trustee for the Bellevue State Bank, its cestui que trust. I am wholly unable to agree with this contention, and shall briefly state my reasons for my disagreement.

It is a well-established rule of law that, where one party with the possession of his property by reason of fraud practiced by the one who procures the property, upon discovering the fraud he may rescind the contract and pursue his property and recover the same, unless it has passed into the hands of an innocent purchaser. *Corn Exchange Bank v. Solicitors' Loan & Trust Co.*, 188 Pa. 330, 41 Atl. 536, 68 Am. St. Rep. 872; *Färber v. Stephens* (O. C.) 35 Fed. 17. Strictly speaking, the right to pursue property in such cases rests upon the doctrine of rescission of contracts rather than that of trust and trustee. 1 Perry on Trusts, § 166. The principle upon which the recovery is allowed is the same both at law and in equity. The misrepresentation or fraud which entitles the party to rescind the contract and pursue the property must consist in some fact material to the contract or of something that goes to the essence of the contract itself. 1 Perry on Trusts, § 174.

Courts of equity are constituted for the purpose of doing substantial justice between the parties; but this must be administered under some recognized system and standard, for the reason that individuals in the same society differ in their views of absolute right and justice and of moral standards as well. This principle is tersely enunciated by Perry on Trusts, at section 173, where he says: "There are in every community two classes of rights—perfect rights, and imperfect rights. Perfect rights are those that may be enforced, or for the breach of which damages may be recovered; imperfect rights are those which are conceded to every man, but which cannot be enforced by human tribunals, and for the breach of which no damages can be recovered. Thus every man has a right to the utmost good faith, and the most perfect frankness and truthfulness

in all the transactions of business; but courts of justice would be utterly powerless to enforce such a standard of morality. They would have neither the time nor the means of investigating the innumerable acts of buyers and sellers. And so courts have been obliged to lay down certain practical rules and limitations upon the subject of misrepresentation."

No court of equity would undertake to interfere with and rescind the transactions of men simply because there has been a breach of the moral or ethical standard generally recognized by men, or because some one has promised to do a certain thing or meet an obligation or transact certain business, and has failed to do so, either at the time or in the manner represented. If courts were to undertake this thing, they would be overwhelmed and swamped with business. Every case of this kind must be considered in the light of its own peculiar facts and circumstances and be decided on such clear and unmistakable principles of equity as are generally recognized and conceded to be both civilly and morally binding on men in their dealings with each other. It is never equity or justice to restore a negligent person, or one who has failed to exercise reasonable care and precaution, to a right at the expense of innocent third parties.

Now, turning to the undisputed facts of this transaction, let us inquire as to whether the transaction bears any of the earmarks of a trust, and, if not, whether there was any such fraud practiced as went to the essence and consideration of the contract so as to convert the transaction into a constructive trust. In the first place, the parties dealt at arm's length. They sustained no confidential relation toward each other. The Bellevue State Bank was not a depositor of the Idaho State Bank and was not dealing with the bank upon the same theory that a depositor deals with a bank. The Bellevue State Bank was notified at the time Cramer procured this loan that the Idaho State Bank was short of funds and that Cramer considered it necessary and essential that he procure this sum of \$2,500 in order to continue to do business and meet the current demands on the bank. The loan was made upon the promise of Cramer that the bank would repay the sum within a day or two, or upon the Idaho State Bank receiving a sum of \$5,000 in currency which was then supposed to be on the way from somewhere not disclosed. In the meanwhile the officers of the bank making the loan had notice that the money was to be immediately expended in meeting the demands of the bank. This money was not delivered to Cramer for the purpose of being applied to the use and benefit of the Bellevue State Bank, but rather to be used and applied as the money and property of the Idaho State Bank. It is said, however, that the fraud and deception in this case consist-

ed in the representation of Cramer that he had a \$5,000 shipment of currency on the way that would reach Halley on that day or the following day, and that this loan should be paid out of that sum. Let us see if this was the *essential ingredient* of the contract and the moving consideration for the loan. *If the officers of the Bellevue bank would not take Cramer's promise that he would repay this loan or would not trust his word of mouth, then certainly they would have no more reason to trust his representation that he had a shipment of currency on the way out of which he would make the payment.* If he had made a naked promise, as he did, on which he received this loan, without giving any security or even any evidence of the indebtedness, it might be said that there was no other tangible proof he could have then offered to show that he meant what he said. If they could not rely on his promise to pay, then why rely on his statement about this shipment? But when he told them that he had a shipment of \$5,000 currency on the way, they might have asked him for the evidence of that fact. If his statement was true that he did have a shipment on the way, he must have had written evidence either by way of letter or telegram which would have constituted proof that what he said was true. They never even asked for any such evidence or proof; they relied on his word in this respect as much as they did with reference to the promise to pay. I recite this merely for the purpose of showing that they undoubtedly made the loan upon the faith of Cramer's promise to repay the loan, rather than upon the specific representation that he had \$5,000 coming. The promise to pay was the real essence of the consideration and contract. The other representation was simply an additional inducement. The subsequent action of the officers of the Bellevue State Bank demonstrates that this was absolutely true, because they never made any demand for the money or took any steps to procure the payment until the 31st, whereas it is proven that Cramer represented that the \$5,000 shipment would be received not later than the 26th, the following day after the loan was made. These facts demonstrate conclusively to my mind that this was an ordinary loan and that it was no more induced upon the representation that Cramer had a shipment of \$5,000 in currency coming than it was induced upon his standing as a banker and business man and his mere promise to pay the debt. No method was pointed out or provided for in that agreement whereby the Bellevue bank should be able to lay hold upon or receive the sum of \$2,500 out of this specific shipment in any other mode or manner than by the officers of the Halley bank bringing it or sending it to the Bellevue bank, and it would evidently have made no difference to the Bellevue bank whether it came out of that shipment or from money

received from general depositors. It was a mere trade or commercial transaction.

Another thing in this case which ought to receive serious consideration is the fact that the Bellevue bank at the time of making this loan was placed in possession of such facts by Cramer as to put a reasonably prudent and diligent man on inquiry as to the solvency of the Halley bank, and this was such notice and information as would have undoubtedly precluded any ordinary business man depositing that sum in the bank at that time on a general deposit. Suppose a general depositor going to the bank had been at the time notified that the bank was so close run for funds that it could not pay out cash over its counter to the sum of \$2,500. Does any one suppose the general depositor would have deposited that money in the bank under those circumstances and with that knowledge and notice? Undoubtedly, he would not have done so. And should a depositor make a deposit under such circumstances, no court of equity would give him a preferred lien on the assets of the bank for that sum on the grounds that the bank was insolvent at the time of making the deposit and that he had no notice. A court of equity would rather charge him with failure to exercise due diligence and impute to him constructive notice that the bank was then insolvent. This court has said, in *State v. Cramer*, 20 Idaho, 638, 119 Pac. 80, that "a bank is insolvent when its assets and property are of such character and value that it is unable to meet its demands in the usual and ordinary course of business." Now the question arises at once: Did not the Bellevue bank have notice when it made this loan to Cramer that the Idaho State Bank was at the time and the moment prior to the making of the loan unable to meet its demands in the usual and ordinary course of business, and that the very reason why it was soliciting and procuring this loan of \$2,500 was to run it until the following day? In other words, according to Cramer's statement and representation at the time of procuring this loan, he needed this much to run him until the following day. The query arises in my mind at once: Is one bank, making a loan to another bank under such circumstances and conditions and representations, to be allowed, after the borrowing bank has gone into the hands of a receiver, to come into a court of equity and rescind the contract and have the receiver declared to be the trustee of a constructive trust in favor of the lending bank? If a constructive trust can be established under such circumstances, then I cannot conceive of any ordinary sale and transfer of property upon the promise of the vendee to pay at a certain time and in a given manner that cannot be converted into a constructive trust in every instance where the purchaser fails to make payment at the time or in the manner specified. To adopt such a rule, however, would be disastrous to busi-

ness affairs, and would render all commercial transactions precarious and uncertain. There is no more reason for allowing one bank making a loan to another to rescind the contract and pursue the assets of the bank under the theory of a constructive trust, than there is for allowing the individual and private citizen under the same state of facts and circumstances to pursue the same remedy. If, however, this remedy were allowed in all such cases in the ordinary business affairs of life, a large percentage of the sales and transfers of personal property and chattels would be the subject of litigation, and that would always be the case where the purchaser failed or was unable to make payment as promised at the time the sale was made.

The authorities cited on this question in the opinion by the Chief Justice are all of them dealing with a different state of facts from that involved in this case. An examination of these authorities will disclose that they are treating questions where a trust relation is shown to have arisen in the first instance and thereafter been violated, or with the law applicable to depositors, or some such state of facts differing entirely from this case.

The nearest approach to this case to be found among the authorities cited is that of *Corn Exchange National Bank v. Solicitors Loan & Trust Co.*, 188 Pa. 330, 41 Atl. 536, 68 Am. St. Rep. 872, and that case differs so widely from this in its facts that a rule of law announced covering those facts cannot be accepted as controlling authority in a case like this. There the trust company called up the bank by telephone and asked for \$2,000 in \$2 bills, and on receiving a favorable reply by 'phone, the trust company sent its check on the Fourth Street National Bank, where it had funds on deposit sufficient to meet the check, and the bills, done up in packages, were returned to the trust company by the same messenger who delivered the check to the bank. The bills were delivered to the bank, but the packages were never opened, and the trust company did not open its doors the following day, but made an assignment for the benefit of its creditors, and the Fourth Street National Bank had immediate notice of the failure. The bank that had furnished the \$2,000 in bills and received the check therefor on the Fourth Street National Bank immediately presented the check for payment, and the Fourth Street National Bank refused to pay on the grounds that it had notice of an assignment for the benefit of creditors. The court allowed the bank to pursue the packages of bills into the hands of the receiver and recover the same on the theory and upon the grounds that there was a total failure of consideration, in that the check given for the bills was wholly worthless and that it would be inequitable under such circumstances to allow the creditors of the bank to have the benefit

of this property, which still remained intact and had never found its way into the assets of the bank, and for which no consideration whatever had passed.

Another important difference between that case and this, and one which alone ought to be sufficient to distinguish the two cases, is that in the *Corn Exchange Bank Case* the bank had no notice of any facts which would put it on inquiry as to the *solvency of the trust company*. The very fact that this sum of money was to be in small denominations and that the bank sent its check along in payment therefor would indicate that the bank was securing the money merely for the purpose of making change and that it was well able to pay for the same. *In the present case, however, the money was wanted in any denomination possible for the purpose alone of carrying on business and meeting its obligations and on the ground that it was short of funds.*

I am satisfied that this case should be decided upon the proposition that no trust relation has been established. It would follow that the other question discussed by the Chief Justice is not essential to the decision of this case. In view, however, of the fact that the majority have deemed it necessary to consider and pass upon the question of pursuing the assets of a bank in cases where a trust has been established, I must here register my dissent from the apparent views enunciated in the majority opinion. This court has decided in *State v. Thum*, 6 Idaho, 323, 55 Pac. 858, *First National Bank of Pocatello v. Bunting*, 7 Idaho, 27, 59 Pac. 929, 1106, and *State v. Bruce*, 17 Idaho, 1, 102 Pac. 831, 134 Am. St. Rep. 245, that trust funds may be followed into the general assets of the bank, irrespective of the question of identification, and that the trust may be fixed upon the general assets for the return or payment of the trust estate. The cases of *State v. Thum* and *First National Bank of Pocatello v. Bunting* both involved the same state of facts, and there the record showed that the trust estate, amounting to some \$63,000, had been paid out in the regular course of business, and that only \$5,300 was left in the bank at the time it went into the hands of a receiver. The facts in those cases were substantially the same as in *State v. Bruce*, and the same principle of equity was involved in all these cases. By the decision of the majority of the court in the present case, it is proposed to overrule a uniform line of decisions of this court covering a period of 14 years, and now return to a rule long since abrogated, rather than to continue to follow what seems to me to be the rule of reason and justice which has heretofore prevailed in this state. I cannot give my assent to that proposition.

I think the judgment should be affirmed, but desire to place my concurrence specifically upon the ground that no trust relation has been established in this case.

SHERRED v. CITY OF BAKER et al.
(Supreme Court of Oregon. July 30, 1912.)

**1. WATERS AND WATER COURSES (§ 40*)—
RIPARIAN RIGHTS—NATURE OF RIGHTS.**

It is the use of water, and not the water itself, to which one may acquire a property right.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 32; Dec. Dig. § 40.*]

**2. WATERS AND WATER COURSES (§ 80*)—
RIPARIAN RIGHTS—RIGHT OF LOWER RIPARIAN OWNER.**

At common law a riparian owner diverting water for his own uses was bound to let it pass to the lower owner undiminished in quantity and quality, except as it was naturally consumed by the use for which it was taken.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 72; Dec. Dig. § 80.*]

**3. WATERS AND WATER COURSES (§ 190*)—
PUBLIC WATER SUPPLY—RIGHTS AS BETWEEN CITY AND LESSEE.**

A municipal charter (Special Laws 1903, p. 595) provided that the city might purchase, take by gift, or acquire real and personal property for municipal purposes, with power to manage, lease, or otherwise dispose of the same; and the city council was empowered to provide the city with water, and to erect waterworks within or without the city limits, to manage such water works, and to establish rates for the city or residents in the vicinity of the waterworks outside the city. Laws 1911, p. 121, declared that a city operating a system of waterworks might sell or supply water to any person within or without its limits. The city acquired priority and superiority of right to the use of waters of a creek, and permitted plaintiff to divert a certain amount therefrom for irrigation, and thereafter, and before it had made actual use or connections for use for municipal purposes, leased the same water right to others outside the city, destroyed plaintiff's dam, and refused to allow her to divert any water from the creek. Held, that the main purpose of the charter was to provide water for city use by conducting the waters of the creek to the city, and that before an actual connection and use the city was in the position of a private owner, without right to lease it to others, and so deprive plaintiff of her use under the permit.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 268; Dec. Dig. § 190.*]

Appeal from Circuit Court, Baker County; William Smith, Judge.

Action by Florence L. Sherred against the City of Baker, its Mayor Commissioner, and Commissioners of Departments. Decree for defendants, and plaintiff appeals. Modified.

The essence of the complaint is that the defendant city, a municipal corporation, about the year 1900, for the purpose of ultimately increasing its water supply, acquired by purchase sundry miners' appropriations of the waters of various creeks tributary to Powder river, in Baker county. These appropriations dated back and took effect since the year 1866, and included 400 inches, miners' measurement, under a six-inch pressure, of the waters of Goodrich creek. The grievance of the plaintiff is that, although she has

a permit, under date of April 8, 1910, from the state engineer, to divert upon her land in Baker county from that creek 80 miners' inches of water under six-inch pressure, for the purpose of irrigating her land, and although the city has not yet diverted into its pipe line or conducted into the city any of those waters, it refuses to allow her to divert any of that creek, has destroyed her dams and ditches, and, on the contrary, has leased the use of the water in question to other parties in her neighborhood, who have no right whatever in the creek, either by appropriation or otherwise, except as lessees of the city. In brief, she claims the right to use the water to the extent permitted by the state engineer until the city shall actually conduct the waters of Goodrich creek within its municipal boundaries for the use of its inhabitants. She acknowledges the superior title of the city to the ultimate use of the water, but claims the right to use it herself, to the extent mentioned, as against the lessees of the city, and asserts, not only that the leasing of the water to her neighbors is not within the authority of the city, but also that it is not such a use as is contemplated by law on the part of the city, so as to prevent her enjoyment of the same.

After sundry admissions and denials, the defendant city interposed four affirmative defenses. By the first it asserted corporate powers for that purpose, and averred that it purchased the prior appropriations of the miners about January 29, 1900, and immediately thereafter began a system of improvements of its then water system, designing to extend it ultimately to include the waters of Goodrich creek, and that meanwhile it has put the water to a beneficial use at all times. By the second defense it avers an independent appropriation on behalf of the city by its mayor and auditor, and the expenditure of a sum of about \$10,000 in constructing improvements designed to finally conduct the waters of Goodrich creek into the city limits for municipal purposes. The substance of the third defense is that, being the owner and in possession of the miners' appropriations, before mentioned, together with the ditches used formerly by the miners, the city leased these rights to certain persons mentioned, and that those lessees have put the water to a beneficial use, paying an agreed rental to the city for that purpose, and that for 30 years past the waters of Goodrich creek, to the amount of 400 inches, have flowed and been accustomed to flow each and every year in the same ditches and ditch rights. The substance of the fourth separate defense is the title by prescription in the waters in contest here. The plaintiff interposed a general demurrer to each of these defenses. Pending the hearing and consideration of these demurrers, and for the purpose of construing the plead-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ings of this suit and making them definite and certain as to any rulings which the court might make thereon, the parties entered into a written stipulation as follows:

"(1) Goodrich creek is a perennial stream in Baker county, Oregon, flowing in an easterly direction from a spur of the Blue Mountains to Powder river. Such creek lies at points and places material to this case about eight or ten miles northwest and outside of the corporate limits of the city of Baker. Between Goodrich creek and the city, and running in the same direction and lying south thereof, are certain other creeks, named Mill, Marble, Big Salmon, Little Salmon, and Elk creeks; the latter being nearest to the corporate limits of the city.

"(2) In the years 1900 and 1901 the defendant city acquired by purchase, through good and sufficient deeds thereto, the rights of certain mining interests to the waters of Goodrich creek to the extent of 400 miners' inches, which was and is the normal flow of the creek; and such rights so acquired were valid and legal rights to the waters of said stream under an appropriation thereof dating from the year 1887, and such deeds conveyed to the defendant city a good and valid title to such water and water rights at the time of the execution thereof.

"(3) The defendant city acquired such rights and ditches through which they had been used prior to that time in furtherance of a general plan looking toward the acquisition of a larger water supply than it had at that time, anticipating and expecting that it would be required for future needs of the city.

"(4) At the time of the purchase of said rights and ditches, the city supply, so far as the creeks above named are concerned, was confined to the waters of Elk creek only, and that at the same time the city purchased and acquired the ditches and water rights of Goodrich creek, included in the same purchase, it also purchased certain other water rights in and to the waters of Little Salmon, Big Salmon, Marble, and Mill creeks, and immediately thereafter proceeded to extend its water system north from Elk creek to tap the waters of such creeks in which it acquired its new rights at the same time that it acquired its rights in and to the ditches and water rights of Goodrich creek, above described.

"(5) The pipe line of the defendant city which was used to convey the waters of Elk creek to the city reservoirs was tapped and extended around the brow of the mountain in a northerly direction, and tapping and diverting the waters of Little Salmon, Big Salmon, and, some years later, still further to and tapping the waters of Marble creek; but the ditch and pipe line by which the city is supplied with water has never been extended beyond Marble creek to include in the city's water supply any of the waters of Goodrich creek in controversy in this suit,

and none of the waters of Goodrich creek have ever been conveyed to or within the corporate limits of the defendant city.

"(6) Goodrich creek lies some four miles to the north of Marble creek, and running east and parallel thereto. Shortly after the purchase of 1900 and 1901 of such old rights and ditches out of Goodrich creek, the defendant city expended something like \$10,000 in constructing a reservoir at the head of Goodrich creek and making a beginning on ditches out of Goodrich creek south towards Marble creek, having in mind the connecting up of Goodrich creek and the reservoirs so constructed with Marble creek and the city's ditch and pipe line at that point; but this work was never carried out, and no water has ever been impounded in the reservoir, and the beginning of the ditch that was made out of Goodrich creek has never been used for the purpose of carrying water.

"(7) At the time of the construction of the reservoir, the city, by its mayor and auditor, pursuant to ordinance, made a water location on Goodrich creek to the extent of 500 inches, miners' measure. This seems to have been done by way of and for the purpose of enlarging the rights of the city in and to the waters of said creek to which the city had succeeded by purchase. The construction and work of said reservoir succeeded this location within a short and reasonable time thereafter. The normal flow of Goodrich creek during the irrigating season does not exceed 400 inches, miners' measurement, and the location of the city could not cover any water in addition to that which the city acquired by purchase during the irrigating season.

"(8) Each and every year since the city acquired such rights through such deeds it has leased the waters of Goodrich creek for either mining or irrigation purposes, and such waters, for each and every year, were put to a beneficial use by the lessees; and in May, 1909, the city executed a lease of all its water interests in Goodrich creek to certain farmers for irrigation, stock, and domestic purposes, to be used on their lands lying under the ditches diverting the waters thereof, and such waters have been so used. This lease does not expire until May, 1914; and it was in defense of this lease and the claimed rights to turn all the waters of said creek to such lessees for such purposes that the city, during the last irrigation season, came in conflict with the rights plaintiff claims to the use of such waters. Plaintiff had the option to join in this lease as one of the lessees, but did not do so.

"(9) Such farmers live near Goodrich creek, and are neighbors of plaintiff. The city has, pursuant to such lease, diverted all the waters of such creek above the lands of plaintiff in the same manner and by the same methods and means that such waters were diverted for mining purposes by the predecessors in interest of defendant city, and to the

same extent, and conducted the waters therefrom down to and upon the lands of the farmers from the same points and through the same ditches as were used by the predecessors in interest of the city, and all of said ditches lying above the lands of plaintiff; and ever since the purchase of said water rights the defendant city has exercised dominion and control over said water rights and asserted ownership thereto as against all persons, including plaintiff.

"(10) The only beneficial use the city has ever made of the waters of Goodrich creek has been their sale and lease to such farmers and other persons for such purposes. Goodrich creek has never been connected with the ditches and pipe lines by which the city procures its water supply, and none of the waters of Goodrich creek have ever been diverted to or used within the corporate limits of the city, and none have ever been diverted to or through the ditches and pipe lines by which the city has always received its water supply. None of these things have been done, or could have been done, for the reason that Goodrich creek has never been connected with the going city water system, and the ditch and pipe line of that system has never been carried further north than Marble creek, and about $6\frac{1}{2}$ miles of additional pipe line would be necessary to extend the pipe line by which the city is supplied from Marble creek to Goodrich creek.

"(11) The ditches by which the waters are diverted to the lessees for such purposes, and by which they have always been diverted, are the same ditches by which the predecessors in interest of the city used the waters of Goodrich creek; but they are not a part of the ditches or water system by which the city of Baker now or ever did procure its water supply, and these waters which are now leased are not diverted through them, or by or through any ditch or pipe line by which the waters that are now used and have been used by the city are diverted.

"(12) About \$90,000 is now being expended in improving and enlarging the present pipe line and water system of the city as far north from the junction of Elk creek as Marble creek; but no work is being done now in connecting Goodrich creek with Marble creek on the ditch and pipe line which supply the city with water.

"(13) The city has a present need of the waters of Goodrich creek, and could and would use them if it had any means of diverting them to its going water system, or within its city limits for municipal purposes; but until such time as the necessary work of connecting Goodrich creek with the ditch and pipe line is done, and an extension thereof is made, it expects and asserts the right to hold the waters of Goodrich creek for its future needs or demands, and, pending such extension and connection to and with Goodrich creek, to lease such waters and

water rights to any one who will put them to a beneficial use, and to carry out the terms of the aforementioned lease. Under the terms and conditions of such lease, the lessees thereof, at all times from March 1st to October 1st, each and every year, have been putting such waters to a beneficial use.

"It is stipulated that, subject to any rights of the defendants of a prior date, the plaintiff made her filing on the waters of Goodrich creek as alleged in plaintiff's complaint, and that such filing was approved by the state engineer to the extent of 80 inches of the waters of Goodrich creek, and that she has since applied said waters for irrigation of her lands, when permitted by defendants, and that plaintiff is the owner of the land described in the complaint."

With this practically agreed case before it, the circuit court overruled the demurrer to the answers and, the plaintiff declining to plead further, entered a decree according to the prayer of the answer, to the effect that the defendant city of Baker has a first and prior right to the water of Goodrich creek, described in the pleadings in the suit, to the extent of 400 inches, miners' measurement, under a six-inch pressure, as such right is mentioned and described in defendant's first separate answer; that as against the defendant, the plaintiff has no right to the use of the same, or any part thereof; that as between the parties to this suit said defendant's title in and to the use, enjoyment, and possession of such waters be forever quieted and confirmed; that the plaintiff be and is hereby enjoined from the use of the same, or interference with the use of such waters, or any part thereof, by the city or its agents or employees or lessees; and that the defendant have and recover its costs and disbursements. The plaintiff has appealed from this decree.

C. C. McCulloch, of Baker (McCulloch & McCulloch and W. S. Levens, all of Baker, on the brief, for appellant. Gustav Anderson, of Baker, and Chas A. Johns, of Portland, for respondents.

BURNETT, J. (after stating the facts as above). The priority and superiority of the defendant city's right to use the water when it can use it being conceded by the plaintiff, the question is whether or not the leasing of the waters of Goodrich creek to her neighbors is such a use by the city as will prevent the plaintiff from applying to her arid land, named in the complaint, the amount of water from that source permitted by the state engineer. The plaintiff asks us to hold the defendant to the principle that the measure of the right of a water user is the actual beneficial use to which he puts the water, and that, although such person may be the prior appropriator, yet, subject to that right, a subsequent taker may employ the water in a beneficial way while the former is not using it. She maintains that

her right in this respect is a valuable right, of which the city cannot deprive her to her injury by leasing to a stranger, and that by action of that kind the city has not established such a use of the water on its part as would supersede her privilege in that respect.

By section 1 of the act of the Legislative Assembly, filed in the office of the Secretary of State February 19, 1903, Baker City, with which the present city of Baker is identical, was incorporated, and it was declared that the city may "purchase, or acquire by the exercise of the right of eminent domain, may receive and hold property, both real and personal, within or without said city, for municipal purposes, and shall have the right of possession and control of all buildings, parks, property, and of all tracts of land belonging to said city, and other property which has been or may hereafter be dedicated, or in any manner whatsoever obtained for public purposes of said city; and may manage, lease, sell, or dispose of the same for the benefit of the city; may receive bequests, gifts, and donations of all kinds of property in fee simple, in trust, or otherwise, * * * with power to manage, sell, lease, or otherwise dispose of the same, in accordance with the terms of said gift, bequest or trust, or absolutely, in case such gift, bequest, or trust be unconditional." In subdivision 15 of section 174 of the same act, the council is declared to have power within the city "to provide the city with good and wholesome water, and for the erection of waterworks within or without the city limits, as may be necessary or convenient therefor, and to provide a fund for constructing and defraying the expenses of the same; to make all needful rules and regulations for the conduct and management of the same; to establish rates for the use and consumption of the water by the city, or the inhabitants thereof, including the people living along the line, or in the vicinity of the works outside of the city; to provide for the payment of water rates monthly in advance, and to shut off the water from any house, tenant, or place for which the water rate is not duly paid or when any rule or regulation is disregarded or disobeyed, and to make property liable for the water rent, rate, or charge, when the water is used thereon * * * and to do any other act or to make any other regulation necessary and convenient for the management and conduct of such water system." Special Laws 1903, p. 595.

Bearing in mind that the object of the corporation is for governmental purposes, and not for gain or emolument, we note in the charter that the council is authorized to provide the city with good and wholesome water. This is the main purpose of the power conferred, and evidently contemplates that water shall be conducted to the city. Ancillary to that end is the provision allowing

the erection of waterworks within or without the city limits, and the right to make regulations for the conduct and management of the same, and likewise to establish rates, charging not only the inhabitants of the city, but the people living along the line, or in the vicinity of the works outside the city, for the consumption of water. It would be a strained construction to say that this section means that the city has power to provide strangers with good and wholesome water in the first instance. By mentioning the inhabitants of the city in the same category with people living along the line, or in the vicinity of the work outside of the city it is plain that all three of those classes are included together, and are to be treated alike; and hence it would follow that the water should be conducted within the city, so that the inhabitants thereof would be subject to rates for its use and consumption in like manner as people living along the line, or in the vicinity of the work outside of the city.

Allusion has been made to the act of the Legislative Assembly, filed in the office of the Secretary of State February 16, 1911, wherein it is provided "that any incorporated city or town, within the state of Oregon, owning, controlling, or operating a system of waterworks * * * for supplying water for its inhabitants, and for general municipal purposes, * * * shall have the right, and are hereby authorized and empowered to sell, supply and dispose of water * * * from such system to any person, persons, or corporation, within or without the limits of such incorporated city or town in which such water * * * system is operated, and to make contracts in reference to the sale and disposal of water * * * from such system, for use within or without the corporate limits." Laws 1911, p. 121. This act evidently contemplates an established system actually supplying water to the inhabitants of a city, and really amounts to a legislative construction of the powers given to the municipal defendant by its charter granted in 1903. Although powers are amply conferred upon the city in the way of contracting and purchasing property, both within and without the city, yet they are all adjuncts to the main municipal purpose of the charter conferring governmental powers upon the city. It was not designed that the city should embark in gainful occupations. Its interests as a proprietor are ancillary and subordinate to the main purpose of its existence, viz., local government. Although it has power to purchase and own property both real and personal and to contract with reference thereto, it would not be contended that the city would have a right under such provision of the charter, to engage in the millinery or shoe business, or anything of that nature not helpful or useful in the matter of government.

[1, 2] Conceding its ownership of the min-

ers' appropriation, as stipulated, yet it is for municipal purposes that it acquired such property. When it undertakes to act with reference to that property as a private owner, it is subject at best to the same rules that affect a private person in a like situation. According to the modern accepted doctrine, it is the use of water, and not the water itself, in which one acquires property in general. Apparent exceptions to this are found in the drinking of water, and such other uses as actually change its form and substance, so that its identity as water is destroyed; but in the main it is the use only of water which is the subject of property. Even at common law, under which the doctrine of riparian rights most strongly prevailed, the owner diverting water for use in mills, or for other like purposes, was compelled to let it pass to his lower neighbor undiminished in quantity and quality, except as it was naturally consumed by the processes employed. He only had the use of the water even under that régime. In modern times it is largely like the air or the sunlight, of which one may own, so far as ownership may be predicated of the same, only so much as he actually consumes.

[3] Within the meaning of its charter, the city has not yet obtained the use of the water of Goodrich creek, although it has a right to acquire such use. Until it does acquire it by conducting the stream to the city, thus providing the city and its inhabitants with wholesome water, it is not in position to use it within the scope of its corporate powers. Meanwhile the plaintiff, to the extent of her subsequent appropriation, may use the water, ceasing when the city, in the exercise of its superior right, actually diverts Goodrich creek into the corporate limits. This is on the principle that the city as a private owner, possessed of prior appropriations, is using the same; as a private owner in leasing the same to strangers, and as such must be subject to the rules which govern private owners in like situations. Neither the city, nor, so far as appears in the record, its predecessors in title, had the right to engage in the business of supplying water for manufacturing or irrigation purposes, to be used by people to whom they would sell the same. Under the most favorable construction of private proprietary interest in the city, the municipality is holding the water as a private owner for its own purposes; and, while it does not use it for its private benefit, it must be subject to the use of any subsequent appropriator. In short, if the city would act with reference to the miners' appropriations as if it were a private owner, as distinguished from a municipality, it must take the title cum onere and be subject to the rights of the subsequent appropriator to use the water while it is not in the use of the city. If it would exercise its charter powers over the

water as a municipality it should conduct the water into the city, so as to provide the inhabitants with the same. So far as the waters of Goodrich creek are concerned, it has not done this; and until it does so it cannot claim its full right as a municipality. Under the record, including the stipulations, as it appears before us, nothing here said is to be construed as impairing the right or title of the city to the appropriation already mentioned, or to continue its work of conducting the waters in question into the city, so it can use them for municipal purposes with the charter incidents of such use. The decree of the circuit court should be modified so as to quiet the title of the city to the waters of Goodrich creek to the extent of 400 inches, miners' measurement, under a six-inch pressure, subject to the right of the plaintiff to use the same to the extent of the permission granted her by the state engineer until such time as the city shall conduct the water into its pipe line, and thence within the municipal boundaries for use by its citizens. *Mann v. Parker*, 48 Or. 321, 86 Pac. 598; *Caviness v. La Grande Irrigation Co.*, 60 Or. 410, 119 Pac. 781; *McCoy v. Huntley*, 60 Or. 872, 119 Pac. 481; *Cantrall v. Sterling Mining Co.*, 122 Pac. 42. The decree of the court below will be modified accordingly.

KERR et al. v. DUVALL et al.

(Supreme Court of Oregon. Aug. 6, 1912.)

1. DEEDS (§ 90*)—CONSTRUCTION.

In the absence of a mistake on the part of the grantor, the utterance of a deed conveying real property is to be strictly construed against him.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 284-287, 247, 248; Dec. Dig. § 90.*]

2. WILLS (§ 439*)—CONSTRUCTION.

In interpreting the language of a will, liberal construction is to be applied, in order to determine the testator's intention respecting the disposition of his property so as not to defeat the purpose of his bounty.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

3. WILLS (§ 487*)—CONSTRUCTION—INTENTION—EVIDENCE.

In order to determine testator's intention in the construction of a will, parol evidence is admissible to explain the situation and condition of testator's property as understood by him when he attempted to dispose of it.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.*]

4. BOUNDARIES (§ 2*)—"FOOT OF HILL."

In determining the boundary of land calling for a line by and along the foot of a hill, the "foot of the hill" would be construed to mean the beginning of an abrupt rise, and not to include the bottom land, though sloping gradually upward from a stream.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2586, 2587.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. APPEAL AND ERROR (§ 878*)—AFFIRMANCE—EVIDENCE.

Where a boundary line established by the court, though not predicated on any evidence appearing in the record, was nearly identical with an attempted compromise line of which the parties had notice and under the evidence was not prejudicial to plaintiffs, defendants not having prosecuted a cross-appeal, the decree would be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8578-8580; Dec. Dig. § 878.*]

Appeal from Circuit Court, Yamhill County; William Galloway, Judge.

Suit by Edward J. Kerr and others against Edward F. Duvall and others to determine a disputed boundary line. From an adverse decree, plaintiffs appeal. Affirmed.

W. T. Vinton and Francis V. Galloway, both of McMinnville (McCain, Vinton & Galloway, of McMinnville, on the brief), for appellants. J. B. Hosford, of Portland, for respondents.

MOORE, J. This is an appeal by the plaintiffs from a decree establishing a disputed boundary. The evidence shows that Elbridge G. Duvall, a resident of Dayton, N. J., was on April 30, 1888, the owner in fee of the donation land claim of Edward T. Warren and wife in Yamhill county, Or., and on that day Duvall made a testamentary disposition, subsequent to the execution of his last will, whereby after his death the defendants secured a title to land in that claim, a part of which is described in the codicil as follows: "Commencing at a point on the southerly line of my farm at its intersection with Deer creek, thence northerly along the westerly side of said Deer creek until it intersects with Beaver creek; thence westerly along the southerly side of said Beaver creek to the foot of the hill; thence in a southerly direction by and along the foot of said hill to the southerly line or boundary of my said farm; and thence easterly by and along said southern boundary to the said Deer creek to the point or place of beginning, containing about twenty-one acres of land." The western limit of the premises thus described forms a part of the eastern border of land, in that claim, which the plaintiffs purchased pursuant to terms of Duvall's last will and testament.

The plaintiffs having secured a survey of what they assert to be the boundaries of the real property thus described in the codicil, by causing the south and west banks of such streams to be meandered and a line to be run northwesterly from a point in the south boundary of the Warren donation claim to a point on the south margin of Beaver creek; so as to include within the area 20.50 acres, allege in the complaint that the line so extended is the correct boundary between a part of their lands and a portion of the defendants' premises. The defend-

ants obtained a survey of what they maintain is the western border of the real property described in the codicil, thereby placing the line further to the west and including a larger area of land than is embraced in the plaintiffs' measurement, and in the answer aver that the line so run constitutes the correct boundary. The decree did not adopt either of such lines, but placed the boundary between them, particularly describing the westerly limit, and including in the tract as devised by the codicil 33.57 acres.

It is maintained by plaintiffs' counsel that, Beaver creek and Deer creek having been referred to as forming the northerly and easterly boundaries of the land, the westerly border should have been located along the foot of the hill in such a manner as to include the area specified in the codicil, and, this being so, an error was committed in not adopting the line described in the complaint as the proper limit. It is insisted by defendants' counsel that the language of the codicil properly received a liberal construction so as to effectuate the testator's purpose respecting the real property described, and that the testimony shows it was his intention to devise all the land within the area as found by the court.

[1] The rule prevails that, in the absence of a mistake on the part of a grantor, the utterance of a deed conveying real property is to be strictly construed against him.

[2] In the interpretation of the language of a last will, however, a liberal construction is applied, in order to determine the testator's intention respecting a disposition of property so as not to defeat the purpose of his bounty. The reason for this distinction in expounding the writings employed in the cases referred to is doubtless to be found in the fact that in executing a deed the grantor usually takes sufficient time and carefully selects the language used to express his purpose. The execution of a will, however, is sometimes postponed until death seems imminent, when it is often impossible for a scrivener to exercise that degree of care in the preparation of a last testament which its importance demands, and, in order to carry out the testator's intention respecting the disposition of his property upon his death and the persons contemplated as his beneficiaries, a liberal construction of his last will is essential.

[3] In order to determine such intention, testimony is admissible to explain the situation and condition of the testator's property as understood by him when he attempted to make a disposition thereof. If the codicil had designated a particular point on the south bank of Beaver creek from which a right line extending southerly should intersect the south boundary of the donation land claim at a point so as to include within the boundaries 21 acres and no more, the plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

tiffs' contention as to the location of the westerly limit would probably be controlling. It will be remembered, however, that the area of the premises, as given in that instrument, is "about twenty-one acres of land." The evidence shows that south of Beaver creek and west of Deer creek extends a hill from which falling rain divergently flows into both streams, so that, if the language "by and along the foot of said hill" is to be strictly construed, no real property would be transferred, since the quoted excerpt from the codicil would mean only the lines forming the southerly and westerly banks of those creeks.

C. E. Duvall, one of the defendants, testified that in the spring of 1888, his father, Edward F. Duvall, at the request of the testator, employed H. S. Maloney to make a survey of the line, the location of which is involved herein, and that when the measurement was completed the field notes thereof were mailed to Elbridge G. Duvall who, pursuant to the information thus obtained, executed the codicil containing the description hereinbefore given.

H. S. Maloney testified that in the year 1888 he was engaged to survey the line last referred to, but whether the measurement was made for the purpose of preparing a will or after it was executed he could not state; that all he remembered was that Edward F. Duvall informed him the testator had given or was to give land on the west side of Deer creek and south of Beaver creek; that the witness delivered the field notes of the survey which he made to the person employing him; and that the line which he run was nearly coincident with the description of the disputed boundary as given in the answer herein. He also testified that in January, 1908, at the request of Warren & Stater, real estate agents who, as he understood, represented the estate of the testator, he again run a line for the westerly boundary and made a plat of the survey which, with the field notes thereof, was duly recorded. A copy of such record was received in evidence showing the westerly line nearly as established by the decree herein.

M. W. Potter, a witness for plaintiffs, testified that he assisted Maloney in making the survey last mentioned; that he was employed for that purpose by Warren & Stater, who as real estate agents were selling the land to plaintiffs and desired to establish the disputed boundary, telling the witness that when such line was definitely fixed a deed could be executed to the purchasers, describing the premises to be conveyed by metes and bounds.

The survey thus referred to was evidently made and the plat and field notes thereof were filed for record before the deed was executed to plaintiffs who knew a controversy existed, respecting the western boundary,

prior to accepting the conveyance. They did not acquiesce in Maloney's survey, but their knowledge of the controversy respecting the boundary before securing their deed deprives them of much of the relief usually awarded to purchasers without notice.

[4] It appears that from Beaver creek and from Deer creek the hill referred to rises very gradually for some distance and then the ascent becomes quite steep. In referring to this acclivity, J. G. Hefty, a surveyor who at defendants' request run a line for the westerly border as described in the codicil, appearing as their witness, was asked on cross-examination: "As a matter of fact, the hill proper begins where the land begins to slope up?" He replied: "No, sir; it does not. All valleys have a slope, and all bottom lands have a slope; but we don't call them hills. The foot of a hill is defined as the beginning of an abrupt rise." The definition thus given is adopted as applicable to the disputed boundary herein, particularly so when construing the language of a will which locates a line by and along the foot of a hill. The testimony shows that the testator had never seen the Warren donation land claim, and his knowledge of the particular tracts thereof must have been obtained from information furnished by persons who understood the condition of the premises. From a description of the land, as hereinbefore quoted, it is manifest that the information thus supplied, as stated by C. E. Duvall and upon which his grandfather evidently relied in preparing the codicil, was quite accurate as is disclosed by the testimony, which tends to show that the line referred to in the answer is as nearly correct as possible. The boundary so asserted by the defendants to be accurate seems to coincide in most particulars with the measurement made by Maloney in 1888. His survey of January, 1908, seems to have been an attempt to adjust the disputed boundary. [5] The line established by the court, however, is not predicated on any evidence appearing in the transcript; but as the boundary thus determined is so nearly identical with Maloney's attempted compromise line, of which the parties had notice, and as the defendants have not taken a cross-appeal, the decree should be affirmed, and it is so ordered.

IRVINE et al. v. BECK.

(Supreme Court of Oregon. Aug. 15, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 242*)—DISPUTED CLAIMS—CLAIMANT'S REMEDY.

Where a claim against a decedent's estate is disallowed by the executor, the claimant's remedy is to present it to the county court for allowance, under L. O. L. § 1241, where it will be tried as a law action.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 242.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key No. Series & Rep'r Indexes

2. EXECUTORS AND ADMINISTRATORS (§ 481*)**—CLAIMS—ALLOWANCE—REPORT.**

Where a claim against a decedent's estate is allowed by the executor, he should so report it in his first semiannual account, or in his final account, if no previous one has been made.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2035; Dec. Dig. § 481.*]

3. EXECUTORS AND ADMINISTRATORS (§ 241*)**—CLAIMS—ALLOWANCE—EFFECT.**

The allowance of a claim against a decedent's estate by the executor is only his approval of it, and does not bind the heirs or creditors, who may still contest it on the settlement of the executor's final account, under L. O. L. §§ 1285, 1286.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 827, 849; Dec. Dig. § 241.*]

4. EXECUTORS AND ADMINISTRATORS (§ 245*)**—DISPUTED CLAIMS—TRIAL—ISSUES.**

Under L. O. L. § 1283, providing that any person interested in a decedent's estate may, on or before the day designated for settling the executor's final account, file objections thereto, or to any item thereof, "specifying the particulars of such objections," where objection was made to a claim for services on the ground only that the claimant had been fully paid in decedent's lifetime, this was the only issue open to consideration; the employment, the services rendered, and their reasonable value, being admitted.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 867-869; Dec. Dig. § 245.*]

5. EXECUTORS AND ADMINISTRATORS (§ 255*)**—CONCLUSIVENESS—PERSONS NOT APPEALING.**

On the trial in the county court of a disputed claim against a decedent's estate, although the only issue presented by the objection was that of payment in the decedent's lifetime, the court allowed a set-off. The contestant only appealed to the circuit court, which reduced the recovery, and from its judgment the claimant appealed to the Supreme Court. *Held*, that the claimant acquiesced in the judgment of the county court, and could have no greater recovery than that allowed by it.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 907-909; Dec. Dig. § 255.*]

Appeal from Circuit Court, Polk County; William Galloway, Judge.

Proceedings on objections filed by Jesse T. Irvine and others against a claim by Temperance Beck against the estate of Nancy Brouse. From a judgment for the claimant for a part of the amount claimed, she appeals. Reversed and rendered.

Mrs. Nancy Brouse died in October, 1900, in Polk county, Or., leaving a will by which B. Wilson was named; and afterward appointed by the county court of that county, executor. Temperance House Beck presented a claim, against the estate for the sum of \$1,000, the reasonable value of 23 months' services, keeping house and caring for Mrs. Brouse from January 5, 1907, to December 1, 1908. The claim is as follows:

"In the Matter of the Estate of Nancy Johnston Brouse, Deceased. Claim of Mrs. Temperance Beck against the above-named

estate. April 18, 1910. To care and attention rendered by the claimant for the deceased between January 5, 1907, and December 1, 1908, a period of one year and eleven months, in keeping house for her, doing her washing, nursing her, and generally caring for her, under an express agreement made on or about January 5, 1907, between the claimant and the deceased, by which the deceased agreed to pay the claimant \$1,000 if the claimant would stay with her from that time to her death and do the work for which this claim is made. The services above mentioned were faithfully performed by claimant for the period aforesaid, when deceased rescinded said contract, discharged the claimant, and rendered further performance of the same by the claimant impossible. The reasonable value of the services rendered by claimant under said agreement is the full sum of \$1,000. No payments have been made thereon."

It appears from the record that, at the time the above agreement was made, Nancy Brouse was about 92 years old and lived on her farm, near Independence; that her daughter, Temperance Beck, who was a widow living in Independence, had been caring for her part of the time; that on January 5, 1907, Mrs. Brouse made an agreement with Mrs. Beck that defendant should keep house for her mother and nurse and care for her generally as long as she lived, in consideration of which Mrs. Brouse was to pay her \$1,000, and that she turned over to B. Wilson, executor of her will, a bank certificate of deposit in that sum, to be delivered to Mrs. Beck by him after Mrs. Brouse's death, if Mrs. Beck had fulfilled the agreement. Thereafter Mrs. Beck lived with and cared for her mother under the agreement until about December 1, 1908, when her mother, being dissatisfied with the arrangement, employed other help and revoked the agreement and countermanded the instruction to Wilson as to the delivery of the certificate of deposit.

The verified claim was presented to the executor on April 22, 1910, and on the same day he indorsed it: "The within claim, presented to me this 22d day of April, 1910, is, after examination, allowed. B. Wilson, Executor of said Estate." On April 30th respondents filed with the clerk of the court objections to the allowance of the claim; the only ground of objections being "for the reason that said Temperance Beck had been fully settled with by Nancy Brouse during her lifetime for the services claimed for in said bill." On December 2, 1910, the executor filed his final account, in which he stated that "in addition to the above claims there has been presented to your petitioner the following claims, which have been not allowed by your petitioner, and the same are presented herewith for further action by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the court, to wit: * * * Temperance Beck (formerly House), \$1,000." On January 7, 1911, Temperance Beck filed objections to the final account, in which she asserts that it is not true that her claim was disallowed; that it was allowed, and that she was so notified; that she received no notice to the contrary, except through the final account.

The validity of the claim was tried before the county court upon the evidence offered by both parties, and, as part of the decree in settling the final account, it adjudged, among other things, that the claim be allowed in the sum of \$802, less a credit of the amount of a note due from claimant to the estate in the sum of \$200, and directed the payment thereof by the executor, and the final account was modified accordingly. Plaintiffs appealed to the circuit court, and judgment was there rendered for defendant in the sum of \$322, from which defendant appeals.

Oscar Hayter, of Dallas, for appellant; Francis V. Galloway, of McMinnville (J. E. Sibley, of Dallas, and McCain & Vinton, of McMinnville, on the brief), for respondents.

EAKIN, C. J. (after stating the facts as above). [1] First, it is important to determine what issues are before us. If the claim had been disallowed by the executor, then the claimant's remedy would have been to present it to the county court for allowance, which would have been tried thereafter as a law action, under section 1241, L. O. L. See *Wilkes v. Cornelius*, 21 Or. 341, 23 Pac. 473.

[2] The claim having been allowed by the executor, he should have so reported it in his first semiannual account, or in his final account, if no previous one had been made.

[3] The allowance of the claim by the executor is only his approval of it, and does not bind the heirs or creditors, who have an opportunity to contest it upon the settlement of the final account, under sections 1285 and 1286, L. O. L. See *In re Chamber's Estate*, 38 Or. 131, 62 Pac. 1013. However, the situation here is somewhat anomalous. The executor reports it as not allowed, but the court tried it as though it had been allowed and objected to by the heirs; and we will so consider it, treating the objections of the heirs, filed April 30, 1910, as objections to the final account.

[4] It is said in *Reach's Estate*, 50 Or. 179, 190, 92 Pac. 118, 122, by Mr. Justice Moore: "Any person interested in the estate may, on or before the day so designated [for settling the final account], file his objections to the final account or to any item thereof specifying the particulars of such objections." B. & C. Comp. § 1203 (L. O. L. § 1286). The requirement which the statute thus imposes to indicate the precise ex-

ceptions relied upon was evidently designed, in the system of pleading, as an answer, controverting the statement of facts contained in the final account, which is treated as a complaint, and such objections are apparently intended to impart notice to the personal representative of the decedent, so as to enable him to prepare for a trial of the issues thus framed. * * * The court's examination of the facts challenged by the exception is therefore limited to the particular specification set forth in the objections interposed." Under this rule there was but one issue tendered by the objections to the account, viz., that the claimant had been fully settled with by decedent in her lifetime for the services claimed for in the bill filed April 22, 1910, thus admitting the employment, the service rendered, and its reasonable value; and even if we consider that the burden of proof on that issue was upon the claimant, the evidence is undisputed that she was not settled with or paid anything thereon.

[5] However, defendant has acquiesced in the decree of the county court and can claim no greater decree here.

The decree of the circuit court will be reversed, and one entered here allowing the defendant's claim in the sum of \$802, upon which shall be credited the sum of \$224, the amount of the note due from her to the estate; interest being computed from the date of the note until January 7, 1911, the date of the decree of the county court.

HOWE v. KERN et al.

(Supreme Court of Oregon. Aug. 6, 1912.)

1. EQUITY (§ 197*)—SET-OFF AND COUNTERCLAIM (§ 41*)—CROSS-BILL—"COUNTERCLAIM."

In an action by an executrix to compel the execution of a mortgage to secure the deferred payment of the purchase price of land, a minor heir to a part of the estate distinct from the land sold was not interested in the result, and the court had no jurisdiction to quiet title against him on defendant's cross-bill; cross-bills being abolished in equity actions by L. O. L. § 390, and such relief against the minor not being a counterclaim against the plaintiff within the meaning of L. O. L. § 401, authorizing counterclaims.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 455-459; Dec. Dig. § 197; *Set-Off and Counterclaim*, Cent. Dig. §§ 76-79, 81; Dec. Dig. § 41.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1645-1650; vol. 8, pp. 7620, 7621.]

2. INFANTS (§ 89*)—ACTIONS—PROCESS—CROSS-BILL.

In an action for specific performance, in which a minor was made a party defendant and served with summons based on the original complaint, judgment could not be rendered against the minor on defendant's cross-bill afterwards filed seeking to quiet title against such minor, where no summons was issued on the cross-complaint, although the guardian ad litem

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

accepted service of the cross-complaint and filed an answer for the minor.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 255-272; Dec. Dig. § 89.*]

3. WILLS (§ 836*)—SPECIAL DEVICES—LIABILITY FOR DEBTS.

Where two pieces of land were specifically devised, each was exempt under L. O. L. § 1252, from sale for the payment of debts so long as any property not specifically devised remained unsold, and each piece was equally liable for such debts when the other property was exhausted.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2139, 2140, 2150-2155; Dec. Dig. § 836.*]

4. WILLS (§ 840*)—SECURED CLAIMS.

A testator's debts which are secured by mortgage must first be satisfied out of the mortgaged property.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 2149; Dec. Dig. § 840.*]

5. EXECUTORS AND ADMINISTRATORS (§ 367*)—SALE OF LAND FOR DEBTS—VALIDITY—QUANTITY OF PROPERTY.

Where property specifically devised is ordered sold for debts for which it is liable, the fact that more is included in the order than is necessary, or that part of the proceeds are applied to claims for which the property is not liable, does not invalidate the sale.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1545-1549; Dec. Dig. § 367.*]

6. EXECUTORS AND ADMINISTRATORS (§ 336*)—SALE OF LAND TO PAY DEBTS—PETITION.

Where the petition for the sale of real property specifically devised showed that there was no other real property, and that the personal property was worth only \$1, and enumerated debts and expenses of administration and taxes amounting to \$506.53, it was sufficient to give the court jurisdiction and show a necessity for the sale.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1385-1396; Dec. Dig. § 336.*]

7. EXECUTORS AND ADMINISTRATORS (§ 336*)—PETITION—MATTERS JUDICIALLY NOTICED.

Since the court will take notice of the contents of a probated will, a petition for the sale of property specially devised need not set out the will.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1385-1396; Dec. Dig. § 336.*]

8. EXECUTORS AND ADMINISTRATORS (§ 336*)—SALE OF LAND TO PAY DEBTS—PETITION—JURISDICTION.

The fact that an executrix's petition for the sale of land specially devised prayed for the sale of more land than was required to pay the debts, did not affect the court's jurisdiction to order the sale.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1385-1396; Dec. Dig. § 336.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by James Gladstone Howe, a minor, by Carrie Howe Sherwood, his guardian, against L. E. Kern and others. From a judgment for defendants, plaintiff appeals. Affirmed.

James Howe, who died on June 24, 1901, made a will on March 14, 1898, and among other things provided:

"Third. I give, bequeath and devise unto my said wife, Carrie Howe, all that property platted and dedicated by me as Howe's addition to the city of Portland and comprising about seventy-two lots, more or less, to be used or disposed of by her for the benefit of herself and my said infant son, and I expressly request that my wife provide for the education and maintenance of my said son out of the proceeds of said lots; provided, that three of the lots of said Howe's addition be held in trust by my said wife for my stepson, William Leon Wheatly, the same to be selected and deeded to said William Leon Wheatly by my said wife whenever in her judgment she shall deem it proper or advisable to do so. Provided, further, that this devise to my wife shall also be subject to the conditions and limitations hereinafter expressed.

"Fourth. I give, bequeath and devise unto my wife, Carrie Howe, and my infant son, James Gladstone Howe, share and share alike, that piece or parcel of land containing about 5 1/4 acres of land lying to the east of and adjoining the said Howe's addition to the city of Portland, said interest of my wife being also subject to the conditions and limitations hereinafter expressed."

"Sixth. I hereby appoint my wife, Carrie Howe, the legal guardian of my infant son, James Gladstone Howe, and request she be allowed to act as such guardian without bonds."

Item 7 provides the conditions upon which the devise to the wife shall depend, and she is nominated executrix without bonds.

By the inventory and appraisement of the property of the estate, the 72 lots mentioned in item 3 of the will are valued at \$14,600, and the 5 1/4-acre tract mentioned in item 4 is valued at \$5,750.

On April 3, 1901, Carrie Howe, the executrix, filed a petition in the county court for the sale of real estate for the purpose of paying the debts of the estate, the expenses of administration, and for the support of the widow and minor child, who was five years of age and the only heir of the decedent. It appears from the petition that there was no personal property of the estate; that the funeral expenses were \$227.50, the delinquent taxes \$39.25, taxes for the current year \$166.53, expenses of administration already incurred \$73.25; that petitioner is without means to support herself and son; that the debts secured by mortgages are \$1,300; that there is a mortgage on block 5 for \$600, one on blocks 6 and 7 for \$400, and one on blocks 1, 2, and 8, and lots A and B for \$300. She prays for an order directing her to sell at private sale any part of the real property for cash or on terms of one-third cash and the payment of the balance to be secured by mortgage.

The court made an order on May 6, 1901,

licensing the executrix to sell at private sale, such part or parts of block 3, which is appraised at \$1,500; block 4, appraised at \$2,500; lots 23 and 24 of block 7 in Wheatland addition to East Portland, appraised at \$15; and the 5¼-acre tract, appraised at \$5,750—as may be necessary to pay the debts and expenses of administration. On and prior to September 8, 1902, she had sold 12 lots in blocks 2 and 3 for \$1,455, and three other lots in block 2 for \$400, the date of which sale does not appear, making \$1,855 received from sales prior to the sale of the 5¼-acre tract, which was more than sufficient to pay the mortgage debts. This tract was sold to defendant Kern on December 1, 1902, for \$3,750; \$1,750 being paid in cash, and the remainder being secured by mortgage due in one year.

The final account, filed April 23, 1903, shows that the total amount received in cash from all sales, including the \$400 collected for rent of the 5¼-acre tract, was \$4,006, over and above the \$2,000 deferred payment; that the total debts and expenses paid, including the mortgage debts, was \$3,256.88.

On April 4, 1903, the executrix brought suit for specific performance against defendant Kern, he having refused to execute the mortgage to pay the deferred payment of \$2,000, the purchase price of the 5¼-acre tract, and on May 12, 1903, Kern answered the complaint. He set out items 3, 4, and 7 of the will, and among other defenses alleged that the plaintiff, as executrix, could not give him a good title to the tract for the reason that no petition for an order of the sale of the real property herein mentioned had ever been made, stating the necessity of the sale.

The minor child was made a party defendant in the suit on July 3, 1903, on motion of defendant Kern, and summons was duly served on him on that date, and, on motion of defendant, Karl Stephan was appointed guardian ad litem for the minor. On the same day defendant Kern filed what he terms a cross-bill, under the title of the suit, which is, in fact, a complaint to quiet title to the property against the minor. Stephan, the guardian ad litem, accepted service of the cross-complaint on July 8, 1903; but no summons was issued or served on the minor. The guardian ad litem answered the cross-bill, admitting the justice of the complaint, and consenting to the decree. On July 16, 1903, the court made findings, and rendered a decree to the effect that the county court acquired jurisdiction of the minor and of the land in the proceeding to sell the same; that Kern acquired title thereto, and adjudged that the minor had no interest therein. On August 23, 1907, Kern sold and conveyed by a warranty deed, for a valuable consideration, 2½ acres of the 5¼-acre tract to defendant Joseph H. Nash, and on September 14, 1907, he sold and con-

veyed to the defendant school district No. 1 of Multnomah county, Or., for valuable consideration, 2½ acres of the tract, and the school district has erected a school building thereon at an expense of \$37,000.

Plaintiff brought this suit on May 26, 1910, alleging the facts, which are briefly stated above, for the purpose of having declared void the proceedings of the county court authorizing the sale of the minor's interest in the 5¼-acre tract, and that the decree of the circuit court, in relation thereto, be held for naught, and the conveyances be declared void, alleging want of jurisdiction of the county court to authorize such sales, and alleging collusion and fraud between Carrie Howe, executrix, and Kern, in bringing the cross-bill and the proceeding therein, to bar the title of the minor.

Defendant Kern and wife answered, admitting some of the allegations and denying the others. Defendant Nash and the school district answered separately, setting out the proceedings of the county court, relating to the sale, and the proceedings of the circuit court quieting the title of Kern to the property; also, pleading the same facts as an estoppel against the plaintiff, and alleging that defendants are innocent purchasers thereof for value, without notice of any defect in the title.

Upon the trial of the suit the court made findings and rendered a decree that defendant Nash and the school district, respectively, are the owners in fee simple of the tracts conveyed to them by Kern, and that the plaintiff has no interest therein, from which decree plaintiff appeals.

Alex Bernstein and Geo. A. Pipes, both of Portland (D. Solis Cohen, of Portland, on the brief), for appellant. R. C. Wright, V. K. Strode, and A. H. Tanner, all of Portland (Johnson & Van Zante, of Portland, on the brief), for respondents.

EAKIN, C. J. (after stating the facts as above). [1] When defendant Kern was called upon by the executrix to execute the mortgage to secure the \$2,000, deferred payment of the purchase price of the 5¼-acre tract, he refused to do so, and she brought suit against him to compel specific performance. That suit raised only the question as to the liability of Kern upon his contract of purchase. His defense was that plaintiff could not give him a good title because the petition for the sale was insufficient to authorize an order of sale. He asks to have the minor made a party defendant in that suit, and an order to that effect was made by the court, but an amended complaint, accomplishing that result, was not filed. However, a summons was served on the minor, and, on motion of Kern, Stephan was appointed guardian ad litem for him in that suit. Kern being willing to complete the purchase and not satisfied that a decree

against him in that suit would quiet his title, he filed what he terms a cross-bill, not against the plaintiff or for relief as to any matter involved therein, but to quiet title against the minor.

[2] Upon the cross-bill no summons was issued and no service of the complaint was had on the minor, nor was there a guardian ad litem appointed for him, but service of the complaint was accepted by the guardian in the suit for specific performance, and he filed an answer therein. The guardian ad litem was selected by the executrix, and he did not investigate the minor's rights, but acted upon the advice of Mrs. Howe, and her attorney, who, it seems, drew his answer, yet her interests in the proceeding were adverse to that of the minor, as it would result in taking his property to pay debts chargeable upon the property devised to her. See *Bowsman v. Anderson*, 123 Pac. 1092. However, by section 390, L. O. L., cross-bills are abolished, except for the purpose of asserting an equitable defense in an action at law; but any defense that a defendant may have against the plaintiff in a suit may be pleaded as a counterclaim under section 401, L. O. L., if it be connected with the subject of the suit. Although the minor was made a party defendant in the suit for specific performance, he was in no way interested in the result. Therefore the circuit court had no jurisdiction in that suit to quiet the title as against the minor, and, so far as it attempted to do so, the decree was void, for the reason that the relief sought by the cross-bill was not a counterclaim against the plaintiff in the suit for specific performance, within section 401, L. O. L., and for the further reason that the minor, against whom the relief was sought, was not brought into court by service of summons.

The plaintiff in this suit, assuming that the petition for the sale of the real estate in the probate proceeding was wholly insufficient to give the court jurisdiction to order the sale, alleges that the answer and cross-bill in the suit for specific performance and the proceedings thereunder were had by collusion and fraud between the executrix and Kern for the purpose of barring and cutting off any claim to the property by the minor; and the defendants plead the proceeding under such answer and cross-bill as an adjudication of the title in their favor, and that they are innocent purchasers for a valuable consideration without notice of any collusion or fraud.

Without considering the question of collusion or fraud on the part of Kern and the executrix, we conclude that the decree in the suit for specific performance did not bar or estop the plaintiff from claiming title to the property, and this brings us to the consideration of the question of the sufficiency of the petition for the sale of the real estate and the validity of the order.

[3] The first question of importance is as to the relation that the fourth item of the will—the devise of the 5% acre tract—bears to the other devise. This is a specific devise to Carrie Howe and the infant. By section 1252, L. O. L., when real estate is specially devised, it shall be exempt from the operation of the order of sale for the purpose of paying debts in the same manner as personal property; and by section 1251 personal property, specially bequeathed, is exempt from the operation of the order of sale so long as any property not specially devised or bequeathed remains unsold. The wife's interest in the property devised by both items 3 and 4 is made contingent upon her remaining with the testator while he lives and remaining unmarried thereafter. In case of desertion or remarriage all the property is to go to the infant. Plaintiff has overlooked the fact that item 3 of the will is also a special devise of the property described and is exempt from the order of sale until property, not specially devised or bequeathed, has been exhausted. By the terms of item 3, the devise to Carrie Howe is charged with the support of herself and the education and maintenance of the child; and the property devised by item 4 cannot be sold to meet such expenses until the other property is exhausted.

[4] The debts of the estate secured by mortgage must first be satisfied out of the mortgaged property. This is recognized by section 1271, L. O. L., which provides for the payment of mortgage debts out of the personal property only when so provided in the will or by order of the court, and by section 1272, L. O. L., if no such provision is made, the property shall be sold subject to the mortgage. The property devised by item 4 is equally liable with that devised by item 3 for the funeral expenses, debts of the estate, and expenses of administration, and either may be resorted to for the payment of such claims or liabilities; and if, in the course of the probate proceeding, either devise has contributed to such liability more than its share, the devisee is entitled to contribution therefor. *Jarman on Wills*, p. 2031.

[5] But the property devised by item 4, having been ordered to be sold for debts for which it was liable, the fact that more property was included in such order than was necessary to pay such debts, or that a part of the proceeds of such sale was applied to claims for which it was not liable, cannot render the sale invalid.

[6] The complaint in this suit alleges that the petition for the sale of real property was insufficient to give the court jurisdiction. "That the said petition for the sale of real property" was insufficient and did not contain the jurisdictional facts to give the court jurisdiction to base an order thereon directing the sale of the said minor's interest in and to the said tract of 5% acres

especially devised to him by said will. That said petition failed to allege or show any necessity for the sale of said property, but, on the contrary, showed that there was no necessity to sell said property. That said petition failed to show that there were any claims for the payment of which said property could be subjected under the terms of the will as above alleged, and said petition failed to set out said will or to petition for the sale of the said property, but the said petition asked only for an order of the court permitting the executrix to sell such portions of said real property belonging to said estate as she might deem necessary from time to time in order that she might sell such part or parts without any order of the court therefor and without any determination by the court that the necessity existed for the sale of said part or parts of said property." No facts are alleged, stating in what regard the petition failed to establish a necessity for the sale of the property, or that there were any claims for the payment of which such property could be subjected. If by this allegation plaintiff means that there was no necessity shown for the sale of this tract, it being specially devised, that objection is fully answered by what has been already stated; there being funeral expenses, expenses of administration, and taxes for which this property was liable. The final account shows that there was actually more than \$1,650 of liabilities for which it was liable, and no property, not specially devised, was applicable to the payment thereof. Therefore the petition shows a necessity for the sale. The inventory and appraisement show there was personal property of the value of \$1, practically no personal property. However, the petition recites that the personal property was sold for \$1, and it enumerates the debts and expenses of administration and taxes amounting to \$506.53, and for the payment of which this property was liable equally with the other.

[7] It is also urged that the petition is defective because it does not set out the will; but, the will having been probated, the court will take notice of its contents.

[8] The petitioner asks for an order permitting her to sell any part of the property of the estate for which she may be able to find a purchaser. Probably she asked for too much, but the prayer does not affect the jurisdiction. The order of sale does not grant all that is prayed for, but authorizes the sale of blocks 3 and 4, and lots 23 and 24 of block 7, in Wheatland addition to East Portland, and the 5½-acre tract or so much thereof as may be necessary to realize the amount of money sufficient to pay the claims, charges, and expenses of administration. Such latitude to the executrix was probably ill advised, but does

not affect the jurisdiction to make the order or the title of the property sold thereunder. If being necessary that some of the real estate be sold to pay this indebtedness, and all the real property having been disposed of by special devise, the property under each devise is liable equally for the payment thereof, and the petition is not subject to the criticism offered, but was sufficient to give the court jurisdiction to make the order of sale.

The sale of more of the property than was necessary to pay the debts for which it was liable, and the payment of a part of the proceeds of the sale upon debts chargeable to other property, are matters of procedure that do not go to the jurisdiction of the county court to make the order for the sale of property, and these defects are aided by the curative statute. Section 1259, L. O. L. The decree is affirmed.

BURNETT v. MARRS et al.

(Supreme Court of Oregon. Aug. 15, 1912.)

1. CONTRACTS (§§ 10, 56*)—CONSIDERATION—MUTUALITY.

A writing requesting insertion of an advertisement on a show curtain for a period of one year and agreeing to pay a weekly sum therefor, accepted by the party to whom addressed and acted upon by both parties, was based on a valid consideration and was not void for want of mutuality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. §§ 10, 56.*]

2. JUDGMENT (§ 572*)—RES JUDICALA—JUDGMENT ON DEMURRER TO DEFECTIVE PLEADING.

While a judgment rendered on a demurrer is conclusive as to the facts confessed thereby, where the demurrer goes to the merits, a demurrer to a complaint in an action by the assignee of a corporation, on the ground that the plaintiff did not plead properly the corporate existence of the assignor, goes merely to a formal or technical defect, and a judgment sustaining it will not bar a subsequent action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1041, 1047-1049; Dec. Dig. § 572.*]

3. JUDGMENT (§ 572*)—JUDGMENT AS BAR—DEMURRER—EFFECT OF APPEAL.

The decision on the demurrer being by a justice of the peace, neither an appeal to the circuit court and an affirmation therein, nor a ruling striking out an amendment to the petition filed therein, would change the character of the judgment or bar a subsequent action, as the merits were not determined in either court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1041, 1047-1049; Dec. Dig. § 572.*]

4. TRIAL (§ 396*)—BY COURT—FINDINGS—CONFORMITY TO ISSUES.

Where a former judgment was not res judicata, an allegation of the defendants' answer in relation thereto was immaterial, and was properly ignored by the court in its findings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

5. TRIAL (§ 3061) — BY COURT — FINDINGS — STATE OF EVIDENCE.

Where, in an action on a contract, the defendants offered no evidence other than the record of a judgment relied on as res judicata; no finding on the question of giving notice to the plaintiff in attempting to rescind was warranted.

[Ed. Note.—For other cases: see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 896.*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by B. K. Burnett against J. D. Marrs and others. From a judgment for plaintiff, defendants appeal. Affirmed.

The complaint alleges, in substance, that on June 5, 1910, the defendants, as partners under the name of Grand Electric Company, entered into an agreement in writing with the C. E. McKenna Company, a corporation organized under the laws of the state of Washington and authorized to transact business in Oregon, of which the following is a copy:

"We hereby authorize you to insert our advertisement in space A. A. A. on Grand Ad Curtain, Portland, Ore., subject to change of booking, name or location of theater, for the term of one year (12 calendar months' actual display) from the day advertisement appears and to continue in force after that time until canceled by written notice to the main office. To occupy space selected, for which we agree to pay to your order the sum of \$5.00 per week, payable monthly in advance. *First painting free*; all subsequent changes to be at the expense of advertiser. If copy is not supplied within 10 days after signing this agreement, the C. E. McKenna Co. will be at liberty to supply such copy or matter to the best of their ability. In case of suit to collect any part of this contract, the advertiser agrees to pay such additional sum as the court shall adjudge reasonable as attorney's fee in such suit. No verbal understanding or conditions not specified herein will be recognized. Grand Electric Co. Address, 127 Grand Ave.

"Accepted: C. E. McKenna Co., Inc., per Geo. W. Cox."

It is also alleged that pursuant to the contract the C. E. McKenna Company furnished defendants with advertising from June, 1910, until January, 1911, amounting to \$175, only \$85 of which has been paid, that the claim was assigned to plaintiff, and that \$25 was a reasonable attorney's fee.

Defendants answered, admitting the partnership of defendants and the execution of the contract, and denying the other allegations of the complaint, and for a further answer pleaded in effect that the contract on the part of defendants was voluntarily made, and for no consideration whatever, that on the 6th day of October, 1910, the contract was rescinded by a written notice to the C. E. McKenna Company. For a further and separate answer the defendants allege, in

substance, that on February 4, 1911, the plaintiff commenced an action against defendants in the justice's court for Portland district, Multnomah county, Oregon, for the recovery of \$90 on account of the contract mentioned; that February 10, 1911, a general demurrer to the complaint, filed by defendants, was sustained by the justice's court, and a judgment rendered in favor of defendants for costs; that the action was appealed to the circuit court of that county, and a judgment there rendered sustaining the demurrer of defendants, on the ground that the corporate existence of the C. E. McKenna Company, Incorporated, assignee of the plaintiff therein, was not properly pleaded; that thereafter, by leave of the circuit court, an amended complaint was filed, and on motion of defendants the same was stricken out on the 7th day of May, 1911, for the reason that the court had no authority to allow an amended pleading to be filed, which changed the issue tried in the justice's court; and that the plaintiff is estopped from prosecuting this action.

Plaintiff filed a reply, denying the new matter in the answer, except as to the former judgment, upon the motion to strike out plaintiff's complaint. The cause was tried before the court without the intervention of a jury.

Allen H. McCurtain, of Portland, for appellants. Benjamin E. Hayman, of Portland, for respondent.

BEAN, J. (after stating the facts as above). [1] Defendants, upon this appeal, assign as error that the court erred in rendering judgment for plaintiff, for the reason that plaintiff failed to prove that the contract set up was executed for the C. E. McKenna Company by any one who had authority to bind the company. The allegation in the complaint as to the execution of the contract is contained in paragraph 3 thereof, which paragraph is admitted by defendants in their answer. Therefore there was no issue as to the execution of the contract. Defendants also set forth the execution of the agreement in writing, and for a second assignment of error claim that the same is void for want of mutuality. The contract set out in the complaint, while somewhat informal, being accepted by the C. E. McKenna Company and acted upon by both parties, was, in effect, a mutual contract. The acceptance was a consideration for the agreement upon the part of defendants, and bound both parties to its conditions. The testimony shows that defendants made payments for advertisements, pursuant to the terms of the writing. The contract authorized the advertising and fixed the price therefor, and, the work having been done, the defendants are certainly liable to pay for such. We think this contention is, without merit.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] It is also contended by counsel for defendants that the judgment in the former action upon the demurrer and motion to strike out plaintiff's complaint is a bar to this action, and that the court erred in failing to so find as requested by defendants. This is the real point for this court to determine. It will be noticed from the statement of the pleadings that the first action, to which a general demurrer was sustained, was determined upon a motion to strike out an amended answer because an amendment was inserted therein to the effect that the C. E. McKenna Company was a corporation. A judgment rendered on a demurrer is equally conclusive, by way of estoppel, of the facts confessed by the demurrer, as would be a verdict and judgment finding the same facts. But a judgment on demurrer, based merely on formal or technical defects and raising only a question of pleading, is no bar to a second action for the same cause. Where the ground of the demurrer is the omission of a material allegation from plaintiff's pleading, a judgment sustaining the demurrer will not prevent the maintenance of a new suit on the same cause of action, in which the new declaration or complaint supplies the missing averment. 23 Cyc. 1152; 1 Freeman on Judgments (4th Ed.) § 267; O'Hara v. Parker, 27 Or. 156, 163, 39 Pac. 1004; Hughes v. Walker, 14 Or. 481, 13 Pac. 450; Hoover v. King, 43 Or. 281, 286, 72 Pac. 880, 65 L. R. A. 790, 99 Am. St. Rep. 754.

No judgment can be available as an estoppel unless it is a judgment on the merits. 1 Freeman on Judgments (4th Ed.) § 260. A judgment cannot be set up in bar of a subsequent action unless it was a final judgment on the merits, adjudicating the rights in litigation in a conclusive and definitive manner. 23 Cyc. 1126. The determination of a motion or summary application is not res adjudicata, so as to prevent the parties from litigating the same matters again in the more regular form of an action, especially if the matter affected by the motion was only incidental or collateral to the determination of the main controversy. 23 Cyc. 1119. In the case of Pruitt v. Muldrick, 39 Or. 353, at page 358, 65 Pac. 20, at page 21, the following language was used by this court: "In order that a judgment may constitute a bar to another suit," says Mr. Justice Field in Hughes v. United States, 4 Wall. 232 [18 L. Ed. 303]. "It must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and it must be determined on its merits. If the first suit was dismissed for defect of pleading, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

[3] In the former action commenced by

plaintiff against defendants it was determined that there was a defect in the complaint, and the demurrer was sustained for that reason. The judgment in that action did not go to the merits and is not a bar to this action. The fact that the plaintiff appealed to the circuit court, where the judgment of the justice's court was sustained, did not change the character of the judgment; nor did the attempted amendment of the complaint in the circuit court which was stricken out on motion. In neither court were the merits of the controversy between the parties heard or determined.

[4] There was no error in the trial court ignoring the allegation in the answer as to the former judgment. It was not a material allegation, and necessitated no finding. The case of Waggy v. Scott, 29 Or. 386, 45 Pac. 774, cited and relied upon by defendants' counsel, is not in conflict with, but in support of, this ruling.

[5] Defendants offered no evidence other than the record of the judgment referred to, and was therefore not entitled to a finding upon the question of giving notice to the plaintiff in attempting to rescind the contract. The circuit court found that the contract had been carried out by plaintiff. It is claimed that there was not sufficient evidence to support the findings made by the trial court. After a careful examination of the evidence, we think the same supports the findings, and they should not be disturbed. The evidence tends to show that the advertising was done as claimed by plaintiff, and this is not disputed.

Finding no error in the record, the judgment of the lower court is affirmed.

PALMER v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. Aug. 13, 1912.)

1. STREET RAILROADS (§ 119*)—INJURIES TO PEDESTRIAN—INCONSISTENT FINDINGS—JUDGMENT ON SPECIAL VERDICT.

Under L. O. L. § 155, which provides that, where a special finding of facts shall be inconsistent with the general verdict, the former shall control the judgment, where special findings, in an action for injuries from being hit by a street car, established that the plaintiff was guilty of contributory negligence, a judgment was properly entered for the defendant in spite of a general verdict for plaintiff.

[Ed. Note.—For other cases see Street Railroads, Cent. Dig. § 270; Dec. Dig. § 119.*]

2. TRIAL (§ 355*)—INTERROGATORIES—EVIDENTIARY FACTS.

Where, in an action for injuries from being hit by a street car, defendant alleged that, though the plaintiff saw, or reasonably should have seen and heard, the car in time to have avoided a collision, she negligently and recklessly drove onto the defendant's track, and the reply denied it, a direct issue was raised, and a special finding that the plaintiff, by the exercise of ordinary care, could have seen the car in question approaching in time to have avoided

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the accident was not improper as a finding on an evidentiary fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 846-848; Dec. Dig. § 355.*]

3. TRIAL (§ 349*)—SPECIAL VERDICTS—DISCRETION OF COURT.

The submission of special interrogatories requested is discretionary with the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.*]

4. TRIAL (§ 361*)—SPECIAL VERDICTS—EFFECT OF IMPROPER FINDING.

An improper finding in a special verdict will not defeat the verdict, but may be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 862-864; Dec. Dig. § 361.*]

5. TRIAL (§ 352*)—INTERROGATORIES—SUBMISSION OF ULTIMATE FACTS—ORDINARY CARE OF PLAINTIFF.

An interrogatory, in an action for injuries from being hit by a street car, which submitted the question as to whether the plaintiff was in the exercise of ordinary care when hit, was not improper for its failure to submit whether there was ordinary care "under all the circumstances," where the jury were correctly and fully instructed thereon, as it submits an ultimate fact; the circumstances being the evidence from which the fact may be ascertained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. § 352.*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by Laura Palmer against the Portland Railway, Light & Power Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action to recover damages sustained by plaintiff for injuries inflicted in a collision between an electric car operated on defendant's street railway and a buggy in which plaintiff was riding. This case was before the court on a former appeal, and is reported in 58 Or. 282, 108 Pac. 211. Another trial was had in the circuit court, resulting in a general verdict for plaintiff in the sum of \$425. With the form of general verdict, the court submitted special interrogations, which, with the answers returned by the jury, are as follows:

"(1) Did the car of the defendant, described in the complaint, run at a greater rate of speed than 10 miles per hour to the point of collision with the buggy in which the plaintiff was riding, as alleged in the complaint? Answer: Yes.

"(2) Did the motorman in charge of the car in question fail to ring the bell, or otherwise give warning to the plaintiff that the car was approaching her? Answer: Yes.

"(3) Could the motorman have stopped the car by the exercise of ordinary care, under all the circumstances, after it became apparent that the plaintiff was crossing the track in front of the car? Answer: No.

"(4) Could the plaintiff, by the exercise of ordinary care, have seen the car in question approaching her in time to have avoided the accident? Answer: Yes.

"(5) Could the plaintiff have avoided the collision by the exercise of ordinary care on her part? Answer: Yes.

"(6) Was the collision an unavoidable accident on the part of the defendant? Answer: No."

The testimony was the same as stated in the previous opinion, and need not be repeated here. The court entered judgment in favor of defendant upon the special verdict, disregarding the general verdict. Plaintiff appeals.

Thomas Brown, of Salem (Carson & Brown, of Salem, on the brief), for appellant. R. A. Leiter, of Portland (Geo. G. Bingham, of Salem, and Franklin T. Griffith, of Portland, on the brief), for respondent.

MCBRIDE, J. (after stating the facts as above). [1] Taken as a whole, the findings of fact in the special verdict amount to this: That the defendant was operating its car at an unlawful rate of speed; that the motorman in charge failed to ring the bell, or otherwise give warning of the approach of the car, but that he could not, in the exercise of ordinary care, have stopped the car after it became apparent that plaintiff was about to cross the track in front of it. These findings conclusively settle the fact of defendant's negligence. Conceding, for the purposes of this case, the proposition that finding No. 4 was upon an evidentiary fact, findings No. 5 and No. 6 conclusively establish the fact that the plaintiff, by the exercise of ordinary care on her part, could have avoided the accident, and that the collision was not unavoidable on her part. These findings are conclusive that plaintiff was guilty of negligence, contributing to her injury; and it was the duty of the court, under section 155, L. O. L., to give judgment in accordance with the special findings.

[2] We cannot agree with counsel that finding No. 4 was improper as being merely a finding upon an evidentiary matter. In paragraph 2 of defendant's second defense, it is alleged that, "though plaintiff and her husband saw and heard, or reasonably should have seen and heard, said car approaching in time to adjust their course and avoid a collision," they negligently and recklessly drove their horse and buggy upon the track directly in front of defendant's approaching car, etc. This was denied by the reply, and thus a direct issue was raised as to whether plaintiff, in the exercise of ordinary care, might have seen the car in time to have avoided the collision.

[3, 4] The court, in its discretion, might have refused to submit this interrogatory to the jury, and, for that matter, might have refused to submit any interrogatory requested; but, under the circumstances, we do not think its submission was improper, and if it were this would not necessarily be reversible

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

error. It is a rule of practice that improper findings in a special verdict do not defeat the verdict, but should be disregarded. Board of Commissioners, etc., v. Bonébrake, 146 Ind. 311, 45 N. E. 470; Jones v. Casler, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274; Equitable Ins. Co. v. Stout, 185 Ind. 444, 38 N. E. 628.

[5] It is claimed that the court erred in submitting interrogatory No. 5 to the jury without adding to it the words, "under all the circumstances," but this qualification was given in the general charge in this language: "It is for you to determine whether the defendant departed from the rule of ordinary care under all the circumstances, and under the instructions I have given you; and it is for you to determine whether, under all the circumstances, the plaintiff departed from the rule of ordinary care in a way to contribute to her injury." And again: "Ordinary care is such care as a reasonably prudent person would exercise in his own behalf over his own affairs under like circumstances." The duty of the jury to consider all the circumstances is referred to in other parts of the charge, and is made especially prominent. Now, the ultimate fact is the exercise or failure to exercise ordinary care. The circumstances of the accident are not the ultimate fact, but are evidence by which the ultimate fact is to be ascertained; and, after the explicit instruction of the court to the jury as to the weight and attention they give to all attendant circumstances, it was unnecessary to require them to state, in answer to an interrogatory, that they had done the very thing that the court had by repeated instructions directed them to do. This instruction, given in substantially the same language, is approved in the following cases: C. & N. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15, in which case the court said: "The question substituted by the court submitted to the jury a material and controlling fact, and one which could properly be made the subject of a special finding." See, also, Republic Iron & Steel Co. v. Jones, 32 Ind. App. 189, 69 N. E. 191; Lake St. Elevated R. R. Co. v. Fitzgerald, 112 Ill. App. 312; Chicago City Ry. Co. v. Taylor, 170 Ill. 49, 48 N. E. 831.

Finding no error in the record, the judgment of the circuit court will be affirmed.

BURNETT, J., took no part herein.

SANBORN et al. v. JENNINGS et ux.
(Supreme Court of Oregon: Aug. 13, 1912.)

1. TAXATION (§ 762*)—TAX DEED—RECITALS—SALE FOR CHARGES.

A tax deed is not void as showing a sale for more than the aggregate of taxes, costs, and penalties for which the land is legally liable, though it contained a recital that the bid for which the land was sold was the best made

that was sufficient to pay taxes, costs, charges, and interest, where it does not otherwise appear that any part of the amount bid at the sale was for interest.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1514-1518; Dec. Dig. § 762.*]

2. ESTOPPEL (§ 26*)—PURCHASERS FROM SHERIFF—FORMER TAX SALE.

Purchasers of land from a sheriff are not estopped to assert their title, because of a tax deed to the same premises formerly made by the sheriff, as he made such tax deed in his official capacity, and the doctrine of caveat emptor applies to a purchaser at tax sale.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 61, 62; Dec. Dig. § 26.*]

3. TAXATION (§ 804*)—ACTION TO TRY TAX TITLE—LIMITATIONS.

In an action to quiet title to land, the defendants, who claimed under a tax deed, could not claim the bar of limitations without showing the date on which the deed was recorded.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 804.*]

4. TAXATION (§ 804*)—ACTION TO TRY TAX TITLE—LIMITATIONS—POSSESSION.

And such defense could not be made where the defendants were not in possession.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 804.*]

Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Action by George F. Sanborn and another against A. C. Jennings and wife. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

This is a suit to quiet title to a tract of land in Lane county, Or. Defendants claim title through a tax deed. The answer alleges the assessment of the property to the owner, Ida L. Donaldson, for the year 1899, and the levy of the tax for that year. The tax against the property in question amounted to \$4.50, which became delinquent and was so returned by the sheriff, and thereafter a warrant was duly issued and directed to the sheriff to collect the delinquent tax out of the property described in the roll. After giving notice thereof, as provided by law, he sold the same, on January 28, 1901, to A. C. Jennings, this defendant, for the sum of \$5.56, and on January 8, 1904, a deed therefor was issued to the defendant. The deed is set out in full in the answer, in the recitals of which it is stated that the warrant commanded him to levy upon the lands set out in the tax roll, or so much thereof as should be necessary to satisfy the amount of taxes charged in the tax roll, with costs and expenses; that he levied upon the property in question; that the property was offered for sale and sold to A. C. Jennings, his heirs and assigns, for the sum of \$5.56, that being the best and highest bid therefor; that such parcel of land was the smallest portion of the property levied upon for the tax for which any person bid at the sale a sum sufficient to pay the taxes assessed, as aforesaid, to Ida L. Donaldson, with costs, charges, and interest accruing thereon. Defend-

ants rest their title on the tax deed. For a second defense, defendants make the facts alleged in the first defense a part of the second, and further allege that Fred Fisk, the sheriff of Lane county and tax collector, made the sale and executed the tax deed; and that after he retired from the office of sheriff he secured a conveyance from the tax debtor, Ida L. Donaldson, for the land, and thereafter conveyed the same to plaintiffs, who took such conveyance with knowledge of the facts and for the benefit of Fred Fisk. For a third defense, defendants pleaded the statute of limitations in bar of the suit. Plaintiffs demurred to each of the defenses of the answer, and the demurrer was sustained by the court. A decree was rendered in favor of plaintiffs, and defendants appeal.

Thompson & Hardy, of Eugene, for appellants. Omar C. Spencer, of Portland (Carey & Kerr, of Portland, on the brief), for respondents.

EAKIN, C. J. (after stating the facts as above). [1] In support of their demurrer, plaintiffs urge that, as the tax deed is set out in the answer and shows on its face that the sale was made to pay the taxes, costs, charges, and interest accruing thereon, it is void on its face, the demand including interest, an item not authorized by law, relying exclusively on the opinion in *Stitt v. Stringham*, 55 Or. 89, 105 Pac. 252. The only part of the tax proceeding disclosed by the record before us is contained in the answer, and the defense depends upon the prima facie presumption created by the deed, under section 2823, Hill's Code, in favor of the tax proceeding resulting in the deed. The tax deed states that the warrant in the hands of the sheriff for the collection of the tax commanded him to levy on so much of the property described in the roll as should be necessary to satisfy the amount of taxes, with costs and expenses. It also recites that he levied upon the property described for the taxes due, together with costs and charges, and that notice of the sale was duly given according to law, and the property sold to Jennings for \$5.58. There is a subsequent recital in the deed that the bid was the best bid made that was sufficient to pay the taxes, costs, charges, and interest; but it does not necessarily appear from that recital that any amount was included for interest. The amount of the tax was \$4.50, and the additional \$1.08, included in the bid, may reasonably be inferred as the cost and charges of the levy, advertisement, and other expenses of the sale.

In 37 Cyc. 1339, it is said: "If real property is offered at tax sale for an amount exceeding the aggregate of taxes, costs, penalties, and charges for which the land is legally and actually liable, the sale, as a rule, is entirely void and passes no title. But it will not be lightly assumed that the sale was

made for an excessive amount; on the contrary, this must be clearly shown." The warrant called for the tax, costs, and charges, and the recital of the levy followed that language, and the notice of sale was given according to law, which could not call for interest. The amount of the costs and charges of the proceeding does not appear in the record; nor is there any reference to interest, other than the statement that the bid was the only bid that was sufficient to cover the costs, charges, and interest; and those particular words were evidently printed words of a blank deed, as they and many other clauses indicate, and not the particular language of the sheriff or his scrivener.

In *Doland v. Mooney*, 79 Cal. 137, 21 Pac. 436, it is said: "There are in the certificate and deed preliminary statements that 'said taxes, with five per cent. and the costs of publication, and other costs, not having been paid,' etc.; but they both recite that Mayo was the bidder who offered to take the least quantity and pay the taxes and costs due thereon, including 50 cents for the certificate, and it does not appear that the amount for which the property was actually sold included anything for 'costs of publication'"—the court holding that it does not appear that the amount for which the property was actually sold included anything for costs of publication, and the recital in the deed does not vitiate it; that if an excessive amount was demanded, and the property sold therefore, it would invalidate the sale, and that fact may be shown, but the presumption is in favor of the regularity of official action.

In *Drennan v. Beierlein*, 49 Mich. 272, 13 N. W. 587, the sale was for 30 cents in excess of the tax, and it was contended that the excess amount was improperly added as penalty. The court say that it does not clearly appear for what the 30 cents were added to the state tax; and it is presumed that they were added for some other reason. It must be assumed, in the absence of any clear showing to the contrary, that the addition was lawfully made. These rulings do not conflict with the case of *Stitt v. Stringham*, supra, where the tax proceeding seems to have been before the court, showing the taxes to be \$3.68, and the sale was for \$31, and we conclude that the deed is not void on account of the recital as to costs, expenses, and interest; it not appearing therefrom, or otherwise, that any part of the amount bid at the sale was for interest.

[2] Defendants plead estoppel against plaintiffs as successors in interest to Fisk, the sheriff, who made the sale. Whether the sheriff may be held liable in damages for his own mistake or neglect is a question not raised in this case. In making the deed he acted in his official capacity, and not in his individual capacity; and the covenants of the deed, if there are such, are not personal, but statutory. By section 2823, Hill's Code, the statute, under which the sale in question was

made, provides that "such deed shall operate to convey a legal and equitable title to the purchaser, sold in fee simple to the grantee named in such deed." This is the effect given to the deed if the proceedings are regular, and not a covenant in the deed; and the deed is not in any sense the individual act of Fisk, or a warranty of the title conveyed, much less the conveyance of any title or interest held by the sheriff. 37 Cyc. 1436, 1526; *Stephenson v. Weeks*, 22 N. H. 257; *Gibson v. Mussey*, 11 Vt. 212; *Byam v. Cook*, 21 Iowa, 392. Furthermore, the rule of caveat emptor applies in such a case. 37 Cyc. 1474, 1479; *Dowell v. Portland*, 13 Or. 248, 256, 10 Pac. 308.

[3, 4] As to the third defense—the statute of limitations under section 2840, Hill's Code—it is sufficient to say that the record does not show the date on which the sheriff's deed was recorded, and therefore it does not appear that the suit was commenced three years after such record; nor are any facts alleged to bring the case within the holding of *Martin v. White*, 53 Or. 326, 100 Pac. 290, namely, possession by defendants.

The first defense of the answer states a good defense, the demurrer to which should have been overruled. As to the other defenses, the demurrer was properly sustained.

The decree is reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

WILLIAMS et al. v. A. C. BURDICK & CO., Inc.

(Supreme Court of Oregon, July 30, 1912.)

1. SALES (§ 32*)—OFFER AND ACCEPTANCE.

A dealer offered to a broker a car load of prunes, grade 30s, at a certain price. The broker telegraphed the dealer: "As per your message, R. C. W. offers f. o. b. three and one-fourth car thirty-forty." The 30-40s were a different grade from 30s. In answer to this offer, the dealer wired, "Accept W.'s mailing contract hold 30s firm three and three-eighths," and, by letter sent at the same time, stated that he would not sell any more 30-40s, unless at a certain price. *Held*, that the statement in the telegram as to mailing contract referred to prunes of the grade 30s, and, as the offer to purchase was 30-40s, there was a completed contract by telegram, though a contract was not signed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 59; Dec. Dig. § 32.*]

2. SALES (§ 23*)—OFFER—COMMUNICATION OF ACCEPTANCE—MODE.

Where an offer to buy is made by wire, it may reasonably be presumed that an answer is invited by that means of communication.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. § 23.*]

3. CONTRACTS (§ 26*)—CONTRACT BY CORRESPONDENCE—CONSTRUCTION.

Where parties exchanged telegrams and a letter, pending negotiations for a contract, the question whether or not they intended to effect a contract before signing a writing expressing

its terms was to be determined from the entire correspondence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 53; Dec. Dig. § 26.*]

4. CONTRACTS (§ 26*)—OFFER OF ACCEPTANCE—COMMUNICATION AND ACCEPTANCE OF OFFER.

Where a party has, by letter or telegram, signified his acceptance of an offer, the mail or telegraph is held to be his representative, so that when his letter or message, properly addressed and prepaid, is entitled to be sent forward the minds of the parties have met, and the contract is complete.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 119, 120; Dec. Dig. § 26.*]

5. CONTRACTS (§ 26*)—OFFER AND ACCEPTANCE—CONSTRUCTION.

Where the mail or telegraph is treated as the agent of the party making an offer, a telegram of acceptance, not expressly referring to a contemporaneously written letter for further details, or by way of explanation, so as to impart notice that required the delivery of the letter before the telegram could be safely acted upon, the telegram and the letter should not be construed in pari materia.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 119, 120; Dec. Dig. § 26.*]

6. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action tried by a court without a jury, the receipt of incompetent evidence, properly excepted to, is not prejudicial, unless injury has necessarily resulted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

Appeal from Circuit Court, Multnomah County; John P. Kavanaugh, Judge.

Action by Arthur P. Williams and others, partners under the firm name and style of R. C. Williams & Co., against A. C. Burdick & Co., Incorporated. Judgment for plaintiffs, and defendant appeals. Affirmed.

This is an action to recover damages for the breach of an alleged agreement. It is stated in the complaint that at all the times mentioned therein the plaintiffs were partners as R. C. Williams & Co., and the defendant was a corporation; that on June 14, 1910, a contract was effected, whereby the defendant agreed to sell and deliver to plaintiff, at some point in Oregon, in October of that year, f. o. b., a car of Italian prunes of the grade known to the trade as "30s-40s," for which the plaintiff stipulated to pay 3¼ cents per pound, bulk basis; that the defendant refused to deliver any prunes to plaintiffs, who were at all times ready, able, and willing to pay therefore the stipulated sum; that in Oregon, in October, 1910, the market price of prunes of the kind and grade specified was 4¼ cents per pound, bulk basis; and that by reason of the breach of the agreement plaintiff sustained damages to the extent of \$562.50, for which sum judgment was demanded, with interest from October 31, 1910. The answer having denied each allegation of the complaint, the cause was tried without a jury, resulting in a judgment for plaintiffs as demanded, and the defendant appeals.

Arthur P. Tift, of Portland (Hamilton Johnstone, of Portland, on the brief), for appellant. Wallace McCamant, of Portland (Snow & McCamant, of Portland, on the brief), for respondents.

MOORE, J. (after stating the facts as above). It appears from the bill of exceptions that the defendant is a corporation, engaged in buying and selling dried fruits, its office being in Portland, Or., from which city it sent a telegram, June 13, 1910, to M. W. Houck & Bro., commission merchants at 189 Franklin street, New York, and, referring in the message to such edible fruit then growing in Oregon, stated in part: "Offer one straight car fine large thirties October shipment at three and half base." The next day these brokers, alluding to plaintiffs, wired the defendant in part as follows: "As per your message R. C. Williams offers f. o. b. three and one-fourth car thirty-fourty twenty extra." Replying to this message on the same day, the defendant telegraphed the brokers: "Accept Williams mailing contract hold thirties firm three three-eighths." At the same time the defendant wrote the brokers a letter, from which an excerpt is taken, viz.: "In accordance with the wires exchanged by us to-day we enclose you a contract for R. C. Williams & Co. We signed the yellow one for the buyer and please have them sign the blue one for us and return it promptly. We hardly know how we came to sell this car so cheap, as there is no profit in it for us. We did business with Mr. Williams last year, and wanted to hold their trade, but we do not care to sell any more cars of 30-40s, unless we get 3 3/4 cents, bulk base." Accompanying this letter was the draft of a formal contract containing various specifications. The defendant, on July 1, 1910, wrote Houck & Bro. in part as follows: "We have not received the contract we sent you for R. C. Williams & Co. Please let us know if he accepts or objects, so that we will be in position to sell the car in case he does not accept." After the exchange of several letters in which references were made to the forms of dried fruit contracts adopted by the respective parties, and the refusal of each to sign the contract prepared by the other, the plaintiffs, on August 8, 1910, wrote the defendant, saying in part: "As far as the contract goes, we have got all the contract we want. We have copy of your telegram. We have copy of telegram to you, and we have got the acceptance of car load of 30-40 prunes. * * * You have sold us a car of 30-40 prunes. Ship same along; we will pay you for them and there will be absolutely no trouble." The defendant finally wrote the plaintiffs, saying in part: "Your refusal to sign our contract closed the intended sale on our part, and as there is no contract we will ship you no prunes."

The chief inquiry to be considered on this appeal is whether or not the defendant's telegram of June 14, 1910, to Houck & Bro., in response to their message of the plaintiffs' offer, evidenced a meeting of the minds of the parties and effected a contract. The defendant's counsel maintain that the message contained a qualified acceptance of the bid, and proposed a formal draft evidencing the agreement, but, the overture having been declined by plaintiffs, an error was committed in rendering a judgment in their favor. The error alleged relates to the conclusion of law, which, it is argued, is not deducible from the finding of facts as made by the trial court, in respect to which there is no controversy.

[1] It was stated at the trial of this appeal that dried Oregon prunes are graded by machinery, and that the term "fine large thirties," referred to in the defendant's telegram of June 13, 1910, means such a variety of desiccated fruit that 30, or less, weigh a pound, and that the market value increases with and depends upon the size of the prunes. The "thirty-fourty" assortment, mentioned in the broker's message, is not so large as "thirties," and for that reason it is less valuable in the market than the latter. The offer of R. C. Williams & Co., as detailed in the broker's telegram of June 14, 1910, specified the name of the proposed purchasers, the price they were to pay, the quantity and the quality of the dried prunes desired, which were to be placed, without expense to them, on a car ready for shipment. In response to such offer, it will be remembered that the defendant wired Houck & Bro. as follows: "Accept Williams mailing contract hold thirties firm three three-eighths." This telegram having referred to "thirties," while the offer to purchase related to 30-40s, it will be seen that the message, last quoted, alluded to a quality of dried prunes not embraced in such offer. Whether the "mailing contract" referred to in the defendant's telegram related to "thirties" or to "30-40s" cannot be determined from an inspection of the message. Any doubt on that subject, however, was resolved when the letter accompanying the contract reached New York by mail several days after the receipt of the defendant's telegram.

[2, 3] The offer to purchase having been made by wire, it may reasonably be assumed that an answer was invited by that means of communication. Clark, Cont. (2d Ed.) 26. If the parties intended to effect an agreement, it was consummated June 14, 1910, when the defendant telegraphed the brokers to accept the offer they had received. Bishop, Cont. (2d Enlarged Ed.) § 328. Had the message directed an assent to the bid, provided the plaintiffs' firm name was appended to the contract sent by mail, the supposed condition would necessarily have prolonged the negotiations and constituted a new proposal, which would not have been effective until complied with. Id. § 323. When the

evidence tending to establish an agreement consists of telegrams, or letters sent to and received by the respective parties, their entire correspondence on the subject, pending the negotiations, affords the means of determining whether or not they intended to effect a contract before signing a writing expressing its terms.

[4] Based on this rule, it is contended that the defendant's telegram and letter, having been written at the same time, should be construed together. In order to protect the rights of a party who has, by letter or telegram, signified his acceptance of an offer, the means of transmitting the assent is held to be the representative of the other party, so that when the letter or message, properly addressed, with charges or postage prepaid, is delivered to the agent, so as to entitle it to be sent forward, the minds of the contracting parties have met, and an agreement is effected. 7 Am. & Eng. Ency. Law (2d Ed.) 125; 9 Cyc. 295; *Dayloe v. Merchants' Fire Insurance Co.*, 9 How. 390, 13 L. Ed. 187.

[5] Where the United States Post Office Department and a telegraph company are thus treated as the agents of the party making the offer, fair dealing demands that, unless a telegram expressly refers to a contemporaneously written letter for further details, or by way of explanation, so as necessarily to impart notice and to require a delivery of the letter before the party to whom it is addressed can safely act upon the telegram, the message and the letter should not be construed in pari materia. Any other rule might impose damages upon the party receiving a telegram containing an unqualified acceptance of an offer for relying upon the information thus obtained, since by doing so he might incur obligations to other parties in respect to the subject-matter of the contract that would be burdensome; or, if he could not act upon the telegram until sufficient time had elapsed to enable the delivery of the letter qualifying the acceptance stated in the telegram, needless delay in the transaction of business would inevitably ensue. In the case at bar, the telegram did not make such express reference to the letter as necessarily to constitute the latter a part of the former, or to impart notice. No error was committed by the trial court in refusing to interpret the telegram and the letter as parts of the same affair.

Prior to the receipt of the defendant's telegram of acceptance, the plaintiffs in their negotiations to purchase prunes had not alluded to the execution of a formal writing to evidence an executory agreement. Thereaft-

er each party insisted, without avail, that the form of contract respectively submitted should be subscribed by the other party, until August 8, 1910, when, it will be kept in mind, the plaintiffs, referring to the telegrams that had been exchanged, wrote the defendant: "We have got all the contract we want. * * * You have sold us a car of 30-40 prunes. Ship same along; we will pay for them and there will be absolutely no trouble." In stating the rule for determining the intent and the legal mode of expressing it, whereby the terms of an agreement have been assented to, a text-writer observes: "Where the parties make the reduction of the agreement to writing and its signature by them, a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon. But, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing will not negative the existence of a present contract." 7 Am. & Eng. Ency. Law (2d Ed.) 40. In *Sanders v. Potlitzer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757, it was determined that letters and telegrams constituting an offer and acceptance of a proposition, complete in its terms, might create a binding contract, although there was an understanding that the agreement should be expressed in a formal writing, and one of the parties afterwards refused to sign such an agreement without material modifications. The legal principle thus announced, illustrated, as it is, by the notes to that case, is adopted as controlling herein, without advertent to or commenting upon the many cases cited by defendant's counsel in their able and exhaustive briefs.

In the case at bar, neither party was obliged to assent to the terms of the formal, written contract desired by the other party; but after the negotiations terminated each was bound by the offer and its unqualified acceptance.

[6] Error is assigned in the admission, over objection and exception, of evidence, which, it is asserted, was incompetent. In an action tried by a court without a jury, the receipt of incompetent evidence, properly excepted to, is not prejudicial, unless injury has necessarily resulted. *Taffe v. Smyth & Jones*, 125 Pac. 308.

Believing that such consequences did not follow, and that a fair trial was had, the judgment should be affirmed; and it is so ordered.

BORTON v. CITY OF PORTLAND.

(Supreme Court of Oregon. Aug. 13, 1912.)
MUNICIPAL CORPORATIONS (§ 523*)—PUBLIC
IMPROVEMENTS—ASSESSMENT OF BENEFITS—
REFUND OF ASSESSMENT.

Portland City Charter, § 227, as amended June 3, 1907, provided that water mains should be laid and paid for by a special assessment on the property benefited. As amended in November, 1910, it provided for the payment of the cost of laying water mains out of the water fund provided for by charges against consumers of water, and authorized refunds to "all persons who have paid to the city treasurer assessments for the laying of water mains." Prior to this last amendment, a property owner, who had paid an assessment, conveyed the property by a warranty deed. Held that, under the express provisions of section 227, as amended, in the absence of any special agreement, the grantor, and not the grantee, was entitled to the refund.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1232-1236; Dec. Dig. § 523.*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Luther H. Borton against the City of Portland. Judgment for defendant; and plaintiff appeals. Affirmed.

This is an action to recover money paid on an assessment for a water main. From a judgment sustaining the demurrer to plaintiff's complaint and dismissing the action, plaintiff appeals.

Prior to June 9, 1909, the city of Portland acquired a water system by issuing bonds, and from time to time laid water mains. Provision was made that the interest on the bonds, a sinking fund for redeeming the same, and the cost of laying the water mains should be paid for out of the water fund, which was provided for by charges against the consumers of water. Laws of Oregon, Sp. Sess. 1885, pp. 97, 102; Laws of Oregon, Sp. Sess. 1898, pp. 174, 180; Special Laws of Oregon, 1903, pp. 93, 98. The city charter, as amended June 3, 1907, provided that water mains should be laid and paid for by a special assessment upon property particularly benefited thereby. Portland Charter, § 227. Pursuant to the provisions of this amended section, on June 6, 1910, the city levied an assessment of \$69.40 against lot 2, in block 123, West Irvington, then owned by John Rohner, for the cost of laying a water main. On the 1st day of August, 1910, Rohner paid the assessment, and on the 4th of October of the same year he sold and conveyed to plaintiff, by a general warranty deed, said lot 2, "together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, also all my estate, right, title and interest in and to the same, including dower and claim of dower." Section 227 of the city charter was further amended in November, 1910, with the provision that water mains should be laid and paid for, as former-

ly, out of the water fund. This amendment further provided as follows: "There may be paid out of said water fund and refunded to all persons who have paid to the city treasurer assessments for the laying of water mains in front of or adjacent to their property, in accordance with the provisions of section 227 of the charter of the city of Portland, as amended by the act adopted by the electors of said city on the 8d day of June, 1907, as aforesaid, the moneys, exclusive of interest, so paid, or that may be paid by them to the city treasurer for the laying of water mains in front of or adjacent to their property; provided, however, that no moneys shall be so refunded on account of the construction of a main or mains until such time as the annual income therefrom shall be equal to 6 per cent, of the original cost of said main or mains. Such refund shall be made by warrants drawn by the mayor and attested by the auditor when authorized by a vote of the water board of the city of Portland."

Chas. H. Abercrombie and Roscoe F. Hunt, both of Portland, for appellant. Frank S. Grant, City Atty., and L. E. Latourette, Deputy City Atty., both of Portland, for respondent.

BEAN, J. (after stating the facts, as above). The question to be determined is whether or not plaintiff the present owner of the lot, is entitled to collect the refund. This money is to be refunded or paid pursuant to the city charter referred to, which plainly provides that it may be refunded to persons who have paid the assessments for the laying of water mains in front of or adjacent to their property. Portland Charter, as amended, § 227. Therefore whatever may be said in regard to the equities in the matter which are strongly urged in favor of plaintiff, the right to receive the money depends upon the law referred to. We are not permitted to determine the equities as between Borton and Rohner, in this action. There is nothing ambiguous or uncertain in the charter as to whom the money should be paid. Plaintiff's grantor, by the conveyance of the land, did not assign the claim in question. In the absence of a special agreement to that effect, the right to receive the amount to be refunded did not pass to plaintiff. Such right did not run with the land. Whatever negotiations or considerations entered into the sale of the land can make no difference in this case. Those are matters of contract between the parties. The grantee, Borton, took what was conveyed by the deed, which was the real estate in its then condition. Certainly Rohner could have assigned this claim, the same as any other chose in action; but it does not appear that he did so. This is a new question in the state.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In the case of *Kaston v. Paxton*, 46 Or. 808, 80 Pac. 209, 114 Am. St. Rep. 871, where land occupied by tenants was sold on execution, it was held that the rent, after the date of the sale, but before the redemption, was an assignable thing in action belonging to the execution debtor, and did not pass with a conveyance of the land, unless specially mentioned.

In *Striker v. Striker*, 81 App. Div. 129, 52 N. Y. Supp. 729, the plaintiff in the action paid certain assessments upon real estate in the city of New York, levied on account of the opening of Twelfth avenue. Afterwards the Legislature authorized the comptroller of the city to refund to the persons, respectively, their executors, administrators, and assigns, the amount paid by such persons as an assessment upon the real estate for the opening of Twelfth avenue. The property was subsequently partitioned between the owners, and the property in question set apart to two of them. It was held, under the statute, that the person who paid the assessments was entitled to recover the money, notwithstanding what devolution of title there may have occurred, or what interest others had in the real estate in question.

It appears in the case of *Bernays v. Wurmb*, 4 Mo. App. 231, that plaintiff, who was the owner of a lot, in June, 1866, paid a special tax bill of \$325.20, assessed against his lot for a water pipe. In January, 1867, he sold the lot, executing a warranty deed and delivering this special tax bill, with others, to the purchaser. Afterwards, in 1873, the Legislature provided for refunding the special taxes paid for water pipe, on presentation of the bills to the persons who had paid the taxes. The purchaser of the lot, without the vendor's knowledge,

signed his own name and that of his vendor to an instrument authorizing another to collect the taxes, and through such agent received the money. It was held that the vendor, not the purchaser of the lot, was entitled to the money.

The case of *Smith v. City of Minneapolis*, 95 Minn. 431, 104 N. W. 227, shows that the city ordered a street improved and assessed a certain lot owned by one Dunnegan. The owner paid the assessment, and afterwards sold the lot to plaintiff, representing that the street was to be improved. The city subsequently rescinded its order directing the improvement of such street, and order the money paid by Dunnegan and others to be refunded. Plaintiff sued for the money. The court held that he had no right to it; that the city had a right to abandon the proceedings; and that a conveyance of the lot did not carry with it the right to recover the refund.

In the case of *James v. Schmidt (City Ct. Brook.)* 2 N. Y. Supp. 649, it appears that defendant had agreed to purchase certain property from plaintiff. Before closing the deal, a street assessment was confirmed and became a lien upon the property. Defendant refused to go on with the trade, unless the amount of the assessment was deducted from the price. Plaintiff agreed to this, and the deal was closed. The city afterwards vacated the assessment, and plaintiff sued to recover from defendant the amount so deducted. It was held that plaintiff could not recover.

While all of these authorities are not exactly in point, we think that they support the principle above enunciated. The complaint does not state a cause of action, and the demurrer was properly sustained. The judgment of the lower court is therefore affirmed.

(22 Colo. App. 448)

BULLOCK v. LEWIS,

(Court of Appeals of Colorado. July 8, 1912.)

1. CORPORATIONS (§ 120*)—SALES OF STOCK—CONSTRUCTION.

The object of the construction of a contract being to discover and effectuate the intention of the parties, a contract between a stockbroker and one who purchased mining stock through him should not be construed by the court's charge as an agreement on his part to repurchase the stock at any time, where neither of the parties so understood it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 494, 504; Dec. Dig. § 120.*]

2. INDEMNITY (§ 1*)—CONTRACT—CONSTRUCTION—LIABILITY.

Plaintiff purchased mining stock from a stockbroker who agreed that he would see her out with her money with good interest and that she should lose nothing upon the investment. Held, that the contract entered into between them was not one for him to purchase the stock or to at any time return her money, but one of indemnity which obligated him to make good any loss which she might incur while retaining the stock for a reasonable time.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. INDEMNITY (§ 15*)—CONTRACT—ACCRUAL OF LIABILITY.

Where plaintiff purchased mining stock from defendant broker who agreed to indemnify her for any loss, plaintiff must show that the stock depreciated and has remained so since the purchase, and so the defendant may show the stock's market value at times subsequent to the purchase.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-47; Dec. Dig. § 15.*]

4. INDEMNITY (§ 11*)—CONTRACT—ACCRUAL OF LIABILITY.

Where plaintiff purchased stocks through a broker, who agreed to indemnify her for any loss, plaintiff had a reasonable time, after a purchase, to decide whether she would, despite a slight advance, hold her stock for a better price, or sell it at a small profit.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 21-25; Dec. Dig. § 11.*]

Appeal from District Court, City and County of Denver: Harry C. Riddle, Judge.

Action by M. E. Lewis against Calvin Bullock. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Edward D. Upham and J. E. Robinson, both of Denver, for appellant. Henry Howard, Jr., of Denver, for appellee.

KING, J. This is an action brought by appellee to recover from appellant the principal sum of \$1,770, together with interest thereon at 8 per cent. per annum; the principal sum named being an amount of money paid by plaintiff to defendant to be by him invested for plaintiff in the purchase of certain specified stock in a mining company, and which was by him so invested.

The complaint contained two causes of action, the first in tort and the second in contract. By the first it was in substance alleged: That defendant, about November 12, 1900, represented himself to be the president of the Butterfly-Terrible Gold Mining Com-

pany, a corporation, and that said company owned valuable mines known as the Silver Bell Group in San Miguel county, Colo., upon which a great amount of development work had been done. That wrongfully and with intent to procure money from the plaintiff, defendant stated that rich deposits of ore had been discovered, and that there was "ore in sight" sufficient to pay dividends for a number of years. That plaintiff, relying upon said representations, purchased shares of stock in said company as follows: November 12, 1900, 5,000 shares for \$1,000; March 12, 1901, 1,000 shares for \$385; August 10, 1901, 1,000 shares for \$385. That defendant represented that said investment was perfectly safe and advised plaintiff to place all the money she had therein. That in fact there was only a small body of ore in said mines, which was of little or no value, and that dividends were not paid except for a part of the year 1901. That the stock was worthless. That February 27, 1907, plaintiff made demand of defendant for the sum of \$1,770 with interest thereon, as damages.

For a second cause of action plaintiff made substantially the same allegations as in the first, with the exception of an additional paragraph, as follows (the original was not in italics): "That as inducement for plaintiff to purchase said mining stock in the Butterfly-Terrible Mine, and as a contract between the plaintiff and defendant, the defendant contracted with the plaintiff, on or about the 12th day of November, A. D. 1900, that if she would buy said stock (which she alleges she did) *he would see her out in her purchases, and so that she received her money with good interest thereon, and that she should not lose anything by her said investment.*" And, after alleging the investment of this money in the stock, and that the stock purchased as aforesaid was of no value whatever, alleged: "That the plaintiff frequently called upon the defendant therefor, and he repeatedly assured and promised her that she should have her money and interest thereon, the last of said promises being on or about the 1st day of October, A. D. 1903, and requested her to wait therefor; and, relying upon said request and promises, the plaintiff extended the time for the defendant to pay said money and took no steps to enforce the collection thereof until the 27th day of February, A. D. 1907 (more than six years after the purchase), at which time the plaintiff made demand upon the defendant." She demanded judgment for the sum of \$1,770 and interest thereon from and after August 10, 1901, at 8 per cent. per annum, and that defendant be found guilty of fraud and be committed to the county jail of the city and county of Denver until the judgment was paid, together with costs.

Demurrer to the first cause of action was sustained, whereupon plaintiff asked and ob-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

tained leave to dismiss said cause of action without prejudice, and the case was tried solely upon the second cause of action.

Defendant, for first defense, admitted the corporate capacity of the Butterfly-Terrible Gold Mining Company; that on or about November 12, 1900, said company was operating valuable mining property in San Miguel county, Colo., upon which there were tunnels, shafts, drifts, and crosscuts, and deposits of ore bearing gold and silver, and that he so represented to plaintiff; that plaintiff made demand on him for the sum of \$1,770, on or about February 27, 1901, no part of which had been paid by him to plaintiff. Denied all other allegations of said cause of action. For second and third defenses, defendant pleaded the statute of limitations. For a fourth defense, denied that he had made the pretended contract, assurances, promises, and requests alleged in plaintiff's second cause of action, or any of them, and alleged that at the time mentioned he was a stockbroker, engaged in buying and selling mining stocks for his customers, and that in the course of said business as broker he sold for a customer to said plaintiff, on or about November 12, 1900, 5,000 shares of the stock of said mining company at 20 cents per share, and bought for her on her order, about March 7, 1901, 1,000 shares at 38 cents per share, for which purchase she paid him a commission of \$5, and on August 9, 1901, 1,000 shares at 38 cents per share, for which she paid him a commission of \$5, and that these were the same transactions mentioned in the complaint; that during the entire time from November 12, 1900, until November 1, 1901, stock in said mining company was marketable; that the market price thereof at no time, as bought and sold, fell below the price of 21 cents per share, and that the price and value of said stock from January 1, 1901, to October 31, 1901, ranged from 26½ cents, the lowest, to 48 cents, the highest, per share; that all of said facts were well known to the plaintiff; that plaintiff did not at any time authorize defendant to sell or dispose of said stock, or any part of it; that during said time plaintiff might and could have sold her stock at such price as to enable her to receive her entire investment with good interest, and without loss, but that she failed, neglected and refused to sell. To this answer plaintiff filed a reply denying each and every allegation, except that she admitted that defendant was a stockbroker, and, as such, sold her the mining stock as set forth in the fourth defense.

The evidence upon the part of plaintiff consisted of her testimony and that of her sister, together with certain letters and statements received by plaintiff, or by her sister, the contents of which plaintiff had seen. Plaintiff's testimony, briefly and in substance, is: That she had been acquainted with the defendant prior to November 12,

1900, and that he had solicited her to buy stock in this company, in support of which she submitted a letter addressed to her, dated September 22, 1900 (being in the form of a prospectus), stating the production of the mine during the month of August of that year, together with the net earnings and production up to September 18th, and that there was "absolutely no question about the ability of the Butterfly to pay dividends," closing said letter with the following: "If you have lost money in other stocks this year, this is an opportunity to more than make up your losses, for at the rate at which the shipments are increasing, with an even higher increase in the net earnings each month, we believe the stock is absolutely certain to double in value. We strongly urge you to send in your orders to be executed at market immediately for as much of the stock as you can possibly carry, and feel it is certain to bring you most satisfactory returns, both in dividends and by an even greater gain in its market value." Also, a letter to plaintiff's sister, dated November 10, 1900, which plaintiff had read prior to her purchase on the 12th, as follows: "When you called to see me last about Butterfly you will remember that I told you to wait until we had certain matters arranged which were then pending, and that if the deal went through on which I was working, you were to take 2,000 shares. I have gotten matters arranged so we are going to close this deal up Monday, and you will be safe in putting every dollar you have on earth into it under the conditions. The stock is selling strongly at 20¢ and has been for some days, and I believe it is absolutely certain to go up within the next ten days. I understand your position exactly, and I would not accept the order now if we had not gotten things fixed so that I know you cannot lose on it. Please answer by bearer if you can come in Monday morning early. I presume this will interfere with your work, but there is enough at stake to more than make up the loss of an hour or two that day. As I took the order conditionally in this way, you will get the benefit of the market price of the stock on that date. We have all the money pledged we need, and are going to make the payment Monday morning, so that you will run absolutely no risk, and as I know I can make money for you on the rise, I hope Miss Bahrenburg will be able to do something in it as well. When we pay the money over the stock is absolutely certain to advance, and nothing can prevent it. Kindly let me know when to expect you, and believe me, Yours very truly, (Signed) Calvin Bullock." (Miss Bahrenburg mentioned in the letter is the plaintiff herein; that being her name before marriage.) On November 12, 1900, plaintiff went to defendant's office in the Equitable Building, taking with her \$1,000 to invest in the stock, at which time she says defendant told

her about the ore in sight, and that it would pay dividends for years to come; that she need not fear, "that it was an absolutely safe investment, and that he would see me out with my money, and good interest"; and that acting upon his statements and representations, she gave him the money; but that she had decided, before she went to see him, to invest \$1,000 in the stock. For that sum she received 5,000 shares, which she asked the defendant to keep in his vault for her. Thereafter, on the dates named in in the complaint, she purchased 2,000 additional shares, paying therefor \$770 including commissions. She testified that at each of the subsequent purchases, namely, in March and August, 1901, defendant again made statements to the effect that the investment was absolutely safe, and that he would see her out with her money and good interest, and advised her to put into the stock every dollar she had or could procure, and that she bought acting upon such statements and representations. On cross-examination she stated that she had such implicit confidence in the defendant that she would have invested the money upon his advice; that she had not asked him for his guarantee. She further testified that in October, 1903, she had a conversation with defendant about this money, at which time he explained the operation of the mine and advised her to wait a year, to await developments, to which she consented; that at that time he told her the ore had pinched out and the value of the stock had gone down; that he had told her in 1902 the stock had gone down to 15 cents, or lower, and not to sell it at that low price; that it had been taken off to Colorado Springs Stock Exchange, and that he thought they would strike new ore and the stock would be worth more later; that she did not remember whether she had received printed market reports after the first purchase, but that she had received notice of dividends, and was paid dividends on the stock, the first about January 28, 1901, of one-half cent per share, the second a couple of months later, of three-quarters of a cent per share, and the third a little later, of 3 1/4 quarters of a cent per share. Upon each of the purchases defendant sent plaintiff a receipt in the following form:

"Miss M. E. Bahrenburg, City—Dear Sir: I have bought for your account and risk:

Date	Shares	Stock	Price	Commis-	Rev.	Tax
	5,000	Butterfly	20	ston	chus	
				net	1,000	
Nov. 12		By check			Cr. 1,000.	

"Very truly yours, Calvin Bullock."

Plaintiff's sister was present at each conversation, and her testimony was substantially the same as plaintiff's. Relative to the conversation in 1902, at which the defendant advised them not to sell and that the stock was taken off the market, she testified: "Q. What did he say—the words, just as near as you can? A. He advised us to

hold the stock until later. Q. Go on, tell the rest of it. A. I don't know as I can, word for word. Q. Just tell in your own words. A. I think I have given it in substance, what was said; that she was to hold and not to sell. Q. Any particular time asked to hold it, or anything of the kind? A. No, for an advance. Q. What did Mrs. Lewis say to that? A. She consented to do so." On cross-examination the witness said that at the conversation in 1902 defendant told them the stock had been taken off the mining exchange, and that there was no present sale for it, and advised them to hold it, saying he believed the mine would develop into a good one.

Throughout plaintiff's examination the court refused to permit either the plaintiff, or the defendant to go into the question of the value of the stock. Defendant objected to testimony as to the value of the stock in 1902 and 1903 on the ground that such dates were too remote from the date of the contract to be admissible, but interposed no objection to testimony as to the value of the stock from the date of the purchase "until a reasonable time thereafter."

After plaintiff rested, and upon determining a motion for nonsuit, the court, of its own motion, announced that it would require the stock mentioned to be tendered into court, to be delivered to the defendant in case the jury should find for the plaintiff; the return of the stock to be in addition to the allowance of certain dividends which the evidence showed had been received by the plaintiff upon the stock. The stock was so produced.

For the defense, a witness was called and qualified by showing that he was a resident of Colorado Springs in the brokerage business, and had been for 10 years, and in mining stocks; that he was in such business in 1900 and 1901 on the Colorado Springs Mining Stock Exchange; that he knew the Butterfly-Terrible Gold Mining Company's stock; that it was listed on that exchange in the years 1900 and 1901; that he was familiar with its value and market price during that time; that said stock was sold on the market to a considerable extent. He was asked the market value of the stock between the 12th of November, 1900, and the 1st of September, 1901, but upon plaintiff's objection was not permitted to answer. Thereupon defendant made the following offer: "To prove by the witness now upon the stand, and by other witnesses in attendance: That between the 12th day of November, 1900, and the 1st day of January, 1902, and for some time thereafter, the capital stock of the Butterfly-Terrible Gold Mining Company, being the capital stock of the company referred to in the amended complaint herein, was listed and bought and sold upon the mining exchange of Colorado Springs, and was bought and sold upon the

stock market at Denver. That during all of said time the capital stock described in the amended complaint herein could have been sold upon the market at an amount over and above the amount paid therefor by the plaintiff, with good interest thereon. That during a large portion of said time, and within a reasonable time after plaintiff's purchases, the stock could have been sold for not less than 40 cents a share, and during a portion of said time, including the months of March, April, May, June, and July, 1901, the said stock was worth and could have been sold in the market for between 40 and 48 cents a share, and that at no time after the 12th day of November, 1900, to and including the 1st day of December, 1901, was said stock worth at market price less than 23½ cents per share, and that a great many thousand shares of stock of said company were bought and sold in the market during said period, at prices ranging from 28 cents per share to 48 cents per share." Upon objection by plaintiff, the offer was refused and exceptions taken by the defendant.

Defendant testified that for 14½ years he had been a stockbroker in Denver, buying and selling mining stocks and other stocks on commission; that he sold the stock to the plaintiff on November 12, 1900; that control of the property changed on that day. He denied that at that time, or any other time, he had any conversation in which he stated to plaintiff or to her sister that, if they would invest their money in the stock, he would see them out on their money with interest, or anything to that effect. Testified: That the first 5,000 shares sold to plaintiff were sold by defendant for a client, and the shares sold her at later dates were purchased by defendant upon the stock market, upon plaintiff's order and at the market price. That at the time of the conversation in 1903, the mine had been shut down on account of a strike. The amount of ore mined from month to month and from year to year was shown on a map by different colored lines, which the witness showed and explained to plaintiff. The ore they had been on had pinched out as they went higher in the stope, and it was necessary to go out to the face of the mountain to get the same ore shoot at a different depth. When the ore gave out, the revenue stopped, and it was necessary to raise some money to carry on the dead work. Some of the stockholders put up some money to help carry on this work, but no assessments were made. At these times defendant advised plaintiff not to sell her stock, as it was not saleable. That the strike lasted for about 15 months, and it was a case of "wait" for everybody.

The jury returned a verdict in favor of plaintiff for the entire amount of money paid in by her in the purchase of stock, together with interest at 8 per cent. per annum from August 10, 1901, less the sum of \$150; divi-

dends received upon the stock. Upon this verdict judgment was rendered, and defendant appealed to the Supreme Court.

It will not be necessary to discuss all the errors assigned by appellant, nor, indeed, all that have been relied upon in the argument of his counsel. It will suffice to state generally the reasons which make it necessary to reverse the judgment and remand the cause for a new trial.

The errors assigned relate chiefly to the ruling of the court upon the admissibility of evidence, and upon instructions given, or offered and refused. The correctness of such ruling depends upon the construction of the contract pleaded and the consequent theory upon which the case was tried. The conflicting theories upon which the case was tried are well stated by counsel for appellant: "Assuming that the contract alleged by appellee was made, there were three theories advanced during the trial as to how it should be interpreted. Under the first it is considered that appellant bound himself to pay to appellee, on demand, the sum of money paid out by her for stock, with interest thereon. The second theory is that by the contract appellant agreed to repurchase the stock bought by appellee at what it cost her, and interest; that neither a demand by appellee for such repurchase, nor a tender or offer of the stock by her to appellant, was necessary before she began her action; and that appellee's evidence, having shown her contract, it was then sufficient for her to tender the stock at the trial, not voluntarily, but because compelled by the court. By the third theory the contract is construed to be one to save appellee harmless by reason of her purchase of the stock, necessitating loss by her before she could begin her action, and a proof of that loss, and of the extent thereof, before she could recover."

The theory upon which plaintiff tried the case is not in doubt; for her counsel says: "The appellee insisted upon the trial that the contract was one for the direct payment of the money invested, and interest thereon. There were only two conditions in this contract, viz., for appellee to buy and pay for the mining stock; then she was to have her money and good interest on the same. There were no other conditions annexed to this contract. The only fair construction of the contract, in view of the station in life of the parties, their education, knowledge, and the circumstances under which the purchases were made, and the retention of the stock by appellant, is that appellant would pay her her money and good interest, without any conditions, whenever she demanded it of him." Nor is the theory of appellant in doubt; for, assuming that the words claimed by appellee to have been spoken were spoken by the defendant, with contractual intent, his counsel says: "Obviously the contract was that appellee would

not lose by her investment; that she would be able so to dispose of her purchase that she would receive back her money invested and good interest." In view of the situation of the parties, the results sought; and the subject-matter of the contract, no other construction or interpretation is reasonable or even possible. It was a contract of indemnity against loss. All that appellee sought, expected, or desired was an assurance that she would not lose the money she invested or the interest thereon."

The learned judge who presided at the trial seems not to have adopted the theory of either the plaintiff or the defendant. But, if we judge correctly from his remarks made during the trial, his action in requiring the stock to be produced and tendered, and the instructions given upon the measure of damages, the court adopted the second of the three conflicting theories heretofore set forth, namely, that the contract was for the repurchase of the stock. Such is indicated by his remark during the progress of the trial that the second cause of action was "based upon a promise to redeem the stock," followed by his order requiring the stock to be produced and tendered without the same having been pleaded, over the objection of the defendant and without the approval of the plaintiff, who, in her brief, said: "Appellee was at a loss then, as now, to see any reason or rule or right of the court, upon its own motion, to require her to tender the stock into court. Appellee never has claimed, and does not now claim, that her contract with the defendant was one to repurchase the stock on demand."

The instruction that, if the jury find for the plaintiff, she would be entitled to recover the sum of money paid by her to the defendant, together with interest from August 10, 1901, the date of the last purchase, and from which date interest was claimed by the complaint, could only be based upon the theory announced by plaintiff, or, upon the theory that the contract was for the repurchase of the stock, upon demand, for the purchase price with interest.

[1; 2] The Supreme Court, in *St. Louis, etc., Co. v. Tierney*, 5 Colo. 582, announced certain elementary rules applicable to a correct interpretation of the contract under consideration. We quote from the syllabi: "It is an elementary principle that the object to be attained in the construction of a contract is to discover and effectuate the intention of the parties, and to this end the court will adopt that construction which will bring it as near the actual meaning of the parties as the words they saw fit to employ, when properly construed, will permit. As a guide to a correct interpretation, the law also permits the subject-matter of the contract, the situation of the parties at the time of its execution, and all the surrounding facts and circumstances to be taken into consideration.

A party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties."

With these rules in view it is impossible to adopt the theory of plaintiff. It seems wholly untenable. The transaction was not in the nature of a loan from plaintiff to defendant, nor of a deposit payable on demand. It was, and was by them understood to be, and treated as, an investment of plaintiff's money by defendant in mining stocks which did not belong to him, upon plaintiff's order, from which she hoped to receive large profit from an early advance in the market value of said stock, predicted by defendant and predicated upon the conclusion of certain changes in the affairs of the mining company, negotiations for which were then pending, and the promise of dividends from the showing made in the mine. The promise of defendant, under any reasonable construction of the contract, was conditional, so far as his liability to plaintiff was concerned, upon her sustaining loss on the investment by depreciation of the stock and her consequent inability to recover the amount paid therefor by a resale, or failure of the stock to rise in value, or pay dividends, so that she could realize an advance upon the purchase price equal to good interest on the capital. The situation of the parties and their conduct prior, at the time of, and subsequent to the purchase, exclude the possibility of the correctness of plaintiff's theory. Aside from the formal demand made just prior to beginning suit, there is no evidence that at any of the many conversations between plaintiff and defendant, during more than six years that elapsed between the purchase of the stock and the commencement of the suit, a demand was made upon the defendant to pay or repay the money invested, or even the loss thereon. Plaintiff testified that she asked about the money, and that defendant requested her to wait; but it is clearly shown by her own and her sister's testimony that this referred to her inquiry about her stock and the defendant's advice to wait for a more favorable time to sell.

Nor do we think the contract is susceptible of the construction apparently placed upon it by the court that it contemplated the repurchase of the stock by the defendant. "A fundamental canon of construction, with reference to contracts oral and written, requires that the true intent or meaning of the contracting parties shall be ascertained and the contract be construed, if possible, so as to carry out such intent." *Wolff v. Helbig*, 21 Colo. 490, 498, 43 Pac. 133, 136. It is certain that neither plaintiff nor defendant so understood it. Plaintiff at no time prior to suit offered to return the stock. She did not offer it by her pleading, nor make a tender thereof until required so to do by the court. It seems unusual to force a con-

struction by which the parties to the contract are declared to have had an intention which both deny. Both plaintiff and defendant having repudiated that theory, we are not disposed to give it further consideration, although it seems to be the only theory upon which the instruction of the court as to the measure of damages could be predicated, as we take it for granted that the court did not adopt plaintiff's theory. Taking into consideration the words used, to wit, that he would see her out with her money with good interest, and that she should lose nothing upon the investment, together with the situation of the parties at the time, and all the surrounding facts and circumstances, a reasonable construction, and we think the only construction that can be given to the contract, is that it was one of indemnity against loss, or guaranty that in case of loss defendant would reimburse plaintiff to the extent of such loss. Upon that view, the instructions of the court as to the measure of plaintiff's recovery constituted error for which the judgment must be reversed. The contract being one of indemnity, the plaintiff must show a loss, and the extent of recovery would be the loss sustained measured by the difference between the highest value of the stock within a reasonable time after the purchase, and the amount paid for the stock with interest added, less any dividends received thereon, as shown by the evidence; such reasonable time to be determined by the jury under appropriate instructions which take into consideration the fluctuating and uncertain values of mining stocks. And the failure of plaintiff to avail herself of opportunities to realize upon her investment within such reasonable time might be a good and complete defense to the action.

[3,4] Defendant offered the following instruction, which was refused by the court: "The court instructs you that the burden of proof is upon the plaintiff to show by the preponderance of the evidence not only that the contract alleged by her was made by the defendant, but that she has suffered loss or damage thereunder, and that unless you find by a preponderance of the evidence that the stock purchased by the plaintiff was, within a reasonable time after such purchase, of no value, and continued to be of no value down to the present time, then the plaintiff has not suffered the entire loss which she claims. If you believe from the evidence that the stock was of some value and could have been sold in the market for some price, then the damage which the plaintiff has suffered, in case you find the contract was made as alleged, is the difference between the highest value of such stock within a reasonable time after she purchased it, or at any time thereafter, and the amount she paid for the same, with interest on such difference, and less any dividends she may have received upon such stock."

This instruction correctly stated the law with the exception of that portion which gives the highest price of the stock, at any time after the purchase, as a basis for computing loss. We think the plaintiff would be entitled to a reasonable time after each purchase within which to consider and determine whether she would sell the stock or wait for a better price; that being reasonably within the contemplation of the parties, in view of the promise of dividends as well as increase in market value. The following cases are cited in support of the views announced as to the character of the contract and the measure of recovery: *Norris v. Reynolds*, 131 App. Div. 818, 116 N. Y. Supp. 106; *Brewster v. Countryman*, 12 Wend. (N. Y.) 446; *Belcher v. Loveland*, 119 Mass. 539; *Jenckes v. Rice*, 119 Iowa, 451, 93 N. W. 384; *Lobeck v. Duke*, 50 Neb. 568, 70 N. W. 36; *Kilbride v. Moss et al.*, 118 Cal. 432, 45 Pac. 812, 54 Am. St. Rep. 361.

The case of *Norris v. Reynolds*, supra, was one in which a sale of stock was made by a promotor interested in the corporation, who said to plaintiff: "I will guarantee your money, principal and interest. For whatever amount you invest in the stock, you will have my personal guarantee." In construing this contract, the court said: "From the plaintiff's own testimony and the correspondence that passed between the parties, it is quite plain that, although the word 'guarantee' was used, all that the defendant agreed to do was to indemnify the plaintiff against loss in case he should make the investment. The defendant did not agree to repurchase the plaintiff's stock on demand. * * * Proof that neither the original stock nor that of the cemetery association had any market value on the stock exchange was not sufficient proof that plaintiff's investment had become a total loss and had no present value whatever. Many kinds of investments and stocks may have some value although not dealt in on the stock exchange. In order to maintain his action against the defendant, upon the defendant's contract of indemnity against loss, the plaintiff must prove that he has actually suffered loss. * * * In order, however, to call upon the defendant, upon his contract of indemnity against loss, he must show by competent evidence that after the lapse of a reasonable time his stock, or the property right represented by it, has become worthless, or partially worthless. This can be done by showing through some competent witness the value of the stock with the rights attached to it."

This case seems to have been well considered, the reasoning sound, and the conclusion pertinent and applicable to the instant case. From the views we have expressed it follows that in refusing to admit the testimony offered by the defendant to show the value of the stock from the time of the several pur-

chases, and for a period of some months thereafter, in requiring the stock to be produced and tendered, in denying motion for nonsuit, and in giving instructions not applicable under a proper construction of the alleged contract, the court erred.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein announced.

COLORADO & S. RY. CO. v. BRENNIMAN et al.

(Court of Appeals of Colorado. April 8, 1912.
Rehearing Denied June 10, 1912.)

1. CARRIERS (§ 4*)—CARRIERS OF LIVE STOCK—RAILROAD COMPANIES.

In Colorado railroad companies are common carriers of live stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1, 462-478; Dec. Dig. § 4.*]

2. CARRIERS (§ 113*)—CARRIERS OF FREIGHT—WHEN RELATION ARISES.

A carrier of freight is not responsible as such for goods until they have been delivered to it for immediate shipment in condition for transportation, and requiring nothing further to be done by and no further orders from the consignor, and the goods have been so accepted by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 100, 101, 608-620; Dec. Dig. § 113.*]

3. CARRIERS (§ 113*)—CARRIERS OF FREIGHT—WHEN RELATION ARISES.

In determining whether the relation of carrier and shipper existed, the question of delivery and acceptance of the freight for immediate shipment is not controlled or materially affected through any delay on the carrier's part in placing goods in transit unless for that reason the carrier declined to accept the shipment, until some future time, thereby creating the relation of warehouseman, instead of carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 100, 101, 608-620; Dec. Dig. § 113.*]

4. CARRIERS (§ 41*)—FREIGHT—DELIVERY TO CARRIER.

When a shipper has done all in his power and all that he is required to do by his understanding with the carrier or usages of the business to further the shipment, it then becomes the carrier's duty to do whatever else is necessary to put the goods in transit, and delivery to and acceptance by the carrier will be deemed complete from the time the carrier is advised that the goods are ready for it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 102-106; Dec. Dig. § 41.*]

5. CARRIERS (§ 208*)—LIVE STOCK—DUTY TO PROVIDE FACILITIES.

A railroad company, as a carrier of live stock, is obliged to provide suitable and necessary means and facilities such as good and sufficient stock pens and yards for receiving, loading, and unloading live stock offered it for shipment, and for its delivery to the consignee, and for stock unloaded en route to be fed, or on account of delay, and is liable for damages caused to said stock by reason of its failure to provide such facilities.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 924-928; Dec. Dig. § 208.*]

6. CARRIERS (§ 228*)—LIVE STOCK—DELIVERY OF SHIPMENT TO CARRIER.

In an action against a carrier of live stock for injury thereto, evidence held to show that the carrier accepted delivery of the shipment to a stockyard company in accordance with usage and the customs of the business at that place.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

7. CARRIERS (§ 218*)—LIVE STOCK—LIMITATION OF LIABILITY.

Limitation of liability of a carrier of live stock provided for in the shipment contract does not apply to injuries occurring before the contract was signed; there being nothing to show that the contract was, or was intended to be, retrospective.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

8. CARRIERS (§ 218*)—SHIPMENT CONTRACTS—VALIDITY OF PROVISIONS.

Provision in a live stock shipment contract waiving and releasing all causes of action in favor of the shipper under any prior verbal agreement or written contract is void.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

9. CARRIERS (§ 215*)—LIVE STOCK—INJURY—LIABILITY.

A carrier of live stock cannot avoid liability for injury to a shipment after it was received for transportation through any shortage of cars or relations existing thereafter between the carrier and the stockyard company at whose yards the shipment was received.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 215.*]

10. NEW TRIAL (§ 99*)—NEWLY DISCOVERED EVIDENCE.

In an action against a connecting carrier of live stock for injury to a shipment, it was not an abuse of discretion to refuse the carrier a new trial for newly discovered evidence, consisting of the written contract under which the shipment was transported by the initial carrier, where the affidavits supporting the motion did not set out such contract nor its substance, and where diligence to secure the evidence at the former trial was not shown.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. § 99.*]

Appeal from District Court, Larimer County; James E. Garrigue, Judge.

Action by Frank P. Brennan and another against the Colorado & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. E. Whitted and R. H. Widdicombe, both of Denver, for appellant. Garbutt, Clammer & Sarchet, of Ft. Collins, for appellees.

KING, J. Appellees as plaintiffs below brought suit against appellant, alleging that on the 20th day of October, 1906, plaintiffs, the owners of 1,200 head of sheep, shipped said stock from Chama, New Mexico, over the road of the Denver & Rio Grande Railroad Company to Denver, Colo., consigned to themselves, and that these sheep, together with the waybills, were delivered to the defendant company at Denver on November 1, 1906; that plaintiffs then and there requested defendant to forward said stock without

delay to Giddings, a station on defendant's railroad near Ft. Collins; that defendant accepted the waybills, took the sheep into its possession, and agreed to make the shipment as requested; that defendant failed to make prompt shipment, and kept the sheep in muddy, filthy, and insufficient pens with inadequate facilities for feeding, where the feed was trodden underfoot and wasted so that the sheep received no benefit therefrom, and in which they were exposed to inclement weather, by reason of which 160 sheep, of the value of \$424, died, and the rest shrank in weight and deteriorated in value to the amount of \$215. Other damage was alleged, but withdrawn from the jury.

Defendant pleaded (1) a general denial; (2) that the sheep were shipped to Denver, and there delivered to the Denver Union Stockyard Company, by which they were retained until November 4th, when they were received and loaded by the defendant and shipped to Ft. Collins; that the said stockyard company was not an agent of the defendant; that defendant had nothing to do with said sheep until received by it on the 4th of November; that any delay in shipment was caused solely by the absolute inability of the defendant to procure cars; (3) that the shipment named in the complaint was received by the defendant on November 4th, and transported under a certain written agreement known as a "limited liability live stock contract," entered into on said date between plaintiffs and defendant, by which plaintiffs' claims were released and discharged. The reply, after denying other affirmative allegations of the answer, admitted the execution of the contract, but denied that the claim of plaintiffs in this case is controlled by said agreement, and sought to avoid the conditions set forth in the thirteenth, fifteenth, and twenty-first paragraphs of said contract by alleging that the written notice of loss required by paragraph 13 was given as soon as possible after learning the extent of the damage; that suit was begun within 90 days after the happening of the injury, as required by paragraph 15, and denying the waiver or release provided for in paragraph 21.

Paragraphs 13 and 21 of said contract are as follows:

"(13) All claims for loss or damage from any source shall be presented to the carrier within ten days from the date of the unloading of said stock at destination, and before said stock has been mingled with other stock; otherwise, such claims shall be deemed to be waived, and the carriers shall be discharged from liability. Any carrier liable on account of loss or damage to any of said stock, shall have the benefit of any insurance thereon."

"(21) As a further consideration for the reduced rate herein given, the shipper hereby releases and waives any and all causes

of action for damages, or otherwise, by reason of any written or verbal contract for the shipment of said cattle, or any of them, prior to the execution hereof."

The cause was tried to a jury upon instructions given by the court which practically eliminated the written contract from consideration and denied its applicability to the cause of action, and placed the obligation, duty, and liability of the defendant as at common law, that of practical insurer of the freight, after it was received and accepted by the defendant as a common carrier; and charged that in case the jury found that upon the day following the arrival of the sheep in Denver the agent of the Denver & Rio Grande Railroad Company delivered to the defendant company the bills of lading of said sheep, and that the sheep were accepted by the defendant at the stockyards for shipment, and were at that time ready for shipment, the defendant must, in law, be deemed to have accepted and received the sheep on the day it received the waybills or bills of lading from the Denver & Rio Grande Railroad Company; and further, in effect, that failure of plaintiffs to present claim for loss or damage within 10 days from the unloading of the stock at its destination, as required by said paragraph 13, would not bar plaintiffs' claim if the same was presented within a reasonable time after the amount of the loss had been ascertained in case the jury should further find that the lapse of time did not prejudice the rights of the defendant. Instruction No. 2.

The grounds of error relied on in the briefs of counsel for appellant are as follows: (1) Appellees were not entitled to have the cause as made submitted to the jury, for the reason (a) that appellant was not responsible nor liable for the condition of the stockyards; (b) appellees were precluded from asserting their claim, because made too late. (2) The court erred in the instructions given, namely, instructions 2, 3, and 4. (3) The court erred in refusing to give instructions requested by appellant. (4) The motion for a new trial was erroneously overruled.

The principal evidence upon the questions herein to be considered was given by F. F. Breniman, brother of one of the plaintiffs, who accompanied the shipment, and by T. J. Burns, agent at the Union stockyards for the defendant company. The shipping contract between the Denver & Rio Grande Railroad Company, initial carrier, and the plaintiffs, was not in evidence. Breniman testified that the sheep were billed over the Denver & Rio Grande railroad from Chama, N. M., to Ft. Collins, Colo.; that they arrived in Denver about 8 o'clock on the evening of October 31st; that he went to the office of the initial carrier to see if the sheep could be sent on immediately to Ft. Collins, and

was told by the agent of that company that they would be turned over to the defendant company; that said agent notified the defendant's agent, who declined to receive the sheep that evening on board cars (the reason, as admitted by counsel for both plaintiffs and defendant being that the sheep had been on board the cars at that time for 28 hours without feed or water, and, under the federal statute, must be unloaded); that said sheep were sent to the Union stockyards and unloaded. About 10 o'clock November 1st witness went to the office of the defendant at the stockyards, and asked the agent when the sheep would be shipped; the agent replying that he thought about 5 o'clock on that day. About 5 o'clock witness was told by said agent that they would go out on the 10 o'clock train, and later that they would go about 12 o'clock, then at 3 in the morning, and at this time witness was told to go to bed, and he would be called. Next morning (November 2d) witness again saw the agent, who then told him that the sheep had not been loaded because the bills of lading had not been turned over by the Denver & Rio Grande Railroad Company. Witness then got the agent of that company, and accompanied him to the defendant's office, and found that the bills of lading had been delivered to and were in the hands of defendant's agent, who then told witness that the sheep had not been billed out, and, even if the bills were there, would not have been billed, because witness had not ordered the sheep loaded; that, if no one had been with the sheep, they would have been shipped, but where they were accompanied it was expected that the man in company would order them loaded. Witness then ordered cars and that the sheep be loaded; admitted that he knew there was a general shortage of cars, but testified that nothing was said to him at that time about shortage, and he did not know there was a shortage for that shipment.

Burns, defendant's agent, could not remember when the bills of lading were received by him from the initial carrier. He testified that it was not usual for the initial carrier to deliver bills of lading, but to give a transfer sheet, although sometimes the receiving road would take the waybills in order to save time. His waybills showed that he had received the bills from the initial carrier; that shipment had been made over the Denver & Rio Grande from Chama, New Mexico, consigned to plaintiffs at Ft. Collins with final destination at Omaha, under a through rate with "feed in transit" provisions, but not on a through contract. He testified that it was the custom of the yardmaster at the stockyards, upon arrival of stock billed to points beyond, to post a bulletin showing the fact of arrival, place of shipment, consignee, route, and destination; that each road had its separate bulletin, and that

he supposed such a bulletin was posted November 1st showing the shipment in question, and that he saw it; that the reason for delay in shipment was a shortage of cars, and the fact that plaintiffs' agent accompanying the sheep did not order them loaded. It was shown that several railroad companies, including the defendant and the initial carrier, had agencies and offices at the stockyards, and received and discharged live stock at that point; that there was a rush of business at that time and the stockyards were crowded; that the sheep were confined, without shelter, in open pens in cold and stormy weather, and the yards deep in mud without facilities for feeding; that upon arrival at Ft. Collins 12 of the sheep were dead, and the others so weak that many of them had to be hauled to the feeding pens, and that within a few days 160 of them died and a number more later. The purpose of plaintiffs was to feed and fatten the sheep at Ft. Collins before proceeding to the final destination named. The jury returned a verdict in favor of plaintiffs.

[1-3] 1. In this state railroad companies are common carriers of live stock. *Railway Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986. "The general rule maintained by all the authorities is that carriers of live stock are liable absolutely for loss of or injury to stock intrusted to them for transportation, like other common carriers, unless the loss or injuries were occasioned by the act of God, or the public enemy, or the negligence of the shipper, except that they are not liable for loss or injury caused by the 'proper vice' or natural propensities of the animals themselves, and not by any negligence on the part of the carriers." *Moore on Carriers*, p. 509; *Railway Co. v. Rainey*, supra. But the authorities are uniform in holding that the carrier is not responsible, in that capacity, for goods, until they have been delivered to the carrier for immediate shipment, in condition for transportation, and requiring nothing further to be done by, and no further orders from, the consignor, and the goods have been so accepted by the carrier. *Elliott on Railroads* (2d Ed.) § 1409; *Hutchinson on Carriers* (3d Ed.) § 113; *Moore on Carriers*, p. 133; 6 Cyc. p. 614. To effect such a delivery to the carrier there must be either actually or in legal effect a complete surrender to it of possession and custody, and as a consequence all control over the goods must be abandoned by the owner until the purpose of the bailment has been accomplished; and, until this has been done, it cannot be said that the carrier has assumed any responsibility for the goods as carrier. *Hutchinson on Carriers* (1st Ed.) §§ 72, 73; *Moore on Carriers*, p. 133. The question of delivery and acceptance for immediate shipment does not seem to be controlled, nor to any considerable extent affected, by the fact that there may be, or is expected to be, some delay on the

part of the carrier in placing the goods in transitu, unless for that reason the carrier declines to accept the goods for shipment until some future time, and thereby its liability, if any, becomes that of warehouseman, instead of carrier. The rule in that respect seems to be fairly stated in *Railway Co. v. Murphy*, 60 Ark. 333, 338, 30 S. W. 419, 420 (46 Am. St. Rep. 202), quoted as authority by counsel for both plaintiffs and defendant, and being as follows: "When the shipper surrenders the entire custody of his goods to the carrier for immediate transportation, and the carrier so accepts them, so instant the liability of the common carrier commences. When this occurs, the delivery is complete, and it matters not how long, or for what cause, the carrier may delay putting the goods in transitu. If a loss is sustained, not occasioned by the act of God, or the public enemy, the carrier is responsible. But, on the contrary, as there is no divided duty of safe keeping, and no apportionment, in the event of loss, between the owner and the carrier, the surrender of control over the goods by the shipper must be such as to give the carrier the unqualified right to put at once in itinere, and the carrier must have accepted them for that purpose." And also in *Elliott on Railroads*, § 1409, as follows: "Railroad companies are held to the liability of warehousemen, not to that of common carriers, for goods deposited with them otherwise than for immediate shipment. Thus, if the shipment is not to begin until further orders from the consignor, or something has been done by him, the carrier's liability attaches the instant, but not before, the orders have been given, or the something has been done. If, however, the delay in shipment is due, not to the request or default of the consignor, but to the exigencies of the railroad company's business or to its default, the carrier's liability usually dates from the deposit, and not from the commencement of the journey. Thus, where goods bearing the consignee's name and address are delivered to a railroad company, without agreement to the contrary, the delivery is equivalent to an express order to ship immediately; and the fact that the consignee consents that they may wait in the freight house because the company has no car ready will not relieve it from liability as an insurer."

[4] It has been held that whether freight has been delivered to a common carrier so as to fix its liability as such is a mixed question of law and fact, and delivery may be shown by proving that the freight was sent to the place where the carrier was accustomed to receiving it, and that notice was duly given that it was there for transportation. *Elliott on Railroads*, § 1413. And that the liability of a common carrier begins with the actual delivery to it, or with such notification as, under the usages of business, constitutes a constructive delivery. *Id.* §§ 1443, 1412. And

when the owner of the goods has done all in his power, and all that he is required to do by his understanding with the carrier, or the usages of the business, to further the shipment, it then becomes the duty of the carrier to do whatever else is necessary to put the goods in transitu, and the delivery and acceptance will be considered as complete from the time the carrier is informed that the goods are ready for it (*Hutchinson on Carriers*, § 125; *Elliott on Railroads*, § 1404; *Illinois Central Ry. Co. v. Smyser & Co.*, 38 Ill. 354, 87 Am. Dec. 301), and that no formal acceptance is necessary (*Elliott on Railroads*, § 1404, and cases cited). It is also held in *Houston, etc., Ry. Co. v. Hodde*, 42 Tex. 467, that delivery is a question of fact for the jury. But in *Gass et al. v. N. Y., etc., R. R. Co.*, 99 Mass. 226, 96 Am. Dec. 742, it is said that delivery is a question of law where there is no dispute as to the facts.

[5] A railroad company as a carrier of live stock is obliged to provide suitable and necessary means and facilities, such as good and sufficient stock pens and yards for receiving, loading, and unloading live stock offered it for shipment, and for its delivery to the consignee, and for stock unloaded en route to be fed, or on account of delay, and is liable for damages caused to said stock by reason of the carrier's failure to provide such facilities. *Moore on Carriers*, p. 500; *Covington Stockyards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73; *International, etc., R. Co. v. McRae*, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926; *Feinberg v. Delaware, etc., R. Co.*, 52 N. J. Law, 451, 20 Atl. 33; *Hutchinson on Carriers*, §§ 634, 638 (3d Ed.).

[6] 2. Counsel for appellant in their brief say: "If there are cases in the books involving identically the same questions as are involved in the case at bar, we have been unable to find them." The statement of counsel as to the absence of cases directly in point is confirmed by our own examination to the extent that we find few, if any, cases in which the liability of the connecting carrier has been based upon a delivery by the initial carrier, or the consignor, to a stockyard company, a corporation separate and distinct from the carriers or either of them, and which was the owner and in sole control of the pens and other facilities for feeding and discharging shipments of live stock. There are cases, however, which, from similarity of conditions involved, and by analogy, throw some light upon the subject. *Covington Stockyards Co. v. Keith et al.*, supra; *N. Pennsylvania R. Co. v. Commercial Bank of Chicago*, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287. In the first case the United States Supreme Court by Harlan, justice, holds that a railroad company holding itself out as a carrier of live stock is under legal obligations arising out of the nature of its employment to provide suitable and necessary means and facilities for receiving live stock.

offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned; that such duty cannot be efficiently fulfilled in a town or city without the aid of yards, in which the stock offered for shipment can be received and handled with care; and that the rights and obligations of the parties are not different, whether the railroad company itself maintains the stockyards, or employs another company or corporation to supply the facilities for receiving and delivering live stock, which the railroad company was under obligations to the public to furnish.

Upon the question of delivery the court, at the request of appellant, instructed the jury that if the stockyards where the sheep were held prior to shipment "were not owned, controlled, or operated by defendant, and were not furnished to plaintiffs by defendant, and that said stock was not accepted by defendant for shipment until the cars were furnished in which the sheep were loaded and shipped," under the issues, their verdict must be for the defendant; and also that mere delivery to the stockyards at Denver by the Denver & Rio Grande Railroad Company or its agent was not delivery to the defendant. The evidence as to the relations between the stockyards or the stockyard company and the carriers is somewhat vague, but seems to establish the fact that the stockyards was a common point used by railroad companies in Denver for delivery of stock, receipt of stock, and exchange thereof between the railroads terminating in Denver and connecting roads beyond that point, and that the pens and sheds in said yards were used by the railroad companies for the feeding of stock in transit, and it does not appear that any other pens or sheds or facilities for loading, unloading, delivering, or receiving, watering, or feeding stock were at that time furnished or supplied by such carriers in the city of Denver. Therefore there appears to have been competent evidence, legally sufficient, upon which the jury might find that the pens in which the stock was kept were furnished by the defendant to plaintiffs, or were by selection and adoption a part of defendant's system for shipping live stock; and that in accordance with usage and customs of the business at that place the sheep were delivered to and accepted by the defendant for immediate shipment on the first day of November.

[7, 8] 3. Plaintiffs' right to a recovery cannot be determined by the provisions of the limited liability contract, for the reason that the contract was not entered into, nor mentioned, until the 4th day of November, whereas the alleged acts or default of defendant by which the injuries complained of were caused occurred between the morning of November 1st and the afternoon of November 4th when the contract was signed, and there is nothing to show that the con-

tract was, or was intended to be, retrospective in its effect, unless it be paragraph 21, which is ineffective under the circumstances. Instruction No. 2, upon the question of notice, seems to have been a partial recognition by the court of some effect to be given to the written contract. But, if the giving of that instruction was error, such error was in favor of the defendant. It would be unreasonable to hold that paragraph 13 of the contract had in contemplation notice to be given of loss or damage sustained prior to the time the contract was signed. The provisions of paragraph 21, waiving and releasing all causes of action under any prior verbal or written contract, upon respectable authority, were void. The Supreme Court of Arkansas in *Missouri & N. A. R. Co. v. Sneed*, 85 Ark. 203, 107 S. W. 1182, held that it was not error in the trial court to exclude from the jury that clause of the contract which required plaintiff to give notice of damage before removal of the stock, where, as in the present case, the damage had already occurred when the contract was executed; that, where the damage to the stock occurred before the contract was entered into, such contract had no bearing upon the case; and that defendant had no right, at the time of shipment, to impose upon the shipper a contract for exemption from liability for damages which had already occurred, and cited *Railway Co. v. Burgin*, 83 Ark. 502, 104 S. W. 161, and *Railway Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760, 118 Am. St. Rep. 75, 12 Ann. Cas. 125, in which it was held not only that a contract made after damage occurred had no bearing upon the case, but that a contract exempting the carrier from liability for damages which had already occurred was void, because unreasonable and discriminatory.

[9] Excluding the written contract the vital question became one of fact, namely: Were the sheep delivered to and accepted by the defendant on the 1st day of November for immediate shipment? If they were so received, the shortage of cars, as well as the relations thereafter existing between the stockyard company and the defendant, were immaterial, as the defendant was then charged with custody and care of the stock, and was liable for any damage thereto not within the exceptions hereinbefore noted. The question of delivery and acceptance was submitted to the jury upon what appear to be appropriate instructions; and we cannot say that the evidence introduced, viewed in its most favorable light to plaintiffs, was insufficient to justify a finding in their favor. Therefore the verdict of the jury in that respect is binding upon this court.

[10] 4. After verdict, application was made by the defendant for a new trial, on the ground of newly discovered evidence, claiming that the written contract of shipment under which the sheep were hauled by the

Denver & Rio Grande Railroad Company from Chama, New Mexico, to Denver, did not require delivery to the defendant, and contained no reference to shipment to any point beyond Denver, except Chicago, nor to any shipment over defendant's line; that the transfer sheet from the Denver & Rio Grande Railroad Company to the defendant shows that said transfer could not have been delivered to the defendant company until after the sheep had been long confined in the pens, and the damage complained of had already been sustained. The motion is supported by affidavits of counsel and others showing that they had no copy of the contract of shipment between the Denver & Rio Grande Railroad Company and plaintiffs, and did not demand one for the reason that they thought it was a part of plaintiffs' case, and that they were surprised in the action of the court in giving instruction No. 3 to the jury, charging that the Denver & Rio Grande Railroad Company was the agent of plaintiffs; that since the trial counsel had caused search to be made among the files of said company and had found carbon copies of the contract and transfer sheet. The affidavits do not contain a copy of the alleged shipping contract with the Denver & Rio Grande Railroad Company, nor set forth its substance. Therefore, neither the trial court nor this court has been informed as to what effect, if any, the written contract, if in evidence, might have. Counsel's affidavit fails to show diligent effort to secure this evidence, which it seems ordinary caution would have required them to investigate prior to or during the trial. The motion was denied, and we see no reason for holding that in such ruling the court abused its discretion.

The record being free from substantial error, the judgment will be affirmed.

FABIAN v. WASATCH ORCHARD CO.

(Supreme Court of Utah. July 31, 1912.)

Rehearing Denied Aug. 16, 1912.)

FRAUDS, STATUTE OF (§ 188*)—INVALID CONTRACT—UNJUST ENRICHMENT.

Where a contract of employment was within the statute of frauds, and therefore unenforceable, defendant having accepted the benefit of plaintiff's services for part of the term before having repudiated the contract, plaintiff was entitled to recover the reasonable value of the services so rendered and accepted, and was not required to show defendant's profit or gain as the result of such services, in order to show unjust enrichment.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 327-333; Dec. Dig. § 188.*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Ferd J. Fabian against the Wasatch Orchard Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Dickson, Ellis, Ellis & Schuller, of Salt Lake City, for appellant. Dey, Hoppaugh & Fabian, of Salt Lake City, for respondent.

STRAUP, J. The complaint is in two counts. One that the plaintiff, a merchandise broker, rendered services for the defendant, a Utah corporation engaged in canning and selling fruits and vegetables, in advertising, introducing, and selling its products in Eastern markets, in consideration of which it, by a written agreement, agreed to give the plaintiff the exclusive right for three years to sell, as a broker, all its manufactured products in the state of Utah and in southern Idaho, for which the plaintiff was to have a brokerage of 2½ per cent. of the amount of all sales made by him or by others in such territory during such time. In the second count, it is alleged that the plaintiff, at the instance and request of defendant, rendered services for it in advertising, introducing, and selling its products in Eastern markets, and there creating a market for its products, which services were reasonably worth the sum of \$8,000.

The case was tried to the court, without a jury. The court found: That the defendant had invested a considerable sum of money in growing asparagus for canning purposes, and that the asparagus plants had reached a stage where they would be producing in considerable quantities. That the defendant was heavily in debt and in straightened financial circumstances. That it had a large quantity of such product on hand, but had no market or outlet for it. That it desired to convert the products into cash, regardless of the profit from the sales thereof, and to create a market therefor in Eastern cities, especially in Kansas City, St. Louis, Cincinnati, Chicago, Pittsburgh, Boston, New York, and Philadelphia, and to advertise and introduce its products in such markets. That thereupon the plaintiff, a merchant broker at Salt Lake City, at the solicitation and request of the general manager of the defendant, and for and on its behalf, visited such cities and there advertised the defendant's products, and devoted time and services in introducing them and in creating a market for them, and solicited and obtained orders amounting, at the prices fixed for the products, to the aggregate sum of between \$30,000 and \$35,000. That the defendant accepted the benefit of such services, and, to the extent of its capacity, filled such orders to the amount of at least \$16,000, and that the reasonable value of plaintiff's services was \$2,300.

The court further found that, in consideration of the services to be rendered, the defendant's general manager orally agreed to give plaintiff for three years the exclusive right to sell the defendant's products

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in Utah and Southern Idaho, and to give him 2½ per cent. commission of all sales made in such territory during such time, either by himself or others. The oral contract was made about the 18th day of April, 1909. The services rendered by plaintiff, and for which compensation is sought, were rendered by him between that day and the 23d day of May of that year. The contract was reduced to writing in December, 1909, and was signed and delivered in the name of the defendant and by the person purporting to act as its general manager, the same person who made the oral contract with the plaintiff. The court found that the person so acting was the defendant's general manager when the oral contract was made, and that he then had authority to make such a contract, but that when the written contract was made he then was not its general manager, and was not in its employ, he having theretofore left it, and hence found that the written contract was unauthorized, and was not the defendant's contract. The defendant, after the rendition of the services, repudiated the contract, notified the plaintiff to that effect, and refused to ratify, confirm, or approve it, or to be bound by it. The court also found that the oral contract, though made by an authorized agent of the defendant, nevertheless, was unenforceable, because by its terms it was not to be performed within one year, and was therefore within the statute of frauds. The court further found that in January, 1910, the defendant discontinued the business of canning fruits and vegetables, and in the spring of that year sold and disposed of its business.

Upon the findings, and in response to the second count of the complaint, the court rendered judgment in favor of the plaintiff for the sum of \$2,300, the reasonable value of the services rendered by the plaintiff and received and accepted by the defendant. From the judgment, the defendant appeals.

In its brief it states the proposition for consideration to be: "There is but one question in this case, and that is: Was the defendant enriched in any manner by the part performance of the oral contract, which was within the statute of frauds, and what was the value of that enrichment? In other words, what was the value of the benefits received by the defendant from the part performance of the oral contract by the plaintiff?"

Both parties agree that the law on the subject is as stated in *Browne on Statute of Frauds* (5th Ed.) § 118a, that "the rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid, or recover for the services upon a quantum meruit, applies only to cases where the defendant had received and holds the money

paid or the benefit of the services rendered," and, as stated in 29 Am. & E. Ency. Law (2d Ed.) p. 836, that, "although part performance by one of the parties to a contract within the statute of frauds will not, at law, entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered, in accordance with and upon the faith of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right to recover is not absolute. The plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract; and hence it must appear that the defendant has actually received, or will receive, some benefit from the acts of part performance. It is immaterial that the plaintiff may have suffered a loss, because he is unable to enforce the contract."

But the defendant asserts that under the facts found by the court the "benefits" received by the defendant cannot be measured by ascertaining and determining the reasonable value of the services rendered by plaintiff, and accepted and received by the defendant, but by ascertaining and determining whether the services resulted to the defendant's profit or gain, whether it "was enriched" thereby, and, if so, "what was the value of that enrichment?" Hence it urges that the court erred in permitting the plaintiff to prove the reasonable value of the services, and in giving the plaintiff a judgment for the sum of \$2,300, the found reasonable value thereof, and further assails the judgment for the reason, as contended by it, that the products sold by it in the Eastern markets on the orders solicited and procured by the plaintiff were sold for less than cost of manufacturing them, and were therefore sold, not to the defendant's profit or gain, but to its loss; and hence the defendant received no "benefit" from the services rendered by the plaintiff and accepted and received by it.

It is not contended that the services rendered by the plaintiff, or the orders obtained by him, were not rendered or obtained in accordance with the contract. No such claim is made. The claim made is that the defendant did not profit, "was not enriched," by the transaction. The defendant's contention leads to this: If A should orally employ B for a period of three years to do the labor in the manufacture of 100,000 brick (assuming such a contract to be within the statute of frauds), and if B, on the faith of and in accordance with the contract, should, within the first nine months, make and produce 20,000, which were received and accepted by A, and A should then repudiate the contract and refuse to longer engage B's services, B could not recover the reasonable

value of the services on a quantum meruit, but to entitle him to recover it would be essential for him to show that the market value of the brick so made by him and received by A was more than the cost of manufacture; otherwise A received no "benefit" from B's services. Or, if A should orally employ B to work on his farm for a term of three years and agree to give him 10 acres of land at the end of that period, and if B, on the faith of the contract, should work nine months on the farm for A in tilling the soil, sowing grain, and reaping crops, and A should then repudiate the contract and refuse to longer engage B's services, again B could not recover the reasonable value of his services; and if it were made to appear that because of drought or a falling market, or other causes not due to his negligence or willfulness, the market price of the products was less than the cost of production, then A received no benefit from B's services, and the latter could not recover from the former.

We think appellant's notion of what is meant by "benefit," as the term is used by text-writers and courts, and applied in cases of the nature under consideration, is not borne out by the authorities. The texts and cases cited by it do not support its contention. *Dowling v. McKenney*, 124 Mass. 478, is cited. There A orally agreed to convey land to B, and to take in exchange or payment a monument to be made by B. B finished the monument and tendered it with the money; but A refused to receive the monument, and refused to convey. There A did not receive or accept the monument. He did not receive or accept the fruits of B's services, and hence received no benefit. Had he received and accepted the monument and then repudiated the contract and refused to convey, then, clearly, B would have been entitled to recover the reasonable value of the monument so delivered to and accepted by A. The case in no wise makes against that doctrine, and falls within the rule stated in 20 Cyc. 299 that, "where services are rendered on an agreement which is void by the statute, an action will lie on the implied promise to pay for such services; but the promise is implied, not from the services alone, but from the benefit to defendant as well, and if defendant has received no benefit, as, for instance, where work has been performed on a chattel which is never delivered, there can be no recovery." To that effect is also the cited case of *Banker v. Henderson*, 58 N. J. Law, 26, 32 Atl. 700.

We are also referred to *Henrikson v. Henrikson*, 143 Wis. 314, 127 N. W. 963, 33 L. R. A. (N. S.) 534. That was an action to enforce specific performance of an oral contract to convey real estate upon performance by the purchaser and the making of valuable

permanent improvements on the land by him. The lower court denied and the appellate court granted specific performance of the contract. The case is not in point, and does not decide anything in support of the appellant here.

Bristol v. Sutton, 115 Mich. 365, 73 N. W. 424, is also cited. There a minor was emancipated and left home. Shortly afterwards his uncle agreed to give him \$1,000 if he would return home and remain with and assist his father on the father's farm until he should attain his majority. The minor carried out the agreement. It was held that, the contract being within the statute of frauds, the approval by the uncle of the minor's conduct was not such a subsequent act as to create an obligation to pay; and that, since the uncle had derived no benefit from the plaintiff's labor, the contract was void. This case also falls within the rule stated in *Dowling v. McKenney*, supra, and in no way supports the defendant's contention.

It is unnecessary to review in detail all the cases cited by appellant. An examination of them will show that they do not support any such doctrine as is contended for by it. We think the well-established rule is that, where one who, not in default, on faith of and in accordance with a contract unenforceable because within the statute of frauds, but not *malum prohibitum* nor *malum in se*, has, in pursuance of the contract, rendered services for the adversary party, who, with knowledge or acquiescence, accepted them and received the benefit of them and repudiated the contract, he may recover on a quantum meruit the reasonable value thereof—not the profit or gain resulting to the adversary party by reason of the transaction, nor the loss suffered or sustained by the other, but compensation for the reasonable value of the services rendered by the one and accepted and received by the other. Page on Contracts, c. 74; *Vickery v. Ritchie*, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810; *Stout's Adm'r v. Royston* (Ky.) 107 S. W. 785; *Cozad v. Elam*, 115 Mo. App. 136, 91 S. W. 434; *Appeal of Hull v. Thomas*, 82 Conn. 647, 74 Atl. 925; *Wojann v. Nat'l Union Bank*, 144 Wis. 646, 129 N. W. 1068; *Jackson v. Stearns*, 58 Or. 57, 113 Pac. 30; *Patten v. Hicks*, 43 Cal. 509; *Lapham v. Osborne*, 20 Nev. 168, 18 Pac. 881; *Snyder v. Neal*, 129 Mich. 692, 89 N. W. 588; *Werre v. Thresher Co.* (S. D.) 131 N. W. 721.

We see nothing in appellant's cases which makes against this. On this theory the case was tried and the judgment rendered. We think it should be affirmed, with costs. It is so ordered.

FRICK, C. J., and McCARTY, J., concur.

CALLAHAN v. SALT LAKE CITY.

(Supreme Court of Utah, June 21, 1912.)

1. COURTS (§ 92*)—DECISION—"DICTUM."

A "dictum" is an opinion expressed by the court, which, not being necessarily involved in the action, lacks the force of an adjudication (quoting 3 Words & Phrases, 2051).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. § 92.*]

2. MUNICIPAL CORPORATIONS (§ 751*)—TORTS—INDEPENDENT CONTRACTOR—LIABILITY.

Where the work required by a street paving contract was such as to necessitate constant supervision with reference, not only to the preparation, but to the laying of the materials, that the contract provided that the city should have authority to inspect the work, order necessary changes, and require the contractor to discharge any incompetent or disobedient employee, etc., did not confer on the city any right to interfere with the methods the contractor employed to do the work, or to do more than see that it was properly executed; and the contractor was an independent contractor, and not the servant of the city, which was not therefore liable for injuries to the property of third persons by the contractor's alleged negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.*]

Appeal from District Court, Salt Lake County; George G. Armstrong, Judge.

Action by M. E. Callahan against Salt Lake City, a municipal corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

S. P. Armstrong, of Salt Lake City, for appellant. H. J. Dininny and P. J. Daly, both of Salt Lake City, for respondent.

FRICK, O. J. Appellant brought this action against Salt Lake City, the respondent, to recover damages. The material allegations of the complaint are as follows: "That the city contracted with P. J. Moran to grade and pave Fifth East street; that on and before May 25, 1908, said Moran plowed up said Fifth East street along the east side of the block in which plaintiff's house is situated; that the city negligently suffered him to throw and leave in the open gutter on the west side of the street earth and rubbish, thereby obstructing the gutter so that it was not capable of carrying off the water, and negligently permitted said condition to remain during the night of May 25th and morning of May 26th; that on said night there was a rainfall causing a large flow of water down said gutter that was diverted by said obstruction onto plaintiff's property, into his cellar, damaging his house." Respondent denied all negligence and averred that the damages, if any, were caused by an act of God.

At the trial it was made to appear that on the 4th day of May, 1908, respondent entered into a contract with the P. J. Moran mentioned in the complaint whereby he agreed to pave with asphalt and concrete a roadway 66 feet wide on Fifth East street between

South Temple and Third South streets in Salt Lake City; that by the terms of said contract he agreed to "execute all of the said named work in a good, substantial, and workmanlike manner, and to furnish all the materials and all the tools and labor necessary to properly perform and complete the work ready for use in strict accordance with the attached specifications." The contract also contained other provisions which appellant deems material and which in substance are as follows: That the contractor shall make and maintain sufficient guards and barricades and do all things to prevent "accident or loss of any kind"; that whenever the contractor is not present at the work and at such time instructions become necessary the board of public works, or the city engineer may give the necessary orders to the superintendent or foreman in charge of the work; that any work which is defectively done shall be removed by the contractor whenever directed to do so by the board aforesaid; that the contractor shall employ suitable mechanics and if any person employed by him is incompetent, disorderly, or disobedient to the board of public works or to the city engineer, such person shall be discharged by the contractor upon request of said board or engineer; that the contractor shall commence work at such place as he may be directed and shall conform to such directions as the board shall give with respect to the order and time in which different parts of the work shall be done; that the contractor shall comply with the ordinances of the city in so far as they may affect his employees or the disposition or transportation of the materials and shall assume all liability, and he agrees to indemnify the city against all loss or damage that may be occasioned by the doing of the work contemplated by the contract. Appellant's counsel also introduced in evidence several city ordinances and has incorporated them into the bill of exceptions. As we view the case, these ordinances were not intended to have, and do not have, any effect upon the case one way or the other. We shall therefore not refer to them further.

At the trial it was made to appear that the ditch or gutter referred to in appellant's complaint was some distance outside of that portion of the street which was being prepared for paving and which was to be paved under the contract referred to; that in turning the teams in scraping the dirt in that portion of the street which was being prepared for paving the witnesses assumed, rather than stated it to be so, that, on the day preceding the night on which the injury complained of occurred, some of the loose dirt was scraped some distance outside of the plowed portion of the street and was either scraped into the ditch or gutter, or left so near it that such dirt was washed into the ditch by the flood which came down

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the street and gutter on the night aforesaid; that the flood was due to what, for this locality, the witnesses said was an extraordinary and unusual rain-storm; that the ditch or gutter in question had always theretofore been of sufficient capacity to carry off flood waters; that in paving the street the contractor was required to construct concrete or cement gutters on either side of the 60-foot strip and to connect the same with a concrete or cement curbing which extended some distance above the bottom of the gutter; that the gutter or ditch referred to in the complaint was some distance away from the gutter and curbing aforesaid; that it was not necessary that the contractor should interfere with or come in contact with the ditch or gutter in question, and it was not contemplated by the contract that he should or was required to disturb the same in any way. There was no evidence that any city official or employé knew or was apprised of the fact that the contractor was scraping dirt into or near the ditch or gutter in question, if, indeed, such was the case.

For the purposes of this decision we shall assume that the dirt was placed into or near the gutter aforesaid by the contractor.

Appellant also showed that there was a culvert over the ditch which was used by the residents on the west side of the street as a driveway, to reach their homes with teams and wagons; that the flood waters washed the dirt and debris down the ditch, and the same lodged against the culvert aforesaid and filled up the ditch at that point so that the water was turned to the west and flowed onto the premises and into the basement of appellant's house and caused the damages complained of.

After substantially proving the foregoing facts, appellant rested his case, and respondent's counsel interposed a motion for a nonsuit upon various grounds, one of which was that from the undisputed facts before the court it was clearly made to appear that Mr. Moran was an independent contractor, and that under the facts as aforesaid respondent was not responsible for his negligent acts which it is claimed caused the injury and damages to appellant's property. The court sustained the motion upon the ground stated and entered judgment dismissing the action.

The only questions for determination are: (1) Whether Moran, under the contract in question, was an independent contractor; and (2) if so, whether, under the undisputed facts, his acts were such for which respondent was, nevertheless, responsible.

Appellant contended in the trial court, and now asserts, that Moran was not an independent contractor, and that respondent is liable for his acts of commission as well as omission in case such acts or omissions constituted negligence. From the opinion of the trial court, which is in the record, it seems it encountered some difficulty in de-

termining whether, under the terms of the contract in question and the undisputed facts, Moran was an independent contractor, and, if so, whether, notwithstanding that fact, the acts complained of were, nevertheless, such as would make respondent liable therefor. In referring to the authorities, and especially to a case decided by this court entitled *Morris v. Salt Lake City*, 35 Utah, 474, 101 Pac. 373, the trial court, in language perhaps more forceful than elegant, expressed himself thus: "Now, the court has been over every one of these authorities that have been cited, and while that *Morris Case* don't decide, in my judgment, anything about what an independent contractor is, they just slide around that in that decision, by conceding it and then go ahead and decide something else." While the court, in his statement, departs somewhat from the ordinary rules of English grammar, yet we have found no difficulty in determining his meaning. Nor did the court intend to leave us in doubt with respect to the ground upon which his decision is based, as appears from the concluding portion of the aforesaid opinion, which reads as follows: "If I have not covered the points counsel have in mind, I am willing to go on and cover them. I want to give sufficient reasons for my ruling so the Supreme Court won't think I am attempting to avoid giving a reason in any of these cases." No doubt the court desired to make the point he passed on so clear that this court could not again "slide around" it without seeing it. This is, however, not the first time that we have discovered either expressed or implied criticisms contained in the rulings made by the trial courts during the course of a trial in which it was intended to infer that this court sometimes fails to decide the point upon which an opinion is desired by them, or, if decided, is, nevertheless, contrary to their views. Whether such criticisms are well founded or not is not for us to determine. We feel constrained to say, however, in this behalf, that we, and not the trial courts, must assume the responsibility of determining whether a question that is raised in a given case is such as is necessarily involved in a decision thereof, and hence requires us to express an opinion upon it. In the *Morris Case*, referred to by the trial court, the question of independent contractor was not involved so as to require a decision. Indeed, if in that case we should have attempted to decide the question either way, the result would still have been the same.

[1] It therefore was not necessarily involved in the case, and for that reason anything we might have said upon the subject would have been mere dictum. "A dictum" is an opinion expressed by the court, but which, not being necessarily involved in the case, lacks the force of an adjudication." 3 Words & Phrases, 2051; and cases there cited. Moreover, it sometimes happens that ques-

tions which are raised by the record are not argued by either side, and in such instances, where the questions are important and a decision of them in a pending case can be avoided, it is better to wait until a case arises wherein the questions have been thoroughly briefed and argued by both sides:

We have referred to the foregoing matters with some reluctance, and shall always refrain from referring to such things except when we deem it necessary. We now close the incident with the observation that, although we cannot unqualifiedly approve the court's English, we nevertheless have found no difficulty whatever in approving his ruling in sustaining the motion for nonsuit.

[2] We cannot agree with counsel for appellant that under the terms of the contract in question the respondent retained such control over the work respecting the details of its execution as prevented Moran from, being what, under the authorities, is held to constitute an independent contractor. The control that respondent retained was merely for the purpose of having the power to see that the work was properly executed in accordance with the specifications. The character of the work contracted for was such as required constant supervision and inspection in order to fully protect the rights of respondent and its taxpayers. Below the asphalt surface was to be a concrete filling which was composed of certain ingredients which were to be of a specified quality, all of which had to be proportioned as to quantity and were required to be properly mixed. If the mixture did not contain the proper proportions of the specified materials, or if the materials were of inferior quality, or not properly mixed or placed in the street, or the gutters or curbing, it might very seriously affect the quality of the work with respect to its durability, and unless the respondent, through its authorized agents, could protect itself in the way provided for in the contract, it had practically no protection whatever. No rights with regard to supervision or inspection were reserved by respondent that were not necessary in order to learn whether the material or work or both were in compliance with the terms of the contract and specifications. Nor did respondent have the right to discharge any of Moran's laborers. All it could do in that regard was to call the contractor's attention to the fact that some of those employed by him were incompetent or were not complying with the terms of the contract or specifications in doing the work. Nor could it give any orders except when Moran was absent, and then only when the work required it because of his absence. We cannot see anything improper in what respondent was permitted to do under the contract. Nor can we conceive any reason why the foregoing provisions affected Moran's status as an independent contractor. If Moran complied

with the specifications and terms of the contract, respondent had no more right to interfere with the methods he employed in doing the work than a mere stranger would have had. While, as may well be expected, the cases as to when and under what facts and circumstances a person who agrees to perform certain work or to erect certain structures is an independent contractor to whom the rule of respondeat superior does not apply are far from harmonious, yet, in our judgment, Mr. Moran comes squarely within the rules laid down in the following well-considered cases in which it is held that, under facts and circumstances not distinguishable in principle from those in the case at bar, the contractors were independent contractors for whose negligence the contractees were not responsible: *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262; *Ege v. Phoenix Brick, etc., Co.*, 118 Mo. App. 630, 94 S. W. 999; *Alabama M. Ry. Co. v. Martin Bros.*, 100 Ala. 511, 14 South. 401; *Prowell v. Waterloo*, 144 Iowa, 689, 123 N. W. 346; *Harding v. City of Boston*, 163 Mass. 14, 39 N. E. 411.

Nor was the work contracted for under the contract in question such as brings it within the rule of nondelegable powers. While the work contracted for was upon a public street, yet the street was, for the time being, withdrawn from public travel. Moreover, there is no complaint here that the injury was caused by reason of the unsafe condition of the street for use or travel. Neither was the work contemplated by the contract of such a character that its execution would necessarily cause the ditch or gutter to be filled or choked up or interfered with so as to affect the flow of water therein. Indeed, it is clear from the terms of the contract and the character of the work that it was not intended that the contractor should interfere with the street outside of that portion which he was to prepare for paving and which he agreed to pave. The contract therefore does not come within the rule that the contractee cannot escape liability where the doing of the work contracted for necessarily brings about the conditions from which the injuries complained of follow as a result. It is likewise clear that this case does not come within the principle upon which the case of *Morris v. Salt Lake City*, supra, is based, namely, that respondent is liable because the contractor created a condition in a public street which was a menace and a danger to the abutting property owner, and that the agents of respondent had actual knowledge of the danger, or that it existed for such a length of time as to impute notice thereof to respondent. The foregoing questions are also considered and passed upon in most, if not all, of the cases we have heretofore cited; and

in all of them it is held that, under the undisputed facts of this case, respondent is not liable for the acts complained of by appellant.

By anything that we may have said herein we do not wish to be understood as expressing an opinion upon the liability of Mr. Moran. This is a question not involved in this case and cannot be determined until he is brought into court.

In our judgment the ruling and judgment of the trial court are clearly right and should be affirmed. Such is the order. Respondent to recover costs.

MCCARTY, J., concurs. STRAUP, J., concurs in result.

**PEMBROKE STATIONERY CO. v.
ROGERS.**

(Supreme Court of Utah. June 20, 1912.
Rehearing Denied Aug. 16, 1912.)

1. LANDLORD AND TENANT (§ 166*)—INJURY TO TENANT'S GOODS—WATER—LEAKAGES—LANDLORD'S LIABILITY.

Where tenants of different floors of a building agreed to keep the pipes and water system on the floors leased by each in repair, the landlord was not liable for injuries to the goods of the tenant of the lower floor by water overflowing from the tub, toilet, and water system on the floor above, in the absence of proof that at the time the upper floor was leased the system was then either improperly constructed, or in such a defective condition as to render its ordinary use injurious to the occupation of the premises below.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 647-656, 657-660; Dec. Dig. § 166.*]

2. LANDLORD AND TENANT (§ 169*)—INJURY TO TENANT'S GOODS—OVERFLOW FROM WATER FIXTURES—EVIDENCE.

In an action for injuries to the goods of the tenant of the lower story of a building by the overflow of water from fixtures in an upper story rented to another tenant, evidence held insufficient to show that the water system above was improperly constructed, or in such a defective condition at the time the upper story was rented as to render its ordinary use injurious to the occupation and use of the premises below.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 644-646, 664-667, 681-684; Dec. Dig. § 169.*]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by the Pembroke Stationery Company against Mrs. M. Rogers. Judgment for defendant, and plaintiff appeals. Affirmed.

W. R. Hutchinson, of Salt Lake City, for appellant. Dey, Hoppongh & Fabian, of Salt Lake City, for respondent.

STRAUP, J. This is a suit by a tenant against a landlord. It is founded on three causes. The building owned by the landlord consists of two stories. The plaintiff leased and occupied the lower. In each

cause of action, it is alleged that the defendant on the second floor maintained a defective bathtub, toilet, and water pipes, and that the water used therein overflowed and leaked to the rooms below occupied by the plaintiff and injured its goods. It was further alleged that the tenants of the defendant on the second floor, with the knowledge and consent of the defendant, used the tub and toilet, and that they negligently permitted water to overflow the tub and toilet, and permitted them to become stopped and clogged, and thereby caused the water to overflow and leak to the rooms below, and that the defendant negligently permitted the tenants to use the tub, toilet, and pipes in a defective condition. The first cause of action is for damages occurring from such alleged causes on the 19th day of July, 1910, the second on the 17th day of January, 1909, and the third on the 15th day of December, 1909. The case was tried to the court and a jury. At the conclusion of the evidence, the court directed a verdict in favor of the defendant. The plaintiff appeals.

The principal assignment of error relates to that ruling. It was made on the ground that the evidence was insufficient to show that the tub, toilet, or pipes were in the alleged defective condition, or to show any negligence on the part of the defendant causing the overflow and damage to plaintiff's property. The evidence shows that the plaintiff, under the terms of its lease, agreed to keep the pipes and water system on the floor leased to it in repair, and to furnish heat to the occupants on the floor above. The tenants on the upper floor agreed, under the terms of their lease, to keep the pipes and water system on that floor in repair. There is much evidence to show that the property of the plaintiff, on different occasions and at about the times alleged in the complaint, was damaged by water either overflowing or leaking from the tub, toilet, or sinks on the second floor, and to the floor below occupied by the plaintiff. But, as correctly ruled by the trial court, there is no substantial evidence that such leakage or overflow was due to defective conditions or improper constructions of the tub, toilet, sinks, or water system, or to any negligence on the part of the defendant. There is evidence that some of the leakage complained of was due to the negligence of the tenants on the second floor in using the bathtub for an ice chest, and other leakages due to lack of attention to water faucets, and to stoppages of waste pipes and sewer connections. A witness for the plaintiff, a plumber, testified that the style of plumbing on the second floor was old style, out of date, and that the shut-off and ball cock of the toilet were not equipped with the latest patents and improvements, and gave his opinion "that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plumbing [on the second floor] was not in a safe condition." But when questioned concerning it, the only facts testified to by him were that the washers of the faucets and the ball cock were worn and needed repair, and that on one occasion they were repaired and replaced by him. He was asked, and he answered: "Q. What other repairs, excepting putting on new washers, would it require to keep that toilet and ball cock in proper operation? A. I don't know that there was anything else out of order, excepting putting on new washers. But there is another condition; the tank can wear out. Q. In this instance, with proper use of that toilet, and keeping in proper condition the things, whatever you call them, washers on the ball cock, what possible danger of overflow could arise? A. I don't know of any, only sometimes the tank will spring a leak. Q. You don't know of any? A. Not if the waste pipe was open. Q. So that, so far as this particular arrangement was concerned, on the 14th day of August, 1909, with a proper washer, with proper use of the toilet, so as not to stop up the four-inch waste pipe, it was in reasonably suitable condition for the purpose for which it was intended? A. It was at that time. Q. Now, when you have an opinion of condemning the system, you only mean by that that in these modern days plumbers have furnished them a more modern toilet system? A. Yes."

[1, 2] The plaintiff and the defendant have no substantial disagreement as to the law. It is in effect conceded by the plaintiff that the defendant here is liable only on proof that the tub, toilet, and water system were improperly constructed, or that they, at the time she leased the upper floor to the tenants to whom possession and control were given, and who agreed to do repairs, were in such a defective condition as to render their ordinary use injurious to the occupation and use of the leased premises by the plaintiff. And that if they then were in a reasonably good repair the defendant would not be liable to the plaintiff for damages resulting from negligence of the tenants of the upper floor in failing to maintain the tub and toilet in repair, or from a negligent use, or for defects originating under the occupancy of such tenants bound to do repairs. We think the evidence does not show a liability within the rule. The conditions with respect to defects testified to by the witnesses for the plaintiff are those only which are incident to ordinary household plumbing and usual repairs, and not to an improper or defective system or appliances.

We think the judgment of the court below ought to be affirmed, with costs. Such is the order.

FRICK, C. J., and McCARTY, J., concur.

GARNES v. ROLLINS.

(Supreme Court of Utah. June 20, 1912.)

WATERS AND WATER COURSES (§ 130*)—PERCOLATING WATERS—RIGHTS ACQUIRED.

Where an owner of land collected into a pond thereon water from springs, seepage, percolation, and an artesian well sunk on his land, and by ditches conveyed the water to different parts of his land for irrigation, and constructed an artificial water course through which water was conveyed into a ditch running along the side of an easement and right of way of another, who during the irrigation season of each year for the last nine years used the water in irrigating his land, the latter did not acquire any prescriptive or vested right in the water as against the owner without reference to the question as to whether the common-law rule that water percolating through the soil without any definite channel is a part of the freehold should be modified, and the owner had the absolute right to intercept the water before it left his premises.¹

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 145; Dec. Dig. § 130.*]

Appeal from District Court, Davis County; J. A. Howell, Judge.

Action by Sarah E. Garnes against C. O. Rollins. From a judgment granting insufficient relief, plaintiff appeals. Reversed and remanded, with directions.

This is an action involving the title and the right to use certain waters which accumulate upon plaintiff's land. The appeal is on the judgment roll alone. The findings of fact, all of which respond to and are within the issues presented by the pleadings, in substance, are: That the source of the water in controversy is on a 14-acre tract of plaintiff's land. That for more than 30 years the water has been collected in a body on said land thereby forming a pond or reservoir. That the pond is supplied by "a large number of streams of water arising and seeping out from and upon the soil of said land in the form of springs, seepage, and percolation," and by an artesian or flowing well which was sunk upon said land by plaintiff's predecessors in interest about 15 years prior to the bringing of this action. That the well has continuously flowed about 40 gallons of pure water per minute. That during the last 30 years plaintiff's predecessors in interest in irrigating and cultivating the easterly portion of the land on which the pond is situated "have greatly increased the flow of percolating and seepage water into said reservoir or pond. That during each and every year of the period last above mentioned the plaintiff's predecessors in interest have expended large sums of money and labor in cleaning out, enlarging, and improving said pond."

¹ *Sullivan v. Mining Co.*, 11 Utah, 433, 40 Pac. 709, 30 L. R. A. 188; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 54 Pac. 244, 70 Am. St. Rep. 819; *Willow Creek Irr. Co. v. Michaelson*, 31 Utah, 248, 60 Pac. 943, 51 L. R. A. 360, 31 Am. St. Rep. 687; *Herriman Irr. Co. v. Keel*, 25 Utah, 98, 63 Pac. 719; *Fayter v. North*, 30 Utah, 156, 83 Pac. 742, 6 L. R. A. (N. S.) 410.

That for 30 years plaintiff and his predecessors in interest have maintained an artificial water course leading from said pond and running in a westerly direction to the west line or boundary of the land, and during all of said time have used said artificial water course to convey the water collected in the pond to a 36-acre tract of plaintiff's land adjoining the parcel upon which the pond is situated and there used it in irrigating the easterly portion of the 36-acre tract of land. "That said use during all of said months (April, May, June, July, August, and September) for the last 30 years has been continuous, uninterrupted, adverse, open, peaceable, and under claim of right, and that the right of the plaintiff and her predecessors in interest has not during all of said time, except in the year 1911, been challenged or questioned by the defendant or any one else. That after having devoted said waters to the uses aforesaid on the easterly portion of the tract of land second above described, the portion designated in plaintiff's complaint herein on file as block 5 of Steuben Rollins' survey became saturated and soaked with water, and that considerable quantities have seeped and percolated through the soil and have arisen to the surface thereof, and some of the same have during the early months of each year during said nine years' period and during the whole of the wet season accumulated upon the surface of that portion known and designated in plaintiff's complaint as meadow or low land and from thence into Rollins' lane, or right of way. That plaintiff and her predecessors in interest, in order to drain said block 5 of Steuben Rollins' survey and convey away therefrom the waters accumulating therein and thereon as aforesaid, constructed at divers times during said period, as their necessities required, certain artificial water courses through which said waste or percolating waters were conveyed into a ditch running along the easterly side of said easement and right of way belonging to the defendant and G. W. Rollins, and that said last-mentioned waters have during the irrigating seasons of each and every year for the last nine years flowed in a northerly direction along the said easement and right of way and have been used in the irrigation of the defendant's land. That all of the waters so flowing into said easement and right of way during said period of nine years have been percolating, draining, and artificially developed waters. That on or about the 1st day of June, 1911, and divers times since that date, contrary to and against the will of the plaintiff, defendant, in disregard of the plaintiff's rights, knowingly and wrongfully diverted the waters flowing into said artificial water course leading in a westerly direction across the Rollins right of way to said block 4 of Steuben Rollins' survey, being the westerly portion of the parcel of land second above described. That the plaintiff was thereby de-

prived of the use and benefit of the waters developed by her and flowing from her land as aforesaid. That the defendant is the owner of a farm lying a short distance north of plaintiff's property with its easterly end line identical with the westerly side line of the easement and right of way belonging to the defendant and G. W. Rollins."

The conclusions of law deduced by the court from the findings of fact, so far as material to the questions presented by this appeal, are as follows:

"No. 2. That the plaintiff is entitled to a decree quieting and confirming her title to the waters described in her complaint herein on file as against the defendant and all persons claiming or to claim the same or any part thereof under or through said defendant, subject to the condition that the said waters shall be beneficially used by the plaintiff or her successors in interest, exclusively upon the land described in her said complaint.

"No. 3. That the plaintiff is entitled to an injunction perpetually enjoining the defendant and all persons claiming under or through him from interfering with the plaintiff or her successors in interest in using the said waters or any part so far as the plaintiff or her successors in interest use or seek to use the same beneficially for irrigation and culinary purposes exclusively on the land described in her complaint or upon any portion thereof.

"No. 4. That the defendant is the owner of a farm lying north of the land described in plaintiff's complaint, which said farm is west of the Rollins lane or easement, and judgment is hereby ordered to be entered accordingly. That the defendant is entitled to the use on said farm of all of the waters which arise, emanate, percolate, seep through, and spring from the land described in plaintiff's complaint which are not necessary to the beneficial irrigation and cultivation of plaintiff's said land."

The decree of the court, so far as material here, provides: "That the plaintiff have judgment against the defendant, quieting and confirming her title to the waters arising, emanating, percolating, seeping through, and springing from the soil of the land described in plaintiff's complaint herein on file as against the defendant and all persons claiming or to claim the same or any part thereof under or through said defendant, subject, however, to the condition that the said waters shall be used by the plaintiff or her successors in interest exclusively upon the land described in her said complaint and herein particularly described. It is hereby ordered, adjudged, and decreed that the defendant have judgment, and he is hereby decreed the use of all of the waters which arise, emanate, percolate, and seep through and spring from the soil of the land described in plaintiff's complaint which are not necessary to the ben-

official irrigation and cultivation of plaintiff's said land. That the plaintiff is entitled to an injunction perpetually enjoining the defendant and all persons claiming under or through him from interfering with plaintiff or her successors in interest in using said waters or any portion thereof, so long as plaintiff or her successors in interest use or seek to use the same beneficially for irrigation and culinary purposes exclusively on the land described in her said complaint, or upon any portion thereof. That the plaintiff's title to said waters, subject to the right of the defendant to devote the same or portions thereof to the irrigation and cultivation of his said farm when the same are not required for the beneficial irrigation and cultivation of plaintiff's land, is adjudged to be quieted against all other claims, demands, or pretensions of the defendant, who is hereby perpetually estopped and enjoined from setting up any further or other claims thereto."

Plaintiff appeals.

Edwards & Ashton, of Salt Lake City, for appellant. James F. Smith, of Salt Lake City, for respondent.

MCCARTY, J. (after stating the facts as above). Appellant, in her assignments of error, assails the conclusions of law wherein the court finds that her title to the water in dispute is "subject to the condition that said water shall be beneficially used by the plaintiff or her successors in interest exclusively upon the land described in her said complaint," and that the defendant is entitled to the use of all the water in question "which is not necessary to the irrigation and cultivation of plaintiff's said land." Appellant also objects to that part of the judgment in which defendant is "decreed the use of all the waters which arise, emanate, percolate, and seep through and spring from the soil of the land described in plaintiff's complaint which are not necessary to the beneficial irrigation and cultivation of plaintiff's said land." The contention made by appellant is that the conclusions of law and that part of the decree covered by the assignments of error are not supported by, nor do they respond to, the findings of fact made and filed in the cause. And she further contends that, under the facts as found by the court, she is entitled to a decree quieting her title to the water in controversy and giving her the right, without any limitations or restrictions in favor of respondent, to apply it to a beneficial use in any locality to which she may desire to convey it.

This claim is based upon the common-law doctrine relating to the ownership of percolating water. Under the common-law rule, sometimes referred to as the English rule, water which percolates through the soil without any definite channel was regarded as much a part of the freehold through which it courses as the clay, sand, gravel,

and rocks found therein, and the owner (leaving out the question of malice) had the absolute right to intercept the water before it left his premises and make whatever use of it he pleased, regardless of the effect that such use might have on a lower proprietor through whose land the water, in its natural course, was wont to filtrate and percolate. Gould on Waters, § 280; 3 Farnham on Water Rights, § 935; Long on Irrigation, § 33; Kinney on Irrigation, § 298; Mosler v. Caldwell, 7 Nev. 363; Delhi v. Youmans, 50 Barb. (N. Y.) 316; Frazier v. Brown, 12 Ohio St. 294; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Chatfield v. Wilson, 28 Vt. 49.

One of the cases cited and relied on by appellant is *Hanson v. McCue*, 42 Cal. 305, 10 Am. Rep. 299. In that case the court said: "Water filtrating or percolating in the soil belongs to the owner of the freehold—like the rocks and minerals found there. It exists there free from the usufructuary right of others, which is to be respected by the owner of an estate through which a defined stream of water is found to flow. The owner may appropriate the percolations and filtrations as he may choose, and turn them to profit if he can. To hold otherwise would be to hold that the plaintiff here could lawfully claim a right to convert the lot of McCue into a mere filterer for his own convenience."

The doctrine thus announced was reaffirmed by the California court in the case of *Southern P. R. Co. v. Dufour*, 95 Cal. 617, 30 Pac. 783, 19 L. R. A. 92; *Gould v. Eator*, 111 Cal. 641, 44 Pac. 319, 52 Am. St. Rep. 201, and *Los Angeles v. Pomeroy*, 124 Cal. 597, 57 Pac. 585, and has generally been accepted in that state until comparatively recent date. In this jurisdiction the common-law doctrine as declared by the Supreme Court of California in the cases above mentioned, in so far as applicable to the questions litigated in which was involved the right of the owner of the land to the percolating water found therein, has been adhered to and followed. *Sullivan v. Mining Co.*, 11 Utah, 438, 40 Pac. 709, 30 L. R. A. 186; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, 54 Pac. 244, 70 Am. St. Rep. 810; *Willow Creek Irr. Co. v. Michaelson*, 21 Utah, 248, 60 Pac. 943, 51 L. R. A. 280, 81 Am. St. Rep. 687; *Herriman Irr. Co. v. Keel*, 25 Utah, 96, 69 Pac. 719; *Fayter v. North*, 30 Utah, 156, 83 Pac. 742, 6 L. R. A. (N. S.) 410.

The general trend, however, of recent decisions in many of the states of the Union, is away from the English rule, or common-law doctrine of unqualified and absolute right to a landowner to intercept and draw from his land the percolating waters therein. In these later cases the right of a landowner to subterranean waters percolating through

his own and his neighbor's lands, and which is a common source of supply for the lands of two or more of them, is limited to a reasonable and beneficial use of the waters upon the land or to some useful purpose connected with its occupation and enjoyment. In 30 A. & E. Ency. L. (2d Ed.) 314, the writer, speaking of the rule last referred to, says: "Under this doctrine it has been held that a landowner has no right, except for the benefit and improvement of his own premises or for his beneficial use, to drain, collect, or divert percolating waters therein where such act will destroy or materially injure the spring of another, the waters of which spring are used by the general public for domestic purposes; that he cannot drain, collect, or divert such waters for the sole purpose of wasting them; that the owner of land cannot gather percolating water by pumps or by natural means that it may be carried to a distant place for use by or sale to strangers having no right to it, in a case where the inevitable result would be to destroy a spring upon the land of an adjoining owner. * * * So it has been held that a landowner cannot collect percolating water by means of artesian wells and convey it away from his land for sale to a distant landowner to the injury of his neighboring landowners."

Smith v. City of Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141, was a case in which the plaintiff was the occupant of a farm upon which was a stream of water running in a well-defined channel fed by springs and from other sources. The stream for more than 50 years had been dammed up forming a pond. The pond, which was of considerable value, was used by plaintiff, among other things, for securing ice. The defendant, for the purpose of furnishing the city of Brooklyn with a water supply, sunk a number of wells in the locality of the stream and pond and about 2,400 feet therefrom, and connected therewith powerful steam suction pumps, built pumping stations, and constructed conduits to carry off the water as it came from the wells. The soil in the locality of these waterworks and of the surrounding country is of a sandy or gravelly nature through which water readily percolates. The pumping operations of the defendant dried up the creek and pond mentioned and resulted in the destruction of wells throughout a considerable area of country in the locality where they were carried on. The trial court, following the rule of the common law relating to percolating waters, dismissed plaintiff's complaint. On appeal the Supreme Court said: "While it is true that the city owned the land upon which it placed its structure, and all of its acts were done upon its own property, it did not, however, make the erections or do the acts for the beneficial use and enjoyment of the land itself for any purpose of

domestic use, agriculture, mining, or manufacturing. * * * No one dwelt thereon, or was expected to. No one used the water thereon, nor was it expected to be used in connection therewith. The sole purpose was to subordinate the use of the land to the particular purpose of a reservoir and conduit in which to gather, store, and carry water to a distant place for its benefit and profit, and for the enjoyment of strangers who have no claim or shadow of right to it as against the plaintiff. It was its purpose not only to take the water which might come by natural percolation upon its land, but also to use artificial means, and by powerful suction drain the adjoining land of its water. * * * By the construction of its conduit, the sinking of its wells, and the suction of its powerful pumps, the whole spring level of the surrounding country has been lowered, and running streams and ponds dried up."

It is also said in the opinion: "It may be stated, with some degree of confidence, that no case will be found in this state—and our research has not enabled us to find one in any other state of this country—where the right has been upheld in the owner of land to destroy a stream, a spring, or well upon his neighbor's land, by cutting off the source of its supply; except it was done in the exercise of a legal right to improve the land, or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture, or mining, or by structures for business carried on upon the premises."

The court, after discussing and distinguishing some of the earlier cases on this subject, says: "We have the fact, admitted by all legal writers, that a property right exists in percolating water of as high a character as the land itself—it is in fact a part of the land. It is a valuable right, and its use is usually indispensable to the enjoyment of the land wherein it is found. This right is only qualified by the equal right of every adjoining landowner. The right of use is supported in either, when, for purposes of use upon the land, or of the land, injury results to one as an incident to such use. But it seems * * * monstrous to assert that one landowner may deliberately and intentionally make an erection for the express purpose of draining the land of another of its percolating water, and thereby destroy streams, springs, ponds, and wells, and be supported in so doing upon the theory that it is the exercise of a legal right in the use of his land."

The rule announced in this case was followed in the case of *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666. The syllabus, as published in 51 L. R. A. 695, of the last-mentioned case, which correctly reflects the opinion of the court, is as follows: "The

drainage of land of a private proprietor by city pumping works which exhaust from all the region thereabouts the natural supply of underground, or subsurface water, and thus prevent the raising upon it of crops to which the land was and is peculiarly adapted, or destroy such crops after they are grown or partly grown, renders the city liable to him for the damages which he sustains, and entitles him to an injunction against the continuance of the wrong." The court in that case cites with approval the case of *Smith v. City of Brooklyn*, supra, and refers to it as containing "a valuable discussion of the subject."

In several recent and well-considered cases the Supreme Court of California departed from, if it did not entirely repudiate, the doctrine of absolute right of the owner of land to the subsurface or percolating water therein as declared in *Hanson v. McCue*, supra, and in several other of its former decisions, and has established for that jurisdiction the new, or, as it is sometimes denominated, the "American" or "reasonable use" rule, which limits the right of the owner of the soil containing percolating water to a reasonable use of such water upon the land in which it is found. *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 700, 64 L. R. A. 236, 99 Am. St. Rep. 35; *McClintock v. Hudson*, 141 Cal. 275, 74 Pac. 849; *Cohen v. La Canada Water Co.*, 142 Cal. 437, 78 Pac. 47; *Montecito, etc., Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Burr v. Maclay Rancho Water Co.*, 154 Cal. 423, 98 Pac. 260; s. c., 160 Cal. 268, 116 Pac. 715; *Barton v. Riverside Water Co.*, 155 Cal. 509, 101 Pac. 790, 23 L. R. A. (N. S.) 331; *Hudson v. Dailey*, 156 Cal. 617, 105 Pac. 748; *Los Angeles v. Hunter*, 156 Cal. 603, 105 Pac. 755; *Miller v. Bay Cities Water Co.*, 157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772. See, also, *Ex parte Elam*, 6 Cal. App. 233, 91 Pac. 811.

The case last cited contains the following terse statement of the rule as now established in that state: "No surface owner possesses the right to extract the subterranean water in excess of a reasonable and beneficial use upon the land from which it is extracted. Any additional extraction is not in the exercise of a right if by such exercise the rights of others are injuriously affected."

In the case of *Meeker v. East Orange*, 77 N. J. Law, 623, 74 Atl. 379, 25 L. R. A. (N. S.) 465, 134 Am. St. Rep. 798, the same question was involved, and the court, in an able and somewhat exhaustive opinion in which many cases are cited and discussed, adhered to the "reasonable use" rule and cites with approval the recent California cases above referred to. The facts of the case and the law as declared are summarized in the third and fourth syllabi as follows:

"3. The defendant, a municipal corporation, for the purpose of supplying its inhab-

itants with water, acquired a tract of land and sank thereon a number of artesian wells, through which it drew out percolating underground water which, but for its interception, would have reached a spring, stream, and well upon plaintiff's land, and also withdrew percolating underground water from beneath the surface of his land to such extent as to damage his crops. Held, actionable.

"4. Percolating underground waters may not be withdrawn for distribution or sale if it therefrom result that the owner of adjacent or neighboring lands is interfered with in his right to the reasonable user of subsurface water, or if his wells, springs, or streams are thereby materially diminished in flow, or his land rendered so arid as to be less valuable for agriculture, pasturage, or other legitimate use."

Wiel, in his excellent work on *Water Rights*, third edition, reviews and discusses the California cases herein referred to, and in a note to section 1063, cites many recent cases from other states in which the so-called American or reasonable use rule was adhered to and followed.

The trial court, in deciding the case at bar, evidently followed the American or reasonable use rule as announced by the late California cases and decisions from other jurisdictions which have departed from the common-law doctrine on this point. The case under consideration, however, is not one involving the rights of parties to subterranean waters which find their way by percolation through lands owned by different parties and which has been intercepted in and diverted from its natural course by one of the parties to the injury of the other. The question of ownership of the percolating subterranean waters is, at most, only incidentally involved. On the question of whether the conditions in this state demand or require a modification of the common-law doctrine of percolating waters, we shall withhold our opinion until some case is presented calling for it. The reason we have devoted so much time and space to the discussion of the subject is that appellant bases her demand for a modification of the judgment upon the common-law doctrine as declared in the decisions of this state herein referred to, and the trial court seems to have concluded that correlative rights of parties to subterranean waters percolating through the soil were in issue, and decided the case upon that theory. It is sufficient to here state, without approving or disapproving the doctrine of the reasonable use rule, that the facts as found by the court do not bring the case within that rule. The seepage or percolating water here involved is created by the artificial irrigation of appellant's land. True, as a result of this irrigation, the water sinks, seeps, and percolates into the soil of appellant's land and saturates it for a depth of several feet; it, nevertheless, is nothing more in fact and

in law than surface or waste water. According to the facts found by the court, the water has been and is collected by appellant into the pond or reservoir hereinbefore referred to, and then by means of ditches it is conveyed to different parts of her land some of which "become saturated and soaked with water and that considerable quantities have seeped and percolated through the soil and have arisen to the surface thereof; * * * that plaintiff (appellant) constructed certain artificial water courses through which said waste or percolating waters were conveyed into a ditch running along the easterly side of said easement and right of way belonging to defendant and G. W. Rollins; and that said last-mentioned waters during the irrigating seasons of each and every year for the last nine years * * * have been used in the irrigation of defendant's land."

The law is well settled, in fact the authorities all agree, that one landowner receiving waste water which flows, seeps, or percolates from the land of another cannot acquire a prescriptive right to such water, nor any right (except by grant) to have the owner of the land from which he obtains the water continue the flow. The general rule regarding the right of the owner of land to surface water therein is stated by Mr. Farnham, in his work on Water Rights (page 2572), as follows: "There is no right on the part of a lower appropriator to have surface water flow to his land from upper property. The owner of the soil on which it falls has an absolute right to it, and may do with it what he pleases. And the fact that surface water has flowed from the land of one man onto that of another for more than 20 years will not prevent the former from draining his land so as to cut off the flow."

In 1 *Wiel on Water Rights* (3d Ed.) p. 50, the author says: "While artificial flow claimants may thus have priorities between themselves, they can have no right of continuance against the owner of the natural supply (the appropriator on the natural stream * * *), except by grant, condemnation, or dedication (or by the rule of compulsory service where the water is distributed to public use). The chief instance of artificial flows in practice is where some stream owner has carried water to a distance and, after use, discharges it below his land or works. * * * Seeing the water come down, other parties arrive, build ditches below, receive the water, and put it to use. Yet unless they have a contract with the stream owner, they must generally rely upon continued receipt from him of such water at their peril. In such case the creator of this artificial flow may cease to allow it to escape." And on page 52 it is said: "In the absence of contract, the natural water-right owner may cease the abandonment of waste from a ditch, and so use the water that none of it thereafter runs waste, or so that it runs off in a

new place where people below no longer can get it. Long receipt by them of the water of itself gives no permanent right to have the discharge continued, whether by appropriation, prescription, or estoppel, even though the lower claimants built expensive ditches or flumes to catch the waste." Numerous decisions are cited by the author in a note to the text which illustrate and support this doctrine. And again on page 54 it is said: "Waste water soaking from the land of another after irrigation need not be continued, and may be intercepted and taken by such original irrigator, and conducted elsewhere, though parties theretofore using the waste are deprived thereof."

In the case of *Burkart v. Meiberg*, 37 Colo. 187, 86 Pac. 98, 6 L. R. A. (N. S.) 1104, 119 Am. St. Rep. 279, the plaintiff dug a ditch along the boundary of her land thereby intercepting and collecting the seepage created by the irrigation of her neighbor's land. The owners of the land from which the water seeped and percolated later dug a parallel ditch on their own land thereby cutting off plaintiff's supply. The water thus intercepted and collected the defendants carried by means of a ditch around plaintiff's land and irrigated other lands owned by them. The court said: "The plaintiff certainly has acquired no vested right to compel the defendants to apply the waters, the right to the use of which they own, in such a way as that some of it will not soak into the ground, but escape and pass from the surface onto her land. The defendants have the right to change the place and manner of use or reduce the quantity applied on their lands, so that no water whatever will escape and reach the lands of plaintiff." The facts of that case are somewhat similar to the facts in the case at bar.

Applying the well-settled principles of law as declared by the foregoing authorities to the facts in this case as found by the court, it necessarily follows that respondent acquired no prescriptive or vested right as against the appellant to the water in question, or any part thereof.

The cause is remanded, with directions to the trial court to modify its conclusions of law and the decree so as to conform with the findings of fact, quieting appellant's title to the water in controversy without any restrictions therein in favor of respondent. Costs of this appeal to be taxed against respondent.

FRICK, C. J., concurs.

STRAUP, J. (concurring). The court found and adjudged the plaintiff the owner of the water. The judgment in such particular is not complained of by either party. The only complaint made is this: The court, after so finding and adjudging, further adjudged that the plaintiff was required to use the water

on a particular tract of land and could not divert and use it on other land. When it was found and adjudged that the plaintiff was the owner of the water, of which no complaint is made, I think the proper disposition of the case is controlled by the principle that an owner of water may divert and use it for beneficial purposes on any lands desired. That principle the judgment violates. I therefore concur in the modification of the judgment.

(14 Ariz. 148)

DOWDY et al. v. CALVI

(Supreme Court of Arizona. July 6, 1912.)

1. ATTACHMENT (§ 122*)—AFFIDAVIT—AMENDMENT.

Civ. Code 1901, par. 362, expressly authorizes amendment of an affidavit in attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-337; Dec. Dig. § 122.*]

2. GARNISHMENT (§ 87*)—AFFIDAVIT—AMENDMENT.

Civ. Code 1901, par. 362, expressly authorizes amendment of a garnishment affidavit.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 156-159; Dec. Dig. § 87.*]

3. PLEADING (§ 248*)—COMPLAINT—AMENDMENT.

Where a complaint stated two causes of action, one for money had and received, acquired by a tortious entry upon plaintiff's place of business in his absence, and the other founded on tortious destruction of his business, an amendment more specifically alleging the indebtedness and the circumstances under which defendant obtained possession of the money, and omitting the second cause of action, was not improperly allowed as introducing a new and different cause of action from that originally pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 709; Dec. Dig. § 248.*]

4. ABATEMENT AND REVIVAL (§ 4*)—ANOTHER SUIT PENDING.

An action should be abated for pendency of another suit for the same relief between the same parties and involving the same subject of action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 25-38; Dec. Dig. § 4.*]

5. ELECTION OF REMEDIES (§ 7*)—INCONSISTENT REMEDIES.

A subsequently commenced action between the same parties, for the same cause of action, seeking different and inconsistent relief, will abate, even though the prior action has been dismissed, because the plaintiff elected his remedy and cannot have two remedies for the same wrong.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 12; Dec. Dig. § 7.*]

6. JUDGMENT (§ 590*)—BAR—RELIEF SOUGHT.

One who has pursued a remedy to judgment cannot prosecute another suit for the same cause of action, but for a different relief, since the facts constituting the cause of action have been adjudicated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1035, 1063, 1064, 1102-1106; Dec. Dig. § 590.*]

7. EVIDENCE (§ 43*)—JUDICIAL NOTICE—FILING OF ACTIONS.

A court cannot judicially know that one action was commenced before another merely because it bears a lower file number.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

8. ABATEMENT AND REVIVAL (§ 8*)—JUDGMENT (§ 590*)—PENDENCY OF ANOTHER ACTION—RES JUDICATA.

Pendency of an action to replevin money, or disposition of the cause adverse to plaintiff, does not affect his right to pursue a valid remedy for its conversion.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-56, 58-63, 68-72; Dec. Dig. § 8.* Judgment, Cent. Dig. §§ 1035, 1063, 1064, 1102-1106; Dec. Dig. § 590.*]

9. REPLEVIN (§ 4*)—SUBJECTS OF RELIEF—MONEY.

Replevin will not lie for the recovery of money unless it is specifically described and the plaintiff shows himself entitled to its possession as the specific money described.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 4-19, 21-26; Dec. Dig. § 4.*]

10. PLEADING (§ 106*)—PLEA IN ABATEMENT—SUFFICIENCY.

In an action for money had and received, a plea in abatement, based on pendency of an action to replevin the money, is insufficient, where the money is not specifically described and it is not alleged that such a claim is made to the money by plaintiff in the replevin suit as to entitle him to the possession of the specific currency, gold, and silver, as described.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 219-227; Dec. Dig. § 106.*]

11. PLEADING (§ 205*)—GENERAL DENIAL—SUFFICIENCY.

A general denial is good as against a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. § 205.*]

12. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—SUSTENTION OF DEMURRER.

Any error in sustaining a demurrer to a general denial is good, where every issue raised by the general denial is either admitted by defendants in other pleadings filed or is supplied by the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

13. SET-OFF AND COUNTERCLAIM (§ 22*)—SUBJECTS.

In a suit for money had and received as upon contract, defendants can, under Civ. Code 1901, par. 1364, plead, as a set-off or counterclaim, any debt due from plaintiff to them founded upon a certain demand, or they can plead any unliquidated or uncertain claim for damages founded upon a tort or breach of covenant arising out of, or incident to, or connected with, plaintiff's cause of action.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 26-37; Dec. Dig. § 22.*]

14. PLEADING (§ 144*)—SET-OFF—LIABILITY FOR RENT.

There can be no liability for rent without privity of contract or estate, and hence a set-off or counterclaim based on rent claimed to be due is insufficient where it fails to allege such privity.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 268; Dec. Dig. § 144.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

15. LANDLORD AND TENANT (§ 1*)—RELATIONSHIP—DEFINITION.

The relation of landlord and tenant is that which arises from a contract by which one person occupies the property of another with his permission, and in subordination to his rights, the occupant being known as the tenant and the person in subordination to whom he occupies as the landlord, it being essential to the relation that the occupancy be both permissive and subordinate.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1; Dec. Dig. § 1.*]

16. SET-OFF AND COUNTERCLAIM (§ 26*)—SUBJECTS.

A claim for rent cannot be said to arise out of, or be incident to, or connected with, defendants' tortious appropriation of plaintiff's money in the building for which the rent is claimed, so as to sustain a set-off or counterclaim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 43, 44; Dec. Dig. § 26.*]

17. SET-OFF AND COUNTERCLAIM (§ 26*)—SUBJECTS.

A claim for trespass upon premises cannot be said to arise out of, or be incident to, or connected with, a conversion by defendants of plaintiff's money on such premises, so as to sustain a set-off or counterclaim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 43, 44; Dec. Dig. § 26.*]

18. PLEADING (§ 380*)—ISSUES AND PROOF.

Evidence offered in support of pleadings which have been eliminated from the case is properly excluded as irrelevant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1227, 1239-1252; Dec. Dig. § 380.*]

19. JUDGMENT (§ 139*)—DEFAULT—VACATION—JUDICIAL DISCRETION.

It was discretionary with the trial court to open plaintiff's default, entered for failure to answer defendants' counterclaim.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.*]

20. PLEADING (§ 332*)—ANSWER—NECESSITY FOR AMENDING.

Where an answer to a counterclaim remained on file, it served equally as an answer to the counterclaim replied to an amended complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1003-1010; Dec. Dig. § 332.*]

21. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR.

Any error in rulings concerning a counterclaim was harmless to defendants, where it failed to state facts sufficient to constitute a counterclaim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4083; Dec. Dig. § 1039.*]

22. INTEREST (§ 22*)—COSTS.

Under Civ. Code, 1901, par. 2774, which provides that a judgment shall bear interest at the legal rate, unless based on a contract providing another rate, a judgment properly awards interest on the costs allowed, as well as upon the principal sum of the judgment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 43-53; Dec. Dig. § 22.*]

Appeal from District Court, Yavapai County, before Justice Edward M. Doe.

Action by Fete Calvi against J. T. Dowdy

and another. From a judgment for plaintiff and from an order refusing a new trial, defendants appeal. Affirmed.

Robt. E. Morrison and E. S. Clark, both of Prescott, for appellants. Norris & Mitchell, of Prescott, and Reese M. Ling, of Phoenix, for appellees.

CUNNINGHAM, J. A judgment was rendered for the plaintiff and from which judgment and an order overruling defendants' motion for a new trial defendants appeal.

The plaintiff commenced this action August 1, 1910, by filing his complaint, in form, separately setting forth two causes of action, the first of which was for the sum of \$1,024.15, money had and received as upon contract, the possession of which money defendants are charged to have acquired by a tortious entry of plaintiff's place of business, in the absence of plaintiff, and seizing and taking the money. The second cause of action is founded upon the alleged tortious destruction of plaintiff's business, for which plaintiff claims damages in the sum of \$500. Plaintiff also filed his affidavit in attachment claiming an indebtedness against the defendants in the sum of \$1,024.15, money had and received by defendants on the 9th day of July, 1910. On September 6, 1910, the defendants filed their answer. On December 28, 1910, plaintiff filed an affidavit and applied for a writ of garnishment against the Bank of Arizona, alleging the same indebtedness due for money had and received in the same amount. On February 2, 1911, defendants moved to quash the attachment proceedings and dissolve the attachment for defects in the affidavits in not setting forth the statutory requirement justifying the issuance of such attachment and garnishment. On the 8th day of February, 1911, the plaintiff filed his amended complaint. The amendments to the original complaint consist of more specific allegations of indebtedness and the circumstances under which defendants obtained possession of the money claimed, and the second separately stated cause of action in the original complaint is wholly omitted in the amended complaint. No ruling was had on the motion to quash and dissolve the attachment, and on February 8, 1911, the plaintiff filed amended affidavits in attachment and in garnishment containing the necessary and required allegations omitted from the original affidavits.

[3.] The appellants assign error upon the ruling of the court permitting the plaintiff to file amended affidavits in attachment and garnishment, and in refusing to dissolve the attachment and garnishment.

The purpose of attachment, including garnishment, is to hold the property of the defendant as security for the satisfaction of any judgment the plaintiff may recover,

against the defendant in a suit pending on a contract, express or implied, for the direct payment of money, made or payable in Arizona. Paragraph 332, R. S. (Civ. Code) of Arizona 1901.

The attachment is liable to abate upon motion unless the bond and affidavit contain all essential matters required by the statute. Paragraph 339, R. S. Arizona 1901.

However, no writ of attachment shall be quashed, nor the property taken thereunder be restored, nor any garnishee discharged, nor any bond by him given canceled, on account of the insufficiency of the original affidavit, writ of attachment, or attachment bond, if the plaintiff, or some person for him, shall cause a legal and sufficient affidavit or attachment bond to be filed, or the writ to be amended, in such time and manner as the court may direct, and in that event the court shall proceed as if the proceedings had originally been sufficient. Paragraph 362, Revised Statutes (Civil Code) of Arizona 1901.

[3] The appellants complain that the amended complaint introduces into the case a new and different cause of action from that originally pleaded; that in the original complaint the alleged cause of action was founded on tort for conversion, whereas in the amended complaint the alleged cause of action is in contract. Appellants do not make their position entirely clear. If appellants intend to complain that in the original complaint the cause of action is founded upon tort, and in form sounds in tort, and on the other hand in the amended complaint the cause of action is founded in tort and in form sounds in contract, we could understand how appellants argue the question of election of remedies so vehemently. The cause of action set forth in the amended complaint is founded upon the identical tort—the conversion of the money tortiously acquired by defendants. The possession of the money is alleged to have been acquired by the appellants from the same building, at the same time, and in the same manner, and in the same sums in both the original and in the amended complaints, and in both the plaintiff is alleged to be the owner of the money converted, and in both the same relief is prayed—the same remedy is pursued. We discover no grounds for election of remedies. If it is the contention of appellants to base their objections on the grounds that, by reason of the plaintiff having joined an action sounding in tort with an action sounding in contract (which was the case in the original complaint), the defendants are at liberty to elect to consider the whole complaint as a single action sounding in tort, because a separate cause of action separately stated therein sounds in tort, and when plaintiff has amended his action and eliminates from his complaint the separate cause of action sounding in tort, is the pursuing of

a different remedy in the amended action from the remedy pursued in the original suit, and thus makes an occasion for an election of remedies, and that plaintiff has elected to pursue his remedy in tort before he pursues his remedy in contract, we can understand, but we cannot agree with their position. While the suit was standing upon the original complaint, the defendants may have caused the abatement of one of said causes of action upon a proper motion, but the necessity for such motion no longer existed when the offensive cause of action was eliminated. No merit appears in the appellants' contention. No departure has resulted by the amendment so made. Plaintiff elected to pursue his remedy for the tortious conversion of his money by his action for money had and received as upon a contract, and thereby waived his remedy for damages suffered by the tortious conversion, which he had the right to do, and by which the defendants are considered in law peculiarly favored.

The amended complaint having been filed before trial, no leave of court permitting the filing of such amended complaint under such circumstances was required; but plaintiff was required to serve appellants with a copy thereof (paragraph 1288, R. S. [Civ. Code] Arizona 1901), and, as no objection is made upon that ground, we presume such service was duly made.

The authorities cited by appellants on this phase of the case have no application to the facts appearing in this case.

[4-8] The defendants pleaded in abatement a replevin suit pending and undisposed of in the same court, alleging that the parties are the same, and by said action plaintiff is seeking to recover \$665, consisting of currency, gold, and silver, and that plaintiff therein alleges that defendants on the 9th day of July, 1910, wrongfully and unlawfully seized and secured possession of said money, and it is alleged that such money is a part and parcel of the money for which plaintiff sues in this action.

Defendants pleaded the same replevin suit in bar, setting up, substantially, the same facts as set forth in their plea in abatement, to both of which pleas plaintiff demurred, and the court sustained such demurrers. These rulings are assigned as error.

Another suit pending in the same or other court between the same parties involving the same subject of action, pursuing the same or a different remedy for relief, upon application made, cannot stand together. The suit first commenced, in point of time, controls, and, when the remedies are inconsistent, such prior suit is an election of remedy and prevails. A subsequently commenced action between the same parties, for the same cause of action, seeking a different relief, will abate even though the prior action has been dismissed, because the plaintiff elected

his remedy and cannot have two remedies for the same wrong. If an action pursuing one remedy has been tried in court, he cannot prosecute another suit for the same cause of action, but for a different relief, because the facts constituting the cause of action have been adjudicated. *Moller v. Tuska*, 87 N. Y. 186; *Thompson v. Howard*, 31 Mich. 309; *Schoonmaker v. Kelley*, 42 Hun (N. Y.) 304; *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; *A. Klipstein & Co. v. Grant*, 141 Fed. 72, 72 C. C. A. 511; and numerous others. But we think the above sufficient to illustrate the law on the subject.

[7, 8] Neither the plea in abatement nor the plea in bar allege the date of the commencement of the replevin suit. This action was numbered 5,395, and the said pleas refer to the replevin suit as No. 5,392. We cannot, nor could the trial court, judicially know that, by reason of the replevin suit having been given a lower number than this action was given it was therefore the suit first commenced in that court. The trial court had this suit under consideration, and not the replevin suit, and was justified in holding that this suit was properly before it, not subject, for the reasons shown, to abate or to be barred unless the pleadings show that the replevin suit was for the same cause of action, seeking a different relief and first commenced. Both pleas are bad when attacked by a demurrer, because, as a general rule, money is not repleviable property, and where such suit was commenced therefor its pendency or disposition adverse to plaintiff does not affect his right to pursue a valid remedy for its conversion. *Lovell v. Hammond Co.*, 68 Conn. 500, 34 Atl. 511.

[9] Replevin will not lie for the recovery of money unless it is specifically described and the plaintiff shows himself entitled to its possession as the specific money described. *Sager v. Blain*, 44 N. Y. 445; *Graves v. Dudley*, 20 N. Y. 76; *Pilkington v. Trigg*, 28 Mo. 95.

[10] The money is not so described, nor is it alleged that such a claim is made to the money by plaintiff in the replevin suit as to entitle him to the possession of the specific currency, gold, and silver, as described. It is clear for these reasons that the court properly sustained the demurrers to the pleas in abatement and in bar. The cases cited by appellants are in no way in conflict with this view of the law. The case of *Wile v. Brownstein*, 85 Hun (N. Y.) 68, was a case to recover the value of personal property released from replevin, which was subject to the action with other repleviable property taken at the same time. The plaintiff had elected his remedy in replevin, and he was not allowed to abandon that remedy and pursue his other inconsistent remedy for the conversion of the goods released and recover their value. The same principle of law

dominates *Bowker v. Cox*, 106 N. Y. 535, 15 N. E. 943.

[11, 12] The plaintiff filed a general demurrer to defendants' answer to the amended complaint. The court sustained the general demurrer, and the defendants assign such ruling as error, for the reason defendants' answer consisted of a number of pleas in abatement, pleas in bar, a general denial, a plea of set-off. An examination of the record discloses that the general denial was squarely attacked by the general demurrer. A general denial is good as against a general demurrer. If by sustaining this demurrer defendants have suffered substantial injury, this ruling is such error as will require a reversal of the judgment and a new trial. If no substantial injury can result to defendants therefrom, then the judgment must stand. Paragraph 1285, R. S. (Civ. Code) Arizona 1901.

On the trial of the cause, the defendants offered to sustain by proof all the matters and things set forth in their set-off and counterclaim, as a whole and in detail. One offer of such proof was limited by counsel to "everything set up by defendants in their pleas in abatement, pleas in bar, in their counterclaim, in their answer, and contained in all their pleas filed in this action by the defendants, save and except the general denial." Which offers were objected to and refused. Another previous offer included "all of the amended answers and other pleadings filed by the defendants in this action." This is the only offer disclosed by the record which could possibly be considered as an offer to sustain the general denial. The action is for money had and received. The facts and circumstances under which the possession of the money was obtained and its amount are not disputed in the evidence received nor in the pleadings of the defendants other than in their general denial. The law supplies the promise in such a case, and the defendants are not permitted to controvert the promise so supplied. Under such circumstances, the general denial raises no issue of fact for proof. Every issue raised by the general denial is either admitted by the defendants in other pleadings filed, or is supplied by the law, and no possible wrong could result to these defendants from the ruling made by the court and complained of by the defendants. The error is without injury to the defendants.

[13-15] The court sustained plaintiff's demurrers to the defendants' set-off and to their counterclaim, and they assign error on this ruling.

The defendants in both their said pleadings claim ownership, title, and right to the possession of the houses occupied by the plaintiff as a saloon from the 23d day of January, 1907, by reason of such house being situated on a mining claim at the time of

its location on said date, as a part of said claim, and in the answer of set-off and in their counterclaim they allege: "That on or about the 25th day of November, 1907, the plaintiff * * * entered into the possession and occupancy of the buildings * * * and from said last-mentioned date down to and including the 9th day of July, 1910, used and occupied the same and carried on a saloon business therein; and that the rent for said premises and for the use and occupation thereof during the time they were occupied by said Calvi * * * is and was the sum of \$40 per month, and that said sum of \$40 per month was a reasonable rental for such use and occupation by said Calvi of said buildings." Alleges frequent demands for payment of said rent, and plaintiff's refusal to pay. Because of such refusal, on the 9th day of July, 1910, the defendants, being the owners of such buildings, entered in said buildings and took possession of all of the personal property of said plaintiff therein situate, including the said sum of money mentioned and described in said amended complaint, for the purpose of enforcing and satisfying the landlord's lien granted them upon said personal property of said plaintiff including said money. The facts and circumstances, set forth by plaintiff as the means by which defendants came into possession of the money sued for, are identical with the facts and circumstances set forth in defendants' said answer of set-off and counterclaim by which they endeavor to excuse the seizure of the money. In each such pleading the defendants endeavor to justify their tortious taking of the money on the grounds that rent was due and they held a landlord's lien on the money as well as on the other personal property belonging to the plaintiff. No other allegation of the relation of landlord and tenant appears in either pleading than as above set forth. No other right of set-off or counterclaim is asserted by defendants than said claim for the rent due from the plaintiff.

The plaintiff having waived the tort and elected to sue for money had and received as upon contract, the defendants could plead as a set-off or a counterclaim any debt due from plaintiff to them founded upon a certain demand. Paragraph 1364, Revised Statutes (Civil Code) of Arizona 1901; Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782. And they may plead any unliquidated or uncertain claim for damages founded upon a tort or breach of covenant arising out of, or incident to, or connected with, the plaintiff's cause of action.

The plaintiff's cause of action is the conversion of the money tortiously taken by the defendants; the subject of the action is the money so converted. The appellants claim that their rent due is a definite, liquidated, and certain demand, and that this demand "arose out of the subject-matter as

set forth in plaintiff's amended complaint." There can be no liability for rent without privity either of contract or estate. 24 Cyc. 1176.

Defendants have alleged in their offset and in their counterclaim no privity of contract or of estate. Their allegations in this connection are that plaintiff "entered into possession and occupancy of the buildings and so continued to use and occupy the same until the 9th of July, 1910," and other allegations assert defendants' ownership of the buildings from January 23, 1907, to the time of pleading, by reason of the buildings being situate on a mining claim acquired by conveyance from the locators. They further claim that plaintiff entered and began to occupy the buildings on November 25, 1907, after the claim of defendants and their predecessors attached to the mining claim. But no fact is alleged, either in the answer or in the counterclaim, showing the capacity in which the plaintiff entered into the possession of the buildings or the capacity in which he continued to use and occupy them—whether he entered, used, and occupied the property as a tenant or as a trespasser. The allegations of entry, use, and occupation of the property are not sufficient to create the relation of landlord and tenant. The relation of landlord and tenant is defined as that which arises from a contract by which one person occupies the property of another with his permission, and in subordination to his rights, the occupant being known as the tenant, and the person in subordination to whom he occupies as the landlord. It is essential to the relation that the occupancy be both permissive and subordinate, and liability as between landlord and tenant rests upon privity, both of estate and of contract. 24 Cyc. 876-877.

[15] The answer of set-off and the counterclaim are therefore subject to plaintiff's demurrer, unless the subject of the set-off or the subject of the counterclaim arose out of the transaction. Defendants' counterclaim and claim of set-off are for rent due for the buildings. We fail to see how rent for buildings could arise out of, or be incident to, or connected with, defendants' tortious appropriation of plaintiff's money.

[17] The defendants' set-off and counterclaim allege a state of facts as would make the entry and occupation by plaintiff of defendants' property a trespass, for which defendants would have a cause of action for possession and damages, but not for rent. Neither would such claim for damages be a matter of set-off or counterclaim in this suit for a certain demand, unless such cause of action arose out of, or is incident to, or is connected with, the plaintiff's claim, and here we again fail to see how a trespass by plaintiff, resulting in damages to defendants, can arise out of, or be incident to, or connected with, the conversion by defendants of plaintiff's money.

"To permit the defendants to prove any payment, counterclaim, or set-off, the same shall be plainly and particularly described in the answer so as to give the plaintiff full notice thereof. Paragraph 1366, R. S. (Civ. Code) Arizona 1901.

The defendants must set forth such a pleading as would state a good cause of action when attacked by a demurrer. This defendants have failed to do, and the ruling of the court was proper.

[18] The defendants assign error on the rulings of the court in denying defendants' offer of evidence in support of their set-off and counterclaim, but as such pleadings had previously been eliminated from the case, for the purpose of the trial, thereafter such evidence was irrelevant.

[19] The court entered the default of the plaintiff for his failure to answer defendants' counterclaim, and thereafter on motion opened the default and permitted plaintiff to file an answer. Thereafter plaintiff filed an amended complaint, to which defendants replied their defenses, including their set-off and counterclaim, and moved for default at the proper time for plaintiff's failure to answer the counterclaim filed to the amended complaint—plaintiff's answer to the same counterclaim interposed to the original complaint remaining on file—to all which rulings the defendants assign error.

The court in opening the default acted clearly within its discretion. "The exercise of the discretion ought to tend, in a reasonable degree at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better as a general rule that the doubt should be resolved in favor of the application." *Watson v. S. F. & H. B. R. Co.*, 41 Cal. 17, reading page 20.

[20] The original answer to the same counterclaim remained on file and served equally as an answer to the counterclaim replied to the amended complaint. This counterclaim was answered, and because an amended complaint was filed and the counterclaim replied, setting up no new matter, made it no new counterclaim. Paragraph 1367, Rev. St. (Civ. Code) Arizona 1901.

[21] If we concede that abstract error was committed by the court in these rulings, no injury could result to defendants therefrom, for the reason such counterclaim failed to allege facts sufficient to assert a counterclaim to the cause of action asserted by the plaintiff, as we have just shown above. No judgment on the counterclaim as asserted could affect the claim of the plaintiff, in this action, and, for that reason, no injury could result to defendants from these rulings of the court.

[22] The court rendered judgment for \$1,024.15, the principal sum, with interest there-

on at the legal rate from July 9, 1910, the sum of \$57.68, with costs taxed at \$61.85, and "together with interest on the total amount of said aggregate sum and costs at the rate of 6 per cent. per annum from the date of this judgment" until paid.

The appellants claim the court erred in allowing interest on the costs in the case.

The costs payable at the date of rendition of the judgment for the debt became a judgment in favor of the winning party, and a judgment bears interest at the legal rate, unless upon a contract providing another rate as the basis of the judgment. Paragraph 2774, R. S. Ariz. 1901; *In re Kennedy*, 94 Cal. 22, 29 Pac. 412; *Palmer v. Glover*, 73 Ind. 529; *Linck v. Litchfield*, 31 Ill. App. 104; *State ex rel. v. Desha County*, 82 Ark. 360, 99 S. W. 1108.

No reversible error appears in the record. Therefore the judgment of the district court is affirmed.

FRANKLIN, C. J., and DUFFY, Superior Court Judge, concur.

N.B.—Judge ROSS being disqualified and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. FRANK J. DUFFY, Judge of the Superior Court of the State of Arizona in and for the County of Santa Cruz, to sit with them in the hearing of this cause.

RODRIGUEZ v. TERRITORY.

(Supreme Court of Arizona. July 15, 1912.)

1. HOMICIDE (§ 127*)—INDICTMENT—SUFFICIENCY.

An indictment charging murder must charge that the killing was unlawful, and was willful, deliberate, premeditated, and with malice aforethought.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 192-194; Dec. Dig. § 127.*]

2. HOMICIDE (§ 129*)—INDICTMENT—SUFFICIENCY.

Under Pen. Code 1901, § 824, which provides that an indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, an indictment for murder, which avers that the defendant did "unlawfully, feloniously, willfully, and of his deliberate and premeditated malice aforethought make an assault upon * * * with a certain pistol," and "did then and there willfully, unlawfully, feloniously, and of his deliberate and premeditated malice aforethought shoot off and discharge said pistol" and "inflict on, in, and upon the body and person of her * * * a mortal wound," from which she died, charges the killing with malice aforethought to a person of common understanding, and is sufficient as against a demurrer.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 197, 198; Dec. Dig. § 129.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

8. JURY (§ 70*)—SUMMONING—SPECIAL VENIRE—COMPETENCY OF JURORS SUMMONED.

Under the law prohibiting the sheriff from summoning bystanders as jurors, jurors summoned upon the issuance of a special venire, though all from a single precinct of a county, were not therefore incompetent, as the law does not require that the jury shall be composed of residents of any particular district.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 810-880, 840, 850; Dec. Dig. § 70.*]

4. JURY (§ 108*)—COMPETENCY—EXAMINATION.

In the examination of the trial jury on voir dire in a prosecution for murder, the court properly permitted the jurors to be questioned whether they believed that a killing which is murder may be surrounded by circumstances so as to make it the duty of the jury to return a verdict of murder in the first degree and fix the death penalty, and properly stated that it was the duty of the jury to return the death penalty under such circumstances as are included within the question.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 480-491, 496; Dec. Dig. § 108.*]

5. CRIMINAL LAW (§ 1166½*)—APPEAL AND ERROR—HARMLESS ERROR.

Though, in a prosecution for murder, upon objection to a question put by the district attorney on cross-examination of the defendant, the court improperly stated that "the district attorney would not ask such a question, unless he had some means of proving it," it will not constitute ground for reversal, where, from the most favorable testimony of the defendant and bystanders, it is apparent that such defendant is guilty of murder.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.*]

6. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for murder, a charge on reasonable doubt, which contains the words, "No jurymen has the right to say, 'I will say there is a reasonable doubt here,' for the purpose of avoiding his duty," immediately preceding, "unless a jurymen does find that a reasonable doubt does exist, he is not to give the benefit of it to the defendant, but, if he does find that a reasonable doubt exists, then he is," could not have misled the jury as to its duty in finding the fact of guilt beyond a reasonable doubt, and was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

7. HOMICIDE (§ 43*)—DEGREE.

That a man's wife left him and refused to live with him, and in the heat of passion, caused by her refusal to return, he killed her, will not reduce the degree of his crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 67; Dec. Dig. § 43.*]

Appeal from District Court, Maricopa County; Edward Kept, Judge.

Francisco Rodriguez was convicted of murder in the first degree, and appeals. Affirmed.

At the April term, 1911, of the district court of Maricopa county, the grand jury returned an indictment against the appellant, charging him with the murder of Jesus M. Rodriguez, his wife. Omitting the formal parts of the indictment, the charge was made in the following words: "The said Francisco Rodriguez, on or about the 2d day of April,

A. D. 1911, and before the finding of this indictment, at the county of Maricopa, territory of Arizona, did unlawfully, feloniously, willfully, and of his deliberate and premeditated malice aforethought, make an assault upon one Jesus M. Rodriguez with a certain pistol, which said pistol was then and there loaded with gun powder and leaden bullets, and which said pistol he, the said Francisco Rodriguez, then and there had and held in his hand, and the said Francisco Rodriguez did then and there willfully, unlawfully, feloniously, and of his deliberate and premeditated malice aforethought shoot, off and discharge said pistol so loaded and held, as aforesaid, at, against, and upon the body and person of the said Jesus M. Rodriguez, and thereby, and by thus striking the said Jesus M. Rodriguez with one of said leaden bullets, inflict on, in, and upon the body and person of her, the said Jesus M. Rodriguez, a mortal wound, of which said mortal wound she, the said Jesus M. Rodriguez, did languish and languishing did then and there die on the 3d day of April, 1911, and within a year and a day from said 2d day of April, 1911. . . ."

To this indictment the defendant demurred upon the statutory grounds for demurrer, viz., that the indictment does not substantially conform to the requirements of sections 824, 825, and 826 of the Penal Code of Arizona, and that the facts in and by said indictment stated do not constitute a public offense, which demurrer was overruled by the court.

The defendant then entered his plea of not guilty. Defendant then interposed a challenge to the special venire of trial jurors, upon the ground that the jurors served by the sheriff in pursuance of the order of the court for such special venire were not summoned from the body of the county, but that all the jurors summoned upon the special venire are residents of and were served from Phoenix precinct of the county of Maricopa, which challenge the court denied.

Upon the trial had upon the issues, the jury returned a verdict of guilty of murder in the first degree and fixed the death penalty. The appellant filed a motion for a new trial, which motion was by the court overruled. Whereupon the court rendered its judgment and sentence in accordance with the verdict, and from which judgment, and from the order denying his motion for a new trial, the defendant appeals.

Struckmeyer & Fisher and J. L. Gust, all of Phoenix, for appellant. G. P. Bullard, Atty. Gen., for the State.

CUNNINGHAM, J. (after stating the facts as above). The appellant contends that the indictment is not sufficient to support a verdict and judgment of murder in the first degree, and alleges that it does not charge a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

willful, deliberate, and premeditated killing of a human being with malice aforethought. If this objection is well founded, the conviction was wrong, and the judgment of the court must be reversed.

It is said by the Supreme Court, in the case of *United States v. Cruikshank*, 92 U. S. 558, 23 L. Ed. 598: "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up from facts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

Under the statutes of Arizona, the indictment must contain the title of the court and a statement of the facts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. Section 824, Penal Code of Ariz. 1901.

The indictment must be direct and certain as regards the party charged, the offense charged, the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. Section 826, Penal Code of Ariz. 1901.

The indictment is sufficient if it can be understood therefrom that it is entitled in a court having authority to receive it; that it was found by a grand jury of the county in which the court was held; that the defendant is named; that the offense was committed at some place within the jurisdiction of the court; that the offense was committed at some time prior to the finding of the indictment; that the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended; that the act or omission charged as the offense is stated with such degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case. Section 833, Penal Code of Ariz. 1901.

No indictment is insufficient, nor can the trial, judgment, or other proceeding therein be attacked, by reason of any defect or imperfection in matter of form which does not tend to prejudice a substantial right of the defendant upon its merits. Section 834, Penal Code of Ariz. 1901.

Murder, as defined by our law, is "the unlawful killing of a human being with malice aforethought. Such malice is expressed or implied. It is expressed when there is manifested a deliberate intention unlawfully

to take away the life of a fellow creature. It is implied where no considerable provocation appears or where the circumstances attending the killing show an abandoned and malignant heart." Section 172, Penal Code of Ariz. 1901.

All murder which is perpetrated by means of poison, or lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree. Section 173, Penal Code of Ariz. 1901.

[1] In order that the conviction may stand in this case, the indictment must charge that the killing was unlawful and with malice aforethought, and that such killing was willful, deliberate, and premeditated. It is contended by appellant that this indictment charges a willful, unlawful, and felonious assault with deliberate and premeditated malice, and that the charge is not equivalent to an averment of willful, unlawful, and premeditated killing; for the latter necessarily implies the existence of the intent with the means of inflicting death, which intent may be lacking in assault, and is not averred, and cites authorities that seem to sustain this view.

[2] In the case of *Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078, the Supreme Court deals with an indictment very similar in form to the one returned against this appellant; the indictment in that case, omitting the immaterial parts, reading as follows: "Did unlawfully, willfully, knowingly, feloniously, purposely, and of a deliberate and premeditated malice make an assault upon one Samuel Roberts; and that they * * * a certain revolver, then and there charged with gunpowder and leaden bullets, * * * then and there feloniously, purposely, and of a deliberate and premeditated malice did discharge and shoot off to, against, and upon the said Samuel Roberts; * * * with one of the bullets, aforesaid, out of the revolver, aforesaid, * * * discharged and shot off, as aforesaid, then and there feloniously, purposely, and with deliberate and premeditated malice did strike, penetrate, and wound him, the said Samuel Roberts, in and upon the right breast * * * one mortal wound, of which said mortal wound he, the said Samuel Roberts, instantly died," and further "did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid."

The Supreme Court comments upon this indictment as follows: "Defendant criticises this indictment as failing to aver deliberate and premeditated malice in killing Roberts, although it is averred that the defendants did, with deliberate and premeditated malice, inflict a mortal wound from which he

instantly died, and that they killed and murdered him in the manner and form aforesaid. If, as alleged in the indictment, they, with deliberate and premeditated malice, shot Roberts in the breast with a revolver and inflicted a mortal wound from which he instantly died, they would have been presumed to contemplate and intend the natural and probable consequences of such act; and an additional averment that they, with deliberate and premeditated malice, intended to kill him was quite unnecessary to apprise the common understanding of their purpose. If they purposely inflicted a mortal wound, they must have intended to kill. No person could have a moment's hesitation as to what was intended to be averred, viz., that the defendants had been guilty of a deliberate and premeditated murder; and, while a number of cases are cited which lend some support to the argument of the defendants, there was no such statute involved as section 1268 of the Oregon Code. We have no doubt the indictment furnished the accused with such a description of the charge as would enable him to avail himself of a plea of former jeopardy, and also to inform the court whether the facts were sufficient in law to support a conviction within the ruling in the Cruikshank Case. While we should hold an indictment insufficient that did not charge in definite language all the elements constituting the offense, we have no desire to be hypercritical or require the pleader to unduly repeat, as to every incident of the offense, the allegations of deliberateness and premeditation. We are bound to give some effect to the provisions of section 1268 in its evident purpose to authorize a relaxation of the extreme stringency of criminal pleadings, and make that sufficient in law which satisfies the common understanding of man."

By Hill's Annotated Laws of Oregon, § 1268, relating to criminal procedure, an indictment must contain: "1. The title of the action, specifying the name of the court to which the indictment is presented and the names of the parties. 2. A statement of the acts constituting the offense in ordinary and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended."

We think the Fitzpatrick Case, controlled by the Oregon statute quoted, is a sufficient authority for us to hold, and we do hold, that the indictment in this case is sufficient to enable a person of common understanding to know what is intended by the language used; and it would be absurd to hold that, because the indictment does not repeat the words "willful, deliberate, and premeditated" before every clause in the charge, therefore the indictment does not charge murder in the first degree. To the same effect is Davis v. Utah, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. Ed. 153, containing an identically worded

statute with ours and the statute of California. To the same effect is People v. Davis, 78 Cal. 355, 15 Pac. 8.

In People v. Martin, 47 Cal. 102, the indictment averred that the defendants "willfully, unlawfully, feloniously, and of their malice aforethought, in and upon one Valentine Eichler, did make an assault, and with an ax, in and upon the head of said Valentine Eichler, then and there feloniously, willfully, and of their malice aforethought, did strike and beat, giving to said Valentine Eichler, then and there, and with an ax aforesaid, * * * divers mortal wounds, of which the said Valentine Eichler instantly died," contrary, etc. The indictment was held good, notwithstanding it did not conclude with the words in the effect, "and so the grand jury say that the defendants, the said Valentine Eichler, in manner and form aforesaid, feloniously, willfully, and of their malice aforethought did kill and murder," contrary, etc. That case holds that, if the indictment charges that the defendant "feloniously, willfully, and of his malice aforethought" inflicted the mortal wound of which deceased died, it is sufficient. People v. Martin, 47 Cal. 101; People v. Steventon, 9 Cal. 274; People v. Ybarra, 17 Cal. 170; People v. Nichol, 84 Cal. 211.

This indictment charges that the defendant did "unlawfully, feloniously, willfully, and of his deliberate and premeditated malice aforethought make an assault upon Jesus M. Rodriguez with a certain pistol," and "did then and there willfully, unlawfully, and feloniously and of his deliberated and premeditated malice aforethought shoot off and discharge said pistol so loaded" and "inflict on, in, and upon the body and person of her, the said Jesus M. Rodriguez, a mortal wound," from which wound she died. From this language no person of common understanding could be mistaken as to what charge was intended to be made against the defendant.

We do not wish to be understood as approving the form in which the indictment in this case is drawn, as the form is very unsatisfactory as a pleading; but section 834 of the Penal Code of Arizona 1901 requires that "no indictment is insufficient, nor can the trial, judgment or other proceeding therein be affected by any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits;" and we hold that the indictment is sufficient in form, and does not tend to prejudice any substantial right of the defendant upon the merits of the case.

[3] The appellant objects to the manner in which the special venire was issued, requiring the same to be returned upon short notice, thus preventing the sheriff from going into the outer precincts of the county and summoning jurors. The objection of the appellant that the jurymen were summoned from Phoenix precinct is untenable, as the

law does not require that a jury shall be composed of residents of the districts or any particular district of the county, but prohibits the sheriff from summoning bystanders only.

[4] Appellant complains that upon the examination of the trial jury upon their voir dire the court permitted the following question: "Q. In other words, then you believe that a killing which is murder may be surrounded by such circumstances as to make it the duty of the jury to return a verdict of murder in the first degree and fix the death penalty and hang the defendant?" And in this connection appellant claims that the court stated that it was the duty of the jury to return the death penalty under such circumstances as are included within the question above. We think the question was proper, and that the statement of the court is the law of Arizona, and that no substantial injury was done to the defendant by the language complained of.

[5] Appellant complains of a question permitted upon cross-examination of the defendant, viz.: "And yet, Rodriguez, not two weeks before you shot her, you dragged her around with a knife in your hand, didn't you?"—and complains that the court, in overruling his objection to the question, commented improperly before the jury in the following language: "The district attorney would not ask such a question, unless he had some means of proving it." The question asked by the prosecution may or may not have been proper; but the statement of the court while making his ruling upon the objection seems to be highly improper. It is well known that jurors often regard the opinion of the court upon the evidence as having very great weight in their deliberations; and in many instances such remarks are the turning points upon which verdicts are reached. If the evidence in this case appeared to be close, giving room for a doubt as to the guilt or innocence of the defendant, or as to the degree of guilt, we would consider the remark of the court as extremely damaging to the rights of the defendant. Upon this phase of the case, we will consider the testimony of the defendant himself, and the testimony given by the surgeon who examined the deceased, and the testimony of one of the witnesses who saw the killing, as the most favorable presentation of the case in behalf of the defendant.

The defendant testified:

"On the 1st of April, 1911, I bought a gun, a pistol. I don't know why I bought it. I know I used to have a gun with me all the time in my pocket, and I had a gun and lent it to a friend of mine, and he took it away, and I went and bought this gun. I don't remember my friend's name. He used to live in Tucson. If I saw his face, I would know him. The greater part of the evening I was in saloons drinking until the saloons closed up.

"I was living at the Star Lodging House, and when I left the saloons I went to the room. I bought three bottles of beer and a couple of pints of whiskey. I took them to my room, and I drank them the next morning, April 2d. That morning I got up at half past 7 and went to a place where I used to get my board, and got my breakfast. Before I had my breakfast, I had a bottle of beer. After breakfast, I came back to the room again. I made a letter, and then drank the other bottle of beer. After I made the letter, I came downtown, because my wife came to the room and called me outside and said she wanted to see me. I went downtown with her. We came down and walked around in the streets, and then I took her back to the candy store—I don't know the name of it—and left her there, and went over and mailed the letter. On the road to the post office, I met a boy named Bill; but I don't remember his last name. They called him Billy. He was a plumber's helper. He was working for Mr. Mulrain while I was working for Mr. Mulrain. We had worked together at the same shop and on the National Bank of Arizona building. After I met Billy, I went across from the post office to a stationery store and bought a big envelope. Billy was with me, and he was waiting outside for me on the other sidewalk, and then I went in there and bought the envelope, and then I mailed the pictures and letter and took them to the post office, and the post office was closed, you know, and I just mailed the letter and came back to the stationery store and told the fellow to mail the pictures for me, and he said, 'All right, I will mail them for you.' And I left with Billy, and he and I come to my room and drank the other bottle of beer and some whiskey I had there. We got back to the room about half past 9 and stayed about 10 or 15 minutes. We drank the bottle of beer and pint of whiskey, and then he and I come downtown together, and then I left him on the corner of Center and Washington, and then I had forgot all about my wife, and I went to the candy store and got my wife; she was waiting there for me. Then we came down here out this way, walking on the sidewalk there, and then we went back again.

"We were talking together, and she asked me for some money. I told her I had some money in my room, and then she said, 'I want to go with you to your room to give me those pictures that you have there that belong to me.' And she asked me to go there and get it for her, and her and I went there together. A pair of drawers and a pair of hose I had there were talked about. She took my laundry one day, and when she sent me that laundry back she sent that pair of drawers and laundry to me. She did some laundry for me, and she sent the washing back with the laundry mentioned. She asked me to come back with her, and I said,

'All right,' and she went there with me, and I gave it back to her. I went to the room and got another pint of whisky and put it in my pocket, and then got the revolver and put it in my pocket too. The only reason I had for putting the pistol in my pocket was that I had in my mind for a long time, you know, was that I could not stay away from her. I used to love her pretty good, you know. I don't remember what I put the pistol in my pocket for; but I put it in my pocket and came out. I wrapped a piece of paper around the clothes and gave the package to her. She took the package with her. I don't remember whether I gave her any money. I was pretty drunk, but I think I gave some to her; but I don't remember sure.

"From the Star Lodging House I walked up with her to where the schoolhouse is there, and then came back again to where the railroad track is, and then back out that street that way toward the east until we came to the corner. I don't know the name of the street, but I think the same street they have on the plan there; but I am not sure. I was talking to her, and asked her if she wanted to come back to me, and she said, 'No,' she was living at home. And all the time I used to tell her to come back to me, and I told her, 'Why don't you come back to me again?' and she told me her folks didn't want her to come back to me again, and they used to make all kind of fun of her that she didn't want to come back to me. And then you know she said to me she was going to get a divorce, and I said to her, 'You better get a divorce if I want it.' And she said: 'I don't care if you want it; but I will get it all the same.' And then she turned around and started to laugh at me, you know, and then when she turned around she said to me: 'You can do whatever you please with me; but I won't come back to you.' Well, I was so angry I don't remember. I was kind of blind. I don't remember what I done after that. I know I shot her; my memory is not clear as to what I did. I was excited. I cannot understand English very well, and I cannot talk good English. I remember well what took place. I remember distinctly the things I did, and that she said she won't come back to me again; won't live with me again.

"I heard the testimony of Col. Johnstone, and I made the statement substantially as testified to by him." (The question was asked by Dr. Orme: "Frank, why did you kill your wife?" or "Did you kill your wife?" He answered: "I did, and I am glad of it. I loved her, and I am ready to hang for it"—or something equivalent to that. I think he used the word "hang."); "I told the judge and everybody that was there that I killed my wife because I loved her with all my heart, you know, and I could not stay away from her, and I didn't want to see her with

anybody, and don't want her to make laugh at me. I didn't buy the pistol on Saturday night with intention to kill my wife. I bought it to keep with me all the time. I don't remember how many shots I fired at her; I think they took the gun away from me. I was so excited I don't remember. After the shooting I ran toward Washington street; then I ran to Madison street; then I turned around toward Washington street. They claim that two weeks before I shot her I dragged her around with a knife in my hand; but it is not true. I saw her not over two weeks before, and I plead guilty in the justice court; but I never had a knife in my hand. My wife begged to have the charge reduced from a felony to a misdemeanor. I know the judge agreed to. I shot her because I loved her. I didn't want her to make any laugh out of me. I didn't want to see her with anybody else. It was my way of showing my love for her. I told Sheriff Hayden that I knew my wife was true to me, and she was. I don't remember if I shot her in the back or not. I was so angry at the time I didn't know how I shot her. I was not very drunk at the time I shot her. I knew what I was doing."

Willard Smith testified that he examined the deceased, and found that she had received five gunshot wounds. One bullet entered the chest from behind just below the right shoulder blade; one entered the chest from behind just below the left shoulder blade; one entered the abdomen from in front below the ensiform cartilage, a little to the right, and followed a course downward and outward and backward, and emerged in the right hip; one was through the fleshy part of the left hand; and one in the left thigh.

Margaret Sasueta testified that she saw the defendant and his wife on Ninth street, between Jackson and Madison streets, about half past 12. "They were conversing when I first saw them. I heard her call for help, and he was running after her and shooting her. I saw him shooting her right in the middle of the back. I could see the revolver. Then she fell, and then he shot her. I don't know how many times he shot her. Then she fell on her knees, and she raised her hands facing him. He was standing about two feet from her. When he gave her the last shot, he said, 'So that you may believe it.' I heard it plain. He said that when he fired the last shot."

The other witnesses who saw the difficulty testified substantially to the same state of facts.

Upon the evidence set out above, we are unable to see where the substantial rights of the defendant have been prejudiced by the court in making the remark of which appellant complains. The error, we believe, was without prejudice to any substantial right of the appellant.

[6] The same rule applies to the fifth assignment of error. The last complaint made by the appellant is to a charge to the jury reading as follows: "Unless a jurymen does find that a reasonable doubt does exist, he is not to give the benefit of it to the defendant." The language of this instruction, as quoted, seems awkward; but, when considered in connection with the other language leading up to it, it is explained, and no mistake was made by the court in using such words. The court, in his charge to the jury in this connection, says: "By reasonable doubt, gentlemen, is not meant a capricious or imaginary doubt. It does not mean a doubt by which the jurymen may say, 'I will take that as an excuse for not finding the verdict I think I ought to do.' A reasonable doubt, as used in the law, means just exactly what it says. There is no better definition than the words themselves, 'a reasonable doubt.' No jurymen has the right to say, 'I will say there is a reasonable doubt here,' for the purpose of avoiding his duty. Unless a jurymen does find that a reasonable doubt does exist, he is not to give the benefit of it to the defendant; but, if he does find that a reasonable doubt exists, then he is." The instructions, when taken together, cannot be held to have misled the jury as to its duty in finding the fact beyond a reasonable doubt, in view of the testimony quoted above.

[7] The evidence offered by the defendant is not sufficient to reduce the homicide from murder in the first degree, unless we hold that the heat of blood produced in the mind of the appellant by the deceased refusing to live with him, and his love for deceased, provoked such a passion as, in law, would amount to a mitigation of the crime. This we are not prepared to admit. This court is not prepared to say that because the wife of a man refuses to live with him that he has the right, under our law, to take her life, to prevent her from securing a legal separation and thereafter becoming the wife of some other man. Jealousy is a motive for crime, not an excuse for it. And where a man, by all the obligations of civilization, government, and religion, has taken the most solemn vow that man can take in the presence of earthly witnesses and his Maker that he will love, support, and protect his wife, because for any reason his wife prefers to live separate and apart from him, that he would be justified in renouncing his marital vows and in taking the life of the one he has sworn to protect is a position this court does not want to assume. Barbaric practices in treating the wife as a chattel and brainstorms are not recognized by this court as excuses, under the laws of Arizona, for committing a crime; nor are they recognized in mitigation of the punishment.

We find no substantial right of the defend-

ant violated in the trial, and no reversible error committed by the trial court. We therefore affirm the judgment of the trial court, and direct that the cause be remanded to the superior court of Maricopa county, state of Arizona, and that the sentence and judgment of the district court of the Third judicial district of the territory of Arizona in and for the county of Maricopa be by said superior court enforced according to law.

FRANKLIN, C. J., and ROSS, J., concur.

(14 Ariz. 185)

STATE, ex rel. DAVIS v. OSBORNE, Secretary of State.

(Supreme Court of Arizona. July 15, 1912.)

1. CONSTITUTIONAL LAW (§ 68*)—STATUTES—VALIDITY—NATURE OF QUESTION.

The constitutionality of an act is strictly a judicial question, though it may involve the legality of holding an election and thereby have a political effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 125-127; Dec. Dig. § 68.*]

2. CONSTITUTIONAL LAW (§ 26*)—STATE CONSTITUTIONS—NATURE.

A state Constitution, unlike a federal Constitution, which is a delegation of powers, is restrictive.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 80; Dec. Dig. § 26.*]

3. ELECTIONS (§ 38*)—TIME FOR HOLDING.

An election cannot be held at a time not designated by law.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 27; Dec. Dig. § 38.*]

4. ELECTIONS (§ 80*)—STATUTES (§ 64*)—GENERAL ELECTIONS—CONSTITUTIONAL LAW.

Act June 14, 1912, providing for a general election in November, 1912, violates Const. art. 7, § 11, which provides that the first general election in the new state shall be held in November of the first even-numbered year after the year in which Arizona is admitted to statehood; and, by providing for a canvassing board to consist of the Governor, Secretary of State, and Chief Justice of the Supreme Court, violates Const. art. 6, § 11, which makes the judges of the Supreme Court ineligible to any office not a judicial one, and Const. art. 5, § 11, which provides that the returns of the election for all state officers shall be canvassed and certificates of elections issued by the Secretary of State; and, by vesting original jurisdiction in the Supreme Court to hear and determine all election contests involving state officers, violates the provision of the Constitution which limits that court's original jurisdiction to specified causes not including election contests, but the invalidity of the act as to state, county, and precinct officers is separable from the provisions for the election of a Representative in Congress and for presidential electors, which last-mentioned provisions are valid.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 20-32; Dec. Dig. § 30; Statutes, Cent. Dig. §§ 58-68, 195; Dec. Dig. § 64.*]

5. CONSTITUTIONAL LAW (§ 15*)—CONSTRUCTION.

In construing a Constitution it is presumed that each and every clause was inserted for some useful purpose, and hence the in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

strument must be construed as a whole, and the several provisions harmonized if possible. [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. § 15.*]

Appeal from Superior Court, Maricopa County; J. C. Phillips, Judge.

Application by the State of Arizona, on relation of H. A. Davis, for injunction against Sidney P. Osborne, Secretary of State. Judgment for defendant, and plaintiff appeals. Reversed.

W. L. Barnum, of Phoenix, for appellant. Lewis T. Carpenter, Asst. Atty. Gen., for appellee.

PER CURIAM. In this action the question is submitted to the court whether an act of the Legislature approved June 14, 1912, entitled "An act providing for general elections of Representatives in Congress, of state, county, and precinct officers, and of Presidential Electors in the state of Arizona; providing for the method of canvassing the vote at said elections; prescribing the method of contesting said elections; and fixing the time at which said elections shall be held"—is repugnant to the Constitution of the state of Arizona, and whether such election may be legally held on the first Tuesday after the first Monday in November, 1912, for the purposes designated in the act. In form the proceeding is an application for a writ of injunction to Sidney P. Osborne, Secretary of State, restraining him from transmitting notices in writing to the boards of supervisors of the several counties of the state under an act of the state Legislature providing for a primary election for the nomination of candidates for elective public offices. The action was begun in the superior court of Maricopa county, a temporary injunction was issued, and on the final hearing the injunction was dissolved. The matter involving a question, public, jurisd. of importance and general interest to the people of the state, it was brought before this court on appeal by an agreed case. It is conceded that the Secretary of State is proceeding to issue a call for a primary election for the nomination of candidates for elective public offices, including all state, county, and precinct offices, and if the act of the Legislature, fixing the first Tuesday after the first Monday in November, 1912, for a general election for state, county, and precinct offices, is void as being repugnant to the state Constitution, the action of the Secretary of State in the premises is illegal, and the judgment of the superior court should be reversed and the temporary injunction heretofore issued should be made permanent by order of this court.

It will be seen that the matter presented calls upon this court to perform its gravest function, that of looking at the language of an act written by delegated authority in the light of language written by the sov-

ern itself, and declaring which language shall speak authority, that of the representatives of the people, or that of the people themselves. It is a duty that this court will not shirk or evade. Its judges are sworn to support the Constitution of the state of Arizona and faithfully and impartially discharge the duties of judge to the best of their ability. This duty we shall perform at all times while we have the honor to sit on the bench, against all encroachments from any source, but in a manner, we trust, befitting the highest tribunal of the state. It may be urged through sinister design or from selfish motives that this court should refuse to pass upon the matter presented for the reason that it is political and not a judicial question. We feel persuaded that no lawyer of standing at the bar would so assert on giving the matter consideration.

The superior courts have jurisdiction in all causes and of all proceedings in which jurisdiction shall not have been vested exclusively in some other court. The Supreme Court has appellate jurisdiction in all actions and proceedings except a civil action to recover money or property where the original amount in controversy does not exceed the sum of \$200. Our courts are not divided into courts of equity and courts of common-law jurisdiction, as is the case in those jurisdictions whose authorities, if superficially considered, would lend color to the view that courts will not decide questions of a political nature. The jurisdiction in law and in equity under our scheme of government is blended in one court which may give appropriate judgment in all cases according to the law and the facts as they may arise.

The superior courts of the state are not limited to the ordinary injunction in equity, the scope and purpose of which is limited to matters involving property or civil rights; but the prerogative writ of injunction may be resorted to in all cases necessary to preserve the sovereignty of the state, its prerogatives and franchises. This matter is reviewed, and the distinction made is very clearly pointed out in Case Note, 3 L. R. A. (N. S.) 382. Matters pertaining to the election of public officers are the very highest prerogatives of the state, and no officer of the state may proceed in such matter without authority of law for his action.

[1] The constitutionality of an act of the Legislature, although it may determine the legality of holding an election and thereby have a political effect, is strictly a judicial question. For whether the act is within the limits of its delegated power or not is a strictly judicial question to be decided by the courts, and in no sense political. This principle is deducible from the authorities, and the doctrine was forcibly announced by the Supreme Court of the United States, speaking through Chief Justice Fuller, in the case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

of *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869. Chief Justice Fuller said: "It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a Presidential Elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the Legislature in joint convention, and the Governor, or, finally, the Congress. * * * The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own."

In *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561, it is said: "The truth is that the power of the respondent to notify elections is in no just sense whatever political; and, in view of the purely ministerial nature of his duty, it is a misuse of terms to assert that his power or duty is in any sense political. The act he is required, as a ministerial officer, to assist in executing by giving notice is the result of legislative power, and therefore, it may be said, of political power; but this does not make the act required of the respondent, in giving or refusing to give the notices, which is a mere consequence of the exercise of political power, a political act, so as to prevent judicial examination of his conduct in acting or refusing to act for that reason, if the law is void for conflict with the Constitution. Were the case otherwise, no act of the Legislature could be questioned for conflict with the Constitution, because it could be said in any such case, as appropriately as in this, that the enactment of the law itself was an exercise of political power, and the court could not, therefore, examine it to determine whether it is in conformity with the Constitution. Such a contention confounds all distinction between the law itself and mere ministerial acts done or required to be done under it." This case was followed and approved in *State v. Cunningham*, 93 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27.

The duty thus devolved cannot be avoided, however unpleasant it may be. In the language of Chief Justice Marshall, "Those who fill the judicial department have no discretion in selecting the subjects to be brought before them." *Worcester v. Georgia*, 6 Pet. 541, 8 L. Ed. 483. And again the great Chief Justice spoke in *Osborn v. Bank of U. S.*, 9 Wheat. 866, 6 L. Ed. 204: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are mere instruments of the law and can will

nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

The will of the law in the present case is the will of the people written into the fundamental law. Chief Justice Taney, in his last judicial utterance, said: "Any legislation by Congress beyond the limits of the power delegated would be trespassing upon the rights of the states or the people, and would not be the supreme law of the land, but null and void, and it would be the duty of the courts to declare it so. For whether an act of Congress is within the limits of its delegated power or not is a judicial question to be decided by the courts." *Gordon v. U. S.*, 117 U. S. 705.

The three co-ordinate departments of the government—the Legislative, Executive, and Judicial—must each move within its sphere; each must remain separate and distinct; it is so provided by our organic law. Each must act within the scope of the power given it by the sovereign will of the people expressed in their Constitution; thus will difficulties be evaded and perplexities avoided.

In passing upon the question we disclaim any purpose or right to interfere with the discretionary powers of the Legislature, or of any state officer. In giving judgment in this cause the court is merely acting as a mediator between the asserted power of the people in the Constitution they have adopted, and an asserted power of the Legislature as delegated representatives of the people. This is its constitutional function.

"Mr. Justice Orton, speaking for the whole court, in the case of *State ex rel. Atty. Gen. v. Cunningham*, 81 Wis. 494, 51 N. W. 730, 15 L. R. A. 561, said: "But it is sufficient that the questions are judicial and not legislative. The Legislature that passed the act is not assailed by this proceeding, nor is the constitutional province of that equal and co-ordinate department of the government invaded. The law itself is the only object of judicial inquiry, and its constitutionality is the only question to be decided."

When we have determined that an act of the Legislature is constitutional and therefore the law, or that the act is unconstitutional and therefore not the law, it then becomes the constitutional duty of the courts, in appropriate cases, involving the performance of ministerial duties, to compel legal action on the part of the officers and agents of the government when they refuse to act, as on the other hand to restrain illegal action when they proceed to act.

The Legislature are but representatives del-

egated to perform duties in subordination to the will of the people. The Legislature speaks for the people. The sovereign people speak in the language of their Constitution. Their will expressed in the Constitution is the will of the sovereign itself. The Legislature may speak but only within the limitations of the fundamental law. The courts may interpret and administer the law, but only in keeping with the oath of the judges to support the Constitution. The executive may execute the law, but under the guise of its execution may not lay a hand against the sovereign will.

Section 11 of article 7 of the Constitution provides: "There shall be a general election of Representatives in Congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November of the first even-numbered year after the year in which Arizona is admitted to statehood, and biennially thereafter."

[2] The provisions of the Constitution must be a limitation upon the legislative power, else they would not have been placed in the organic law. A state Constitution, unlike the federal Constitution, which is a delegation of powers, is restrictive. If the Constitution had remained silent as to the time for election of state, county, and precinct officers, and the tenure of office was not otherwise fixed in the instrument, it could not be questioned that the power of the Legislature, with regard to fixing the time for such election, would have been absolute. But the Constitution fixing the time for such election, an act of the Legislature fixing a different date is so far repugnant thereto and to that extent the legislative act must fail. The Constitution in conferring on the Legislature authority has prescribed to its exercise any limitations which the people saw fit to impose, and no other power than the people can superadd other limitations; neither can any other power than the people strike from the fundamental law any limitations which the people have prescribed therein.

[3] It is fundamental that an election cannot be held at a time not designated by law; that a volunteer election is no election. It would be needless to cite authorities to sustain such an elementary proposition. The time for having an election to select officers to administer the respective departments of the government is a high prerogative of the people of a state. That time may be fixed by the people in the sovereign capacity of adopting their Constitution, or it may be left to the delegated representatives of the people in the Legislature; but, if fixed by the people, the people alone can change it. The Legislature cannot do it, and the courts cannot. As was said in a recent Colorado case, if the courts can amend the Constitution today, and insert therein something that was never there, to sustain a law, they have equal authority to amend the Constitution

to-morrow and strike therefrom something previously there to overthrow a law. The sovereign people, in whom is vested all governmental power, have spoken in their organic law, and their mandate, so expressed, must be enforced, by the courts, even though wise and beneficial attempted legislation is thereby defeated. *People v. Leddy* (Colo.) 123 Pac. 824.

The peculiar value of a written Constitution is that it places, in unchanging form, limitations upon legislative action, unless amended by the people in the mode they have designated, thus giving a permanence and stability to popular government which otherwise would be lacking.

We adopt as our own the language of one of the soundest and most thorough thinkers and jurists who have written on the subject of organic law embodied in our Constitutions: "The courts tread upon dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a Constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the things to be done; and they must then be regarded in the light of limitation upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and to fix those unvarying rules, by which all the departments of government must at all times shape their conduct. * * * We are not, therefore, to expect to find in a Constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in our instrument, which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times, or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only. And we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end." *Cooley, Const. Lim. (7th Ed.)* p. 114.

As was said in *Perry County v. Railroad Co.*, 58 Ala. 556: "We think the only safe rule for interpreting clauses of the Constitution which command certain things to be done, or certain methods to be observed in the enactment of statutes, is to hold that, when it is affirmatively shown by legal evidence that in the attempt to legislate some mandate of the Constitution has been disregarded, such attempt never becomes a law." *Coleman v. Eutaw*, 157 Ala. 327, 47 South. 703; *Opinion of Justices Supreme Court*, 18

Me. 464; *State v. Johnson*, 26 Ark. 281, 287; *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457; *McPherson v. Blacker*, *supra*.

A Constitution framed by a convention after the most solemn and deliberate consideration, and ratified and adopted by the people as their fundamental law to guide and limit the functions of their public servants, and this after a long campaign in which every officer elected spoke and pledged fidelity to it in spirit and in letter, cannot be viewed in the same light as an act of the Legislature passed by the delegated representatives of the people, and which act of the Legislature is necessarily of a temporary nature.

[4] Coming to the act in question, it appears to be repugnant to the Constitution in many aspects. It provides for the election of a Representative in Congress and for all state, county, and precinct officers on the first Tuesday after the first Monday in November in the year 1912, and every two years thereafter. Also for choosing Presidential Electors. It provides for a canvassing board to consist of the Governor, Secretary of State, and Chief Justice of the Supreme Court. This provision is repugnant to the Constitution in two particulars. Members of a canvassing board, while performing a high public function, act strictly in a ministerial capacity. It is a public office of employment, but in no wise judicial. Section 11, article 6 of the Constitution provides that "judges of the Supreme Court and judges of the superior courts shall not be eligible to any office or public employment other than a judicial office or employment, during the term for which they shall have been elected." And again the duty of canvassing the returns of the election for all state officers devolves upon the Secretary of State, and no other officer can perform such duties. By section 11 of article 5 of the Constitution it is provided: "The returns of the election for all state officers shall be canvassed, and certificates of election issued by the Secretary of State, in such manner as may be provided by law." This section of the Constitution is, however, not self-executing. It requires that the Secretary of State shall perform such duties in such manner as may be provided by law. Clearly it was the duty of the Legislature to provide the manner in which the Secretary should canvass the votes.

The act in question vests original jurisdiction in the Supreme Court to hear and determine all election contests involving state officers. Under our Constitution, the Supreme Court is essentially a court of appellate jurisdiction. It is the scheme of our government that contested matters involving questions of fact may take place in an inferior tribunal, and the matter, after judgment, may be reviewed independently in this court on appeal or writ of error. In view of this,

the Constitution has wisely limited the original jurisdiction of the Supreme Court to habeas corpus, and quo warranto and mandamus as to all state officers, and original and exclusive jurisdiction in causes between counties concerning disputed boundaries and surveys thereof, and concerning claims of one county against another. It is not to be supposed that the Legislature may vest us with a jurisdiction which the Constitution denies, and take away a jurisdiction from the superior courts which the Constitution vests in those tribunals.

Section 1 of article 5 of the Constitution prescribes of what the Executive Department shall consist, designates the officers, and fixes the term of those elected under the Enabling Act approved June 20, 1910. The term shall begin when the state is admitted into the Union and shall end on the first Monday in January, A. D. 1913, or when their successors are elected and qualify.

It is a matter of history that the state was admitted into the Union on the 14th day of February, 1912. The section is plain and unambiguous. They are elected at the election provided by the Enabling Act, and the terms of the Governor and other designated officers comprising the Executive Department of the state began on February 14, 1912, and end when their successors are elected and qualify.

Section 2, art. 6: "Judges of the Supreme Court shall be elected at the general election to be held under the provisions of the Enabling Act approved June 20, 1910. Their term of office shall be coterminous with that of the Governor of the state elected at the same time, and the one receiving the highest number of votes shall be the Chief Justice. At the first general state election thereafter, held under this Constitution, at which a Governor is voted for, three judges of the Supreme Court shall be elected, and the judges elected thereat shall be classified by lot, so that one shall hold office for a term of six years, one for a term of four years, and one for a term of two years, from and after the first Monday in January next succeeding said election. The lot shall be drawn by the judges-elect, who shall assemble for that purpose at the State Capitol, and shall cause the results to be certified to the Secretary of State, who shall file the same in his office. The judge having the shortest time to serve, and not holding his office by appointment or by election to fill a vacancy, shall be the Chief Justice, and shall preside at all sessions of the Supreme Court. In case of absence of the Chief Justice, the judge having in like manner the shortest time to serve shall preside. After the first state election one judge shall be elected every two years at the general election, and the term of the judge elected shall be six years from and after the first Monday in

January next succeeding his election, and judges so elected shall hold office until their successors are elected and qualify."

Again it is observed that the first judges of the Supreme Court are elected at the general election held under the provisions of the Enabling Act. The one receiving the highest vote is the Chief Justice. Their term of office is coterminous with that of the Governor elected at the same time; that is, the terms shall end on the first Monday in January, A. D. 1913, or when their successors are elected and qualify.

Then it is provided in said section that: "At the first general state election thereafter, held under this Constitution, at which a Governor is voted for, three judges of the Supreme Court shall be elected, and the judges elected thereat shall be classified by lot, so that one will hold office for a term of six years, one for a term of four years, and one for a term of two years, from and after the first Monday in January next succeeding said election. The lot shall be drawn by the judges-elect, who shall assemble for that purpose at the State Capitol, and shall cause the results to be certified to the Secretary of State, who shall file the same in his office. The judge having the shortest time to serve, and not holding his office by appointment or election to fill a vacancy, shall be the Chief Justice, and shall preside at all sessions of the Supreme Court. In case of absence of the chief justice, the judge having in like manner the shortest time to serve shall preside. After the first state election one judge shall be elected every two years at the general election, and the term of the judge elected shall be six years from and after the first Monday in January next succeeding his election, and judges so elected shall hold office until their successors are elected and qualify."

It will readily be seen that no election for judges of the Supreme Court is contemplated or permitted before the general election provided for by the Constitution. For at the first general election held under the Constitution, at which a Governor is voted for, one of the judges is elected for six years, one for four years, and one for two years, to be determined by lot; the one receiving the shortest term to be Chief Justice. At any election held before this there is no provision for a Chief Justice; indeed, if such election could be held, there would be no Chief Justice to preside. After the first state election, one judge of the Supreme Court is elected biennially or every two years. So it must be conceded that at the first general state election after the election under the provisions of the Enabling Act, one of the judges of the Supreme Court must be elected for six years, one for four years, and one for two years. And it is but a short arithmetical problem to demonstrate that an officer cannot be elected in 1912 for

a term of six years, and his successor be elected in 1914 for a term of six years. But it was intimated on argument, though without insistence or persuasion, that the election provided for by the act of the Legislature is not an election held under the Constitution. Such an argument, if indulged in, would be *reductio ad absurdum*.

Is it possible that the departments of the state government are not at present subordinate to the provisions of the Constitution? Is it to be thought of that the Legislature in the discharge of their duties did not have the Constitution as a golden memento to guide and limit their efforts? Would it be contended that the highest tribunal of the state, when it sits in deliberation to pass solemn judgment upon the lives and property rights of the people of this great state, is not to be controlled and circumscribed in its proceedings by the instrument that gave it birth? The language, "to be held under this Constitution," plainly as words can express the 'idea' is to be held after the Constitution takes effect. It would, indeed, be a matter of concern to the people of this great state if their judicial servants were so bold as to announce that the Constitution, which the people labored for and brought into life after much time and effort, is not at present the polar star of our government, but lies in desuetude until resurrected by a general election to be held in 1914.

At the first general election thereafter, held under this Constitution, etc., is the language of the Constitution, and it is clear that section 11 of article 7 provides such election.

The matter is again emphasized by section 5 of article 6 of the Constitution: "The first judges of the superior court shall be elected at the general election to be held under the provisions of the Enabling Act approved June 20, 1910. Their term of office shall be coterminous with that of the Governor of the state elected at the same time. Thereafter the term of office of all judges of the superior court shall be four years, from and after the first Monday in January next succeeding their election and until their successors are elected and qualify. All judges of the superior court shall be elected at the general state election by the qualified electors of their respective counties."

Again, the first judges of the superior courts are elected under the provisions of the Enabling Act. Again, their term of office is coterminous with that of the Governor. But it will be observed that it does not in words provide that the terms of the judges of the superior court extend to any particular date, or when their successors are elected and qualify. After referring to the election under the Enabling Act, the section reads: "Thereafter the term of office of all judges of the superior court shall be four years, from and after the first Monday in January next succeeding their election and until their

successors are elected and qualify." This section in unequivocal terms fixes the term of office of the judges of the superior courts to be four years, except the term of office fixed by virtue of the first election, to wit, the election under the Enabling Act, and then, again, emphasizes the matter by saying: "All judges of the superior court shall be elected at the general state election by the qualified electors of their respective counties."

In this section, unlike the section with reference to the election of judges of the Supreme Court, where the first general state election is named, the word "first" is not inserted before "general election." Plainly the election attempted to be provided for by the act of the Legislature is a general state election, yet it will readily be seen that if the term of office of judges of the superior court resulting from the first election under the Enabling Act is to be coterminous with that of the Governor elected at the same time, and such judges cannot be elected in 1912, their term of office cannot be coterminous with that of the Governor. On the other hand, it would be as absurd to contend that the judges of the superior court are to be elected in 1912 for a term of four years and again elected in 1914 for a term of four years. It cannot be seriously questioned that state, county, and precinct officers must stand for election in 1914.

Section 1 of article 15 of the Constitution provides: "A Corporation Commission is hereby created to be composed of three persons, who shall be elected at the general election to be held under the provisions of the Enabling Act approved June 20, 1910, and whose term of office shall be coterminous with that of the Governor of the state elected at the same time, and who shall maintain their chief office, and reside, at the state capital. At the first general state election held under this Constitution at which a Governor is voted for, three commissioners shall be elected who shall, from and after the first Monday in January, next succeeding said election, hold office as follows: The one receiving the highest number of votes shall serve six years, and the one receiving the second highest number of votes shall serve four years, and the one receiving the third highest number of votes shall serve two years. And one commissioner shall be elected every two years thereafter."

They are elected at the general election held under the Enabling Act; their term of office being coterminous with that of the Governor elected at the same time. Then the Corporation Commissioners are to be elected when? The Constitution says, at the first general state election held under the Constitution at which a Governor is to be voted for, and their term of office is fixed at six, four, and two years, respectively.

The phraseology with reference to the election of judges of the Supreme Court is, "at the first general state election thereafter," held under this Constitution," referring to the election under the Enabling Act. Concerning Corporation Commissioners, "at the first general state election held under this Constitution." The word "thereafter" is omitted, but it necessarily means the same thing, for the first general state election held under the Constitution must necessarily be "thereafter," or, in other words, after the election under the provisions of the Enabling Act.

Section 3, art. 12: "Subject to change by law, there are hereby created in and for each organized county of the state the following officers who shall be elected by the qualified electors thereof: Sheriff, recorder, treasurer, school superintendent, county attorney, assessor, county superintendent of roads, and of surveyor, each of whom shall be elected for a term of two years, except that such officers elected at the first election for state and county officers shall serve until the first Monday in January, 1913; and three supervisors, whose term of office shall be provided by law, except that at the first election of county officers the candidates for supervisor receiving the highest number of votes shall hold office until the first Monday in January, 1915, and the two candidates for supervisors, respectively, receiving the next highest number of votes shall hold office until the first Monday in January, 1913."

Section 21, art. 4: "The members of the first Legislature shall hold office until the first Monday in January, 1913. The terms of office of the members of succeeding Legislatures shall be two years."

Section 6, art. 22: "All territorial, district, county, and precinct officers who may be in office at the time of the admission of the state into the Union shall hold their respective offices until their successors shall have qualified, and the official bonds of all such officers shall continue in full force and effect while such officers remain in office."

It was argued by the Attorney General in his oral argument before the court that the provisions of the Constitution, with reference to the tenure of office, wherein it is provided that the officers shall hold office until the first Monday of January, 1913, are mandatory, and that unless an election is had in November, 1912, the offices will become vacant. One answer to this is that the Constitution itself provides against such a contingency wherein it says: "The term of office of every officer to be elected or appointed under this Constitution or the laws of Arizona shall extend until his successor shall be elected and shall qualify." Section 13, art. 22.

But it may be contended that section 13, art. 22, has no application to officers elected on December 12, 1911, and whether it does

or not depends as to whether such officers were elected under the Constitution and laws of Arizona.

The Enabling Act provided that the constitutional convention should by ordinance provide for the election of officers for a full state government in case Arizona was admitted to statehood. Section 23, Enabling Act June 20, 1910. The constitutional convention, accordingly, ordained "a proposition relative to the ordinance to provide for the election of the first officers for a full state government," entitled Election Ordinance No. 2. This ordinance prescribed that the qualifications of electors should be as provided by title 22, Revised Statutes of Arizona, August 2, 1901. That the ballots should be prepared, printed, furnished, and distributed as required by the election laws of the territory of Arizona for elections therein. The candidates for election should be nominated in accordance with chapter 24, Session Laws of Arizona 1909. It further provided that "the election laws of the territory now in force, as far as applicable and not in conflict with the Enabling Act, including the penal laws of said territory relating to elections and primaries and illegal voting and other illegal practices thereat are extended to the primary and election herein provided for." It will thus be seen that the election held on December 12, 1911, was conducted under the laws of Arizona, and that the officers were elected under those laws. This is apparent when it is taken into consideration that throughout the Constitution the words "state" and "state of Arizona" are employed, and that in no other place in the Constitution are the words "laws of Arizona" used. The evident purpose of the use of the expression "laws of Arizona" in this section was to comprehend every officer elected or to be elected either under the laws of the state of Arizona or the laws of the territory of Arizona.

Where in a statute or the Constitution the tenure of office is fixed, the courts have many times held that no vacancy occurs, if the laws or Constitution provide for their holding over until their successors are elected and qualified.

In the case of *Badger et al. v. United States*, 93 U. S. 599, reading pages 601 and 602 (23 L. Ed. 991), it is said: "By the common law, as well as by the statutes of the United States, and the laws of most of the states, when the term of office to which one is elected or appointed expires, his power to perform its duties ceases. *People v. Tleman*, 8 Abb. Prac. [N. Y.] 359; *Id.*, 30 Barb. [N. Y.] 193. This is the general rule. * * * The system of the state of Illinois seems to be organized upon a different principle. Thus, the Supreme Court consists of seven judges, who are required to possess certain qualifications of age and residence, and who are elected for the term of nine years (Code

[Rev. St.] of Illinois 1874, pp. 69, 70), at which time it is provided that the 'term of office shall expire.' Circuit judges in like manner are elected for a term of six years. *Id.* p. 70. County judges and county clerks, probate judges and state's attorneys, are elected for the term of four years. *Id.* pp. 71, 72. As to all of these officers, including judges, it is provided in the Constitution of Illinois that 'they shall hold their offices until their successors shall be qualified.' *Id.* p. 73, § 32. They may thus hold their offices much longer than the terms for which they are elected."

In the case of *Commonwealth v. Hanley*, 9 Pa. 513, the court held, under a constitutional provision, that "they shall hold their offices for three years * * * and until their successors shall be duly qualified"; that there was no vacancy in the office. To the same effect are the following cases: *State v. Tallman*, 24 Wash. 428, 64 Pac. 759; *Gosman v. State*, 106 Ind. 203, 6 N. E. 349; *State v. Harrison*, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663; *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *State v. Lusak*, 18 Mo. 334; *People v. Lord*, 9 Mich. 227; *People v. Tilton*, 37 Cal. 614; *People v. Edwards*, 98 Cal. 153, 28 Pac. 831; *People v. Hardy*, 8 Utah, 68, 29 Pac. 1118; *Eddy v. Kincald*, 28 Or. 537, 41 Pac. 156, 655; *State v. Compson*, 34 Or. 25, 54 Pac. 349; *Smith v. Holt*, 24 Kan. 771; *Badger v. United States*, 93 U. S. 599, 23 L. Ed. 991; 23 Cyc. 515; 29 Cyc. 1397.

Precinct officers are in the same situation as all the other officers created by the Constitution. They were in office on the date of the admission of the state into the Union and by virtue of section 6, article 22, they continue in office until their successors have qualified. No election for such officers was had in December, 1911, for the reason that the Enabling Act and Ordinance No. 2 failed to provide for the election of precinct officers. The Constitution having made no provision for the election of such officers until the first general state election, precinct officers will hold until their successors are elected at that time and qualify.

The constitutional convention finished its work of writing the Constitution on December 9, 1910. This instrument under the Enabling Act was to be submitted to the people for ratification in not less than 60 days nor later than 90 days after the adjournment of the convention that framed it. The returns were to be canvassed on the third Monday after the election. It was provided by the Enabling Act that, if the Constitution should be rejected, the Governor should reconvene the constitutional convention, which should frame a new Constitution, subject to the same proceedings of ratification as, if originally prepared. When the Constitution was finally ratified, it was to be sent to the President and Congress for their approval,

and, if approved, the President was to certify the facts to the Governor within 30 days. An election of officers was then to be had not earlier than 60 days nor later than 90 days after a proclamation of the Governor to that effect. It will be seen by a survey of these facts that the members of the constitutional convention could not, with any definiteness, foretell when Arizona would be admitted to statehood. It was possible, if the President and Congress would approve the Constitution at the earliest date after receiving it, that statehood would be accomplished by June, 1911, in which event the first general state election would, as provided in the Constitution, fall on the first Tuesday after the first Monday in November, 1912. The facts are that the President and Congress failed to approve the first draft of our Constitution, and, by a joint resolution of Congress, the people were required to eliminate some feature objectionable to the President. This required another submission and ratification. December 12, 1911, the people voted on the amended Constitution and at the same time elected their officers. The returns of this election were sent to the President, who, on February 14, 1912, issued his proclamation admitting Arizona to statehood.

All of the difficulties encountered by official delays at home, by refusal of the President and Congress to approve the Constitution, legislation requiring the people to amend their fundamental law, could not be known in advance, but some of them could reasonably be, and probably were, apprehended by the framers of the Constitution.

By reason of the uncertainty as to when admission would be had, the convention very thoughtfully provided by section 11, art. 7, that "there shall be a general election of Representatives in Congress, and of state, county and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year after the year in which Arizona is admitted to statehood, and biennially thereafter." In other words, the Constitution provides that if admission to statehood was had in 1911, a general election of such officers should be held in 1912, and if admission is had in 1912 or 1913, an election of such officers is to be had in 1914. Admission being accomplished in 1912, the first even-numbered year thereafter is 1914. Hence no general election of those officers may be had until 1914.

Here the Constitution has fixed the time for holding the first general state election by saying that it shall be "on the first Tuesday after the first Monday in November of the first even numbered year after the year in which Arizona is admitted to statehood and biennially thereafter," which, under the facts in this case, as clearly and definitely names 1914 as if it had been written outright into the Constitution.

It should be borne in mind that the provisions of the Constitution creating offices and fixing their tenure in no way bear upon the question of elections. They do not attempt or pretend to say when successors shall be chosen. They create and fix the tenure of offices. Under a different subject-matter—"Suffrage and Elections"—the Constitution fixes the date of holding elections. This is the only date fixed or attempted to be fixed. It is as certain as to time as the English language can make it. Had the Constitution contemplated an election for state, county, and precinct officers at any other times than named specifically in the instrument, before fixing the date thereof its framers would have used the words "unless otherwise provided by law" there shall be a general election, etc. The absence of any such expression is very significant. We are not to impute the absence of such words, or those of like import, to any other significance than a clear intent to definitely fix the time.

By section 32, art. 2, of the Constitution, its provisions are mandatory unless by *express words* they are declared to be otherwise. "Mandatory" is defined as a command, hence obligatory. That which we must implicitly follow and obey.

[5] It is a salutary rule of construction that the presumption and legal intendment is that each and every clause in a written Constitution has been inserted for some useful purpose, and therefore the instrument must be construed as a whole in order that its intent and general purpose may be ascertained; and, as a necessary result of this rule, it follows that, whenever it is possible to do so, each provision must be construed so that it shall harmonize with all others without distorting the meaning of any of such provisions, so that intent of the framers may be ascertained and carried out and effect given to the instrument as a whole. 8 Cyc. 730.

For the purpose of harmonizing apparently conflicting clauses in a Constitution, each must be read with direct reference to every other which relates to the same subject, if possible, so as to avoid repugnancy.

If we read the several provisions of the Constitution with reference to the election of officers under the provisions of the Enabling Act, and their terms of office as stated, and the provisions for the re-election of such officers at the first general state election thereafter held under the Constitution, and then read, with direct reference to such provisions, section 11 of article 7: "There shall be a general election of Representatives in Congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year after the year in which Arizona is admitted to statehood, and biennially thereafter"—there is perfect harmony and no ambiguity or repugnancy whatever. The

meaning comes upon us just as St. Paul says, "The sparks fly upward—naturally." We plainly see that the framers of the fundamental law had in mind but two elections, one under the provisions of the Enabling Act, at which all the officers elected had but one coterminous tenure of office. All were elected to remain in office for the same length of time. The other, the general election to be held thereafter, under the Constitution, at which the officers to be elected have varying terms of office. Clearly, we could give no other construction, unless it be a strained and confused one and make discord where harmony prevails. Such construction bears out the intent and general purpose of the Constitution and ought to prevail.

And then as Mr. Cooley, one of the soundest jurists who have written on the subject of Constitutional Limitations, says: If directions are given respecting the time or modes of proceeding in which a power should be exercised, the presumption is that the people designed that it should be exercised in that time and mode only, and we would impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end.

The Constitution of Arizona was adopted by the Convention on December 9, 1910, and, at an election provided therefor, was, on the 9th day of February, 1911, overwhelmingly ratified by the votes of the people. After a resolution of Congress approving the Constitution as adopted by the people, President Taft, owing to his hostility to the recall of the judiciary, placed his disapproval upon it by the veto, thereby greatly disappointing the people of this state. After unaccountable delays from many sources, the Constitution was again submitted to the people on December 12, 1911, at which time officers for a full state government were elected. Knowing that it was the only method of obtaining their political independence, the people, in order to establish their own government, obeyed the command of the President and rejected the recall of judges from the Constitution. And finally, after all the delays and trials and misgivings that attended it, the glad tidings were flashed over the wires, on February 14, 1912, to an exultant people, that the proclamation admitting Arizona to statehood had been signed by the President, and the patient work and hope of years was at last realized.

The Constitution provides, in article 7, § 11: "There shall be a general election of Representatives in Congress, and of state, county, and precinct officers on the first Tuesday after the first Monday in November of the first even numbered year after the year in which Arizona is admitted to statehood, and biennially thereafter."

We hold that such provision is mandatory, and any act of the Legislature attempting

to fix another and a different time for holding a general election of state, county, and precinct officers is, with respect to the time fixed, in conflict with the Constitution of this state and must necessarily give way. The sovereign voice is mandatory. It has fixed the time. No other power than that of the sovereign who fixed it, can make a change. It is certainly not allowable for this court to set aside the obligation of such constitutional provision as directory merely. The Constitution says that the general election for such officers shall be held on the first Tuesday after the first Monday in November, 1914, and biennially thereafter, and, because it does not in words prohibit holding a general election therefor annually, no reasonable man would for a moment contend that, by reason of no express prohibition being incorporated therein, the Legislature may provide for general elections annually, or semiannually, or even monthly, after the first general election provided for by the Constitution, or as many general elections for such purpose before that time as the Legislature may see fit to prescribe. The word "thereafter" cannot be construed to mean "before."

As we have seen, the act is repugnant to the Constitution in many particulars. It conflicts as to the date for holding the first general election for state, county, and precinct officers. It conflicts as to who shall canvass the returns and issue certificates of election. It conflicts as to the court which shall have original jurisdiction in election contests. Such an act so violative of the fundamental law cannot be sustained. The question for consideration is one of power and not of policy, and we are unable to arrive at any other conclusion than that the act of the Legislature is in contravention of the Constitution.

The act also provides for the election for a Representative in Congress and for Presidential Electors. But this part of the act is not so inseparably connected in substance with the other parts of the act as to work the destruction of the whole act. Striking out the provision for the election of state, county, and precinct officers, the act is capable of being carried out in accordance with the legislative intent as to the election of Representatives in Congress and Presidential Electors in the year 1912.

The time for the appointment of Presidential Electors and the election of Representatives in Congress is fixed by the Congress of the United States, and the time fixed is the first Tuesday after the first Monday in November, 1912. It could not be questioned that a provision in the Constitution, or in the act of the Legislature, fixing a different date, would be void to the extent that the date conflicted. An act of the state of Michigan, fixing the date for the meeting of Presidential Electors as the first Wednesday of

December, when an act of Congress had provided that the electors of each state should meet and give their votes on the second Monday in January next following their appointment, was declared by the Supreme Court of the United States as in conflict with the act of Congress, and must necessarily give way, yet the act of Congress did not in terms prohibit the meeting at any other time; the state law yielding only to the extent of the collision. *McPherson v. Blacker*, 146 U. S. 41, 13 Sup. Ct. 3, 36 L. Ed. 869.

In that case, on page 34 of 146 U. S.; on page 10 of 13 Sup. Ct., 36 L. Ed. 869, after quoting from Senate Rep. 1st Sess. 43 Cong. No. 395: "The appointment of these electors is thus placed absolutely and wholly with the Legislatures of the several states. They may be chosen by the Legislatures, or the Legislature may provide that they shall be elected by the people of the state at large, or in districts, as are members of Congress, which was the case formerly in many states; and it is, no doubt, competent for the Legislature to authorize the Governor, or the Supreme Court of the state, or any other agent of its will, to appoint these electors. This power is conferred upon the Legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by the state Constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state Constitution, to choose electors by the people, there is no doubt of the right of the Legislature to resume the power at any time, for it can neither be taken away nor abdicated"—Chief Justice Taney said: "In short, the appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States. They are, as remarked by Mr. Justice Gray, in *Re Green*, 134 U. S. 377, 379 [10 Sup. Ct. 586, 587 (33 L. Ed. 951)], 'no more officers or agents of the United States than are members of the state Legislatures when acting as electors of federal Senators, or the people of the states when acting as the electors of Representatives in Congress.' Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded." This case from the Supreme Court of the United States is a very instructive one, as it bears directly on the principle governing the case at bar.

The question presented being one of power and not of policy, we are unable to ar-

rive at any other conclusion than that the proposed action of the Secretary of State, to prepare and transmit to the board of supervisors of the several counties of the state a notice in writing designating state, county, and precinct officers as officers for which candidates are to be nominated at a primary election, which such candidates so nominated are to be voted for at an election to be held on the first Tuesday after the first Monday in November, 1912, is illegal and without authority of law.

To assert the high prerogative of the state in this behalf by one of its officers without lawful authority so to do would, undoubtedly, cause strife, promote discord and grave legal complications out of which would grow confusion, a multiplicity of lawsuits, and contentions seriously embarrassing the due administration of the several departments of the state government, and unnecessary and illegal expense incurred. Such conditions cannot be encouraged to arise even to gratify political ambitions, for ambition should be made of sterner stuff. We are not concerned with the ambitions of men, but only with the reason and justice of the law.

Accordingly, the judgment of the superior court of Maricopa county, in dissolving the temporary injunction heretofore issued, is reversed and vacated, the temporary injunction is so amended as to include in the writ all precinct offices, and, as amended, the temporary injunction is made permanent. Let the writ issue accordingly.

ST. LOUIS & S. F. R. CO. v. FARMERS' UNION GIN CO.

(Supreme Court of Oklahoma. July 1, 1912.)

(Syllabus by the Court.)

1. DAMAGES (§§ 36, 45*)—BREACH OF CONTRACT TO LAY SWITCH TRACK—ELEMENTS OF DAMAGE.

Where a railroad company has induced a cotton gin company to locate a gin plant on the railroad's right of way, and, for an agreed price paid in advance, contracts to lay a track to the gin plant, the object being to have same ready before the arrival of the heavy machinery and material for the gin, and the putting in of such track is delayed an unreasonable time, in the absence of some plausible excuse for the delay, the road will be held liable for the damage thereby caused; and in an action for the delay, extra expense incurred in moving the machinery and material to the gin site are proper elements of damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 92-98; Dec. Dig. §§ 36, 45.*]

2. CARRIERS (§ 98*)—CARRIAGE OF GOODS—DELAY—DAMAGES.

Where gin stands and machinery for a cotton gin are shipped over a common carrier to a gin company whose plant is located and being built on the carrier's right of way, the carrier is charged with notice of the purpose and use of such machinery, and the period of the year in which it is used, and, in case of unreasonable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and negligent delay in shipment, will be held liable for the damages which are the direct result of such delay, although no express mention of the purpose of such machinery and the period in which it is desired for use is made in the shipping contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 396-426; Dec. Dig. § 98.*]

3. CARRIERS (§ 105*)—CARRIAGE OF GOODS—DELAY—DAMAGES.

In an action against a carrier for unreasonable and negligent delay in transporting machinery, the detriment caused by the delay is the loss of the use of such machinery during the time; and, where the purpose of the machinery and the period of its use are known to the carrier, the expense incurred in obtaining other machinery, the expense of maintaining idle hands, the rental value of the machinery, if ascertainable with reasonable accuracy, or the interest on money invested in idle machinery, are proper elements of damage; but remote and conjectural matters, such as interest on money borrowed for speculative purposes, or damage done to cotton purchased with such borrowed money—matters not proximately growing out of the delay—are not proper elements of damage. Neither are loss of profits a proper element unless expressly mentioned and made a condition of the contract at the time of its execution, and then only when such profits can be estimated with reasonable certainty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-458; Dec. Dig. § 105.*]

(Additional Syllabus by Editorial Staff.)

4. TRIAL (§ 330*)—GENERAL VERDICT—SEPARATE CAUSES OF ACTION.

Where two causes of action are submitted together, a general verdict for plaintiff should not be returned, but there should be separate findings on each cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 777-781½; Dec. Dig. § 330.*]

Commissioners' Opinion, Division, No. 2. Error from Pawnee County Court; H. T. Conley, Judge.

Action by the Farmers' Union Gin Company against the St. Louis & San Francisco Railroad Company, Judgment for plaintiff, and defendant brings error. Reversed and remanded.

This action was begun May 23, 1908, by the Farmers' Union Gin Company against the St. Louis & San Francisco Railroad Company, for damages for breach of two separate contracts: One, for failure to put in a switch track within the time defendant company had promised to complete same; the other, for failure to deliver certain machinery, gin stands, which had been consigned by plaintiff for shipment over defendant road. The gin company, a corporation, alleged that it had been induced by defendant to locate its cotton gin upon defendant's right of way; that plaintiff, by virtue of this agreement, in the early part of July, 1907, began the erection and construction of the cotton gin on defendant's right of way in the city of Pawnee.

For its first cause of action it alleged: That subsequent to the agreement that the gin could be located on defendant's right of

way, plaintiff and defendant, through its agents, on about July 10, 1907, entered into a contract by which defendant obligated itself to lay a switch track out to plaintiff's gin for the sum of \$586.72, and to complete same within 30 days, the object being to have said track laid out to the gin in order that the gin machinery, boilers, and lumber could be unloaded and placed in position for operation at less expense. Plaintiff alleged that it paid the contract price to defendant on the day on which the contract was made; that defendant failed to lay such switch track until, after plaintiff's machinery had arrived; that it was not laid until long after the gin machinery had all arrived, the gin constructed and put in operation, although, by the exercise of ordinary diligence, said track could have been laid within ample time for plaintiff's use in shipping in its machinery and material; that, by reason of such unreasonable delay, defendant was compelled to pay the sum of \$50 as an extra expense in hauling the gin machinery from the railroad to the gin where it was needed; that it was also compelled to pay the sum of \$80 as an additional expense in hauling five cars of coal needed for operation of the gin, \$72 for hauling eight cars of cotton seed from the gin to the railroad, \$150 for hauling 1,225 bales of cotton from the gin to the railroad; and that plaintiff sustained all this additional expense, aggregating \$382, by reason of defendant's failure to lay said switch track within the time contracted.

For the second cause of action plaintiff alleged that the damages were sustained by reason of defendant's failure to deliver the gin stands which were to be operated in plaintiff's gin; that such gin stands were purchased at Pautsville, Ala., July 17, 1907, and were duly delivered to and received by defendant company for shipment to the city of Pawnee; that such shipment was negligently and carelessly delayed by defendant at the city of Sapulpa from August 5th to September 15th; that, by reason of such delay in shipment, plaintiff was delayed in the completion of its gin and prohibited from operating same for a period of 40 days; that during such delay, relying on such shipment to be made within reasonable time, plaintiff purchased in the open market 627,000 pounds of cotton at a cost of \$11,000; that the capacity of plaintiff's cotton house was only 80,000 pounds; that, by reason of the delay in shipment, plaintiff was unable to gin out the cotton purchased as fast as it came in, and was therefore compelled to pile about 247,000 pounds on the ground, which, lying on the ground and being thus exposed for a period of 40 days, was damaged in marketable quality to the extent of \$600. Plaintiff further alleged that, by reason of such delay it was unable to gin and market the cotton so purchased, and, such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cotton having been purchased with borrowed money, plaintiff was compelled to pay the sum of \$100 interest on the borrowed money. Plaintiff further alleged that it had been damaged in the sum of \$23 in expenses in endeavoring to locate and trace up its gin stands on defendant's road; the sum of \$50 as an attorney's fee. It further alleged that, in order to have the necessary expert hands for the operation of the gin machinery, plaintiff was compelled to keep a machinist for a period of three weeks at an expense of \$18 per week, awaiting the arrival of the gin stands, and two other men at \$2 a day each, for three weeks; that the aggregate damage sustained by reason of such delay was \$949. Wherefore judgment was prayed for in the sum of \$1,000.

Defendant answered by general denial.

In May, 1909, the cause was tried, resulting in a general verdict in the sum of \$1,000 for plaintiff. Motion for a new trial was presented and overruled, and judgment rendered upon the verdict. From which defendant appeals upon six assignments of error.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and H. H. Grant, both of Oklahoma City, for plaintiff in error; Louis S. Wilson, of Raton, N. M., and Victor O. Johnson, of Shoshone, Idaho, for defendant in error.

HARRISON, C. (after stating the facts as above). [4] There are two distinct causes of action alleged. The court instructed the jury on each. The jury returned a general verdict for \$1,000. No objection is urged against the form of the verdict; hence the defective features are deemed to have been waived. While not saying whether a judgment based upon such a verdict would be reversed if properly presented, yet we would suggest that a better practice in suits of this character would be to return separate findings as to each separate cause of action.

"In general, where two causes of action are submitted to the jury at the same time, a general verdict for the plaintiff should not be returned." 22 Pl. & Pr. 849.

It is a settled rule in Missouri that this form of verdict is reversible error. In *Selbert et al. v. Allen*, 61 Mo. 482, Justice Hough, in delivering the opinion of the court on this question, says: "There were two counts, each containing a separate and distinct cause of action, and a single verdict would have been improper. In *Mooney v. Kennett*, 19 Mo. 554, Judge Scott said: 'A general finding for the defendant on a petition containing several causes of action may be sustained; but, where the finding is for the plaintiff, every consideration of propriety requires that there should be a verdict in each cause of action, and these will all be blended in one judgment.' *Clark v. Railroad*, 36 Mo. 210; *Pitts v. Fugate*, 41 Mo. 405; *Collins v.*

Dullé, 45 Mo. 269; *Bigelow v. Railroad*, 48 Mo. 510; *Owens v. Railroad*, 58 Mo. 394."

Had there been separate findings in each cause of action in the case at bar, the judgment could have been so modified as to obviate another trial; but in its present form it is impossible to ascertain upon what particular facts the verdict is based. We cannot say what issues were found, or whether the verdict is responsive to all the issues involved, and inasmuch as the jury was instructed to take into consideration improper elements of damage in reaching its verdict, and inasmuch as evidence tending to establish improper elements was admitted, we are constrained to reverse the judgment rather than establish an unsafe precedent.

[1] As to the damages alleged to have been sustained by defendant's failure to put in the switch, in the first cause of action, we think each item alleged was a proper element of damage, and that the evidence fairly supports the allegations. It is contended by counsel for plaintiff in error that there was no evidence tending to support the averment that the switch was to be put in within 30 days. Without passing upon this contention, we will say that, under the circumstances in this case, it does not matter whether the defendant company made a definite promise to complete the switch in 30 days or not. The railroad company had induced the gin company to locate its plant on the railroad company's right of way rather than have it located on the right of way of a competing road. Having acceded to defendant's wishes in this regard, the gin company requested that a switch be laid to the gin site, so as to facilitate the handling of the gin machinery and material, and the shipping of cotton and seed from the gin. The railroad company agreed for a stipulated price to lay the switch. The price was agreed upon and money paid to the company on the day the contract was made. The contract was made July 11th and the track was not completed until November 1st. This, in the absence of some plausible excuse, was an unreasonable delay. Under the agreement the gin company was to do the grading necessary for the switch. This was done within 10 days after the contract, and in a manner satisfactory to the railroad, and was accepted by the road. The laying of the switch required but one day's time, after a delay of over three months from the time the grading was completed. And, after the track was laid, there was another delay of about three weeks in putting in a frog by which the tracks were connected, the putting in of which required only about one hour's time. This delay, in our judgment, is closely akin to willfulness, and the only excuse offered is that the road had been unable to get the rails any sooner, and that after the rails were laid it required three weeks more to get a frog. This ex-

cuse, in the absence of any showing as to what efforts had been made to get them, is not sufficient to justify the delay. The fulfillment of this contract within a reasonable time is implied by law, whether a definite time was fixed by the contract or not. The railroad had full knowledge of the object and purpose of this switch. It had induced the plaintiff to locate its gin at this point in order to procure the shipping of plaintiff's machinery and material and the products of the gin. It should not be heard to deny knowledge of the purpose of the gin, nor to deny knowledge of the importance of completing the switch within a reasonable time so that the gin could be put in operation by the beginning of the ginning season. The agent of the railroad company who contracted to put in the switch was definitely informed of the importance of having it ready before the arrival of the gin machinery. It was about 40 days after the contract was made before the machinery arrived, and had to be hauled to the gin site by wagons.

Inasmuch as it required but one day to put in the switch when the work was finally begun, in the absence of some showing for the delay, we think the defendant was guilty of negligence and should respond for the damages resulting therefrom.

[2] In the second cause of action, wherein the wrong measure of damages was applied, the elements of which being the expense of maintaining idle hands, expense of a trip to Dallas, amount paid as attorney's fee, damages done to cotton piled on the ground, and interest on borrowed money. It is contended by plaintiff in error that the loss alleged to have been sustained by piling the cotton on the ground, and the interest paid on the borrowed money with which such cotton was purchased, are not elements of damage for which the law holds defendant liable, for the reason that such losses are too remote and conjectural and were not contemplated by the parties at the time the shipping contract was made, and that the court erred in admitting evidence in support of such allegations and instructing the jury to take such elements into consideration in fixing the amount of damage. In support of such contention, a great number of authorities are cited, among the leading of which are: *C. R. I. & P. Ry. Co. v. Broe*, 16 Okl. 25, 86 Pac. 441; *Franklin v. Louisville & N. Ry. Co.* (Ky.) 118 S. W. 765; *Texas & Pacific Ry. Co. v. Hassell*, 23 Tex. Civ. App. 681, 58 S. W. 54; *Gulf, C. & S. F. Ry. Co. v. Gilbert*, 4 Tex. Civ. App. 386, 28 S. W. 320; *Priestly v. Northern Indiana & Chicago Ry. Co.*, 26 Ill. 205, 79 Am. Dec. 369; *C. R. I. & P. Ry. Co. v. Planters' Gin & Oil Co.*, 68 Ark. 77, 113 S. W. 352; *Harvey v. C. & P. R. Ry. Co.*, 124 Mass. 421, 28 Am. Rep. 473.

So far as the propositions involved in the case at bar have been adjudicated in the cases cited, we think the contention is sup-

ported. That is, so far as the general proposition, that before recovery can be had for lost profits the carrier should be notified at the time of making the contract of the specific purpose for which the goods are to be used, and of the losses in profits, or losses expected to be sustained by not having the use of the goods, is fairly well settled by the authorities cited.

On the question of damage for delay in transportation of articles intended for special use in business, *Hutchinson on Carriers* (3d Ed.) vol. 3, § 1369, says: "If an article is intended for use in business at destination, and the carrier unreasonably delays its transportation, the owner cannot recover for the loss of its use during the delay, or the profits which he would thereby have made if it had been seasonably delivered, unless he alleges and proves that the carrier, at the time the contract for its transportation was made, was informed of the special use to which it was to be put. And proof that the carrier had knowledge of the general use to which the article was to be put will not be sufficient to charge him with liability for loss of its use or the profits which would thereby have been made. The special circumstances of the case requiring care or expedition must have been brought to his attention in such a way that his acceptance of the article under the circumstances, could fairly be said to amount to an assumption of the risks which naturally and proximately would flow from his default. In a well-considered case (*Vicksburg & Meridian Railroad v. Ragsdale*, 46 Miss. 458) in the Supreme Court of Mississippi, in which the complaint was that the carrier had unreasonably and inexcusably delayed in the transportation of a boiler, part of the machinery of a sawmill, for the want of which the mill was stopped, and its profits were lost, the following propositions were stated by Simrall, J., as well settled: First, That in actions for damages for breach of contract of that character, 'the proximate and natural consequences of the breach must always be considered; second, such consequences as from the nature and subject-matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into; third, damages, which fairly may be supposed not to have been the necessary and natural sequence of the breach, shall not be recovered unless by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties; fourth, losses of profits in a business cannot be allowed unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself, or by explanation of the circumstances at the time the contract was made, that such damages would ensue from nonperformance; fifth, if

the contract is made with reference to embarking in a new business (such as sawing lumber for the market); the speculative profits which might be supposed to arise but which were defeated because of a breach of contract which delayed the business, cannot be looked to as an element of damages, these are dependent largely upon other contingencies, skill, industry, energy, the market supply of material, keeping machinery in order, loss of time by weather, or breakage of machinery; sixth, if the delay is in the transportation of machinery, to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means, the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time; seventh, the party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses and diminish the responsibility of the party in default to him."

The foregoing test seems to be the settled rule of law on the propositions therein stated. The author has deduced this test from the vast number of cases on the question, and, aside from being supported by the weight of authorities, it is well founded in reason.

[3] In the case at bar, there are elements of damage which could not be said to have been fairly within the contemplation of the parties at the time the goods were consigned for shipment, namely, the attorney's fee, the interest on money borrowed to buy cotton with, and the damage done to the cotton thus purchased. There is no evidence reasonably tending to support the fact that, at the time the gin stands were shipped, the railroad was informed that the gin company was going to borrow \$11,000, or to borrow any money for that matter, and pay \$100 interest therefor, or that it would probably purchase 247,000 pounds of cotton and pile same out on the ground; and that such cotton would be damaged in the sum of \$600 by lying on the ground, nor was it contemplated by the parties that a counsel fee of \$50 would be paid in the event of delay. It seems reasonable to suppose that, had these elements of damage been made a condition of the contract, the carrier would have declined to assume the risk. But, whether it would have done so or not, there is no evidence showing that these elements were considered or contemplated by the parties at the time the contract was made. The fact that the gin machinery was ordered by plaintiff from the Continental Gin Company of Dallas, Tex., and that the Continental Gin Company ordered it from an arm in Pratt-

ville, Ala., and that the Prattville Company consigned it for shipment to plaintiff, tends rather to disprove than prove the contention that the railroad was informed of any probability of plaintiff's borrowing money or piling cotton on the ground or employing an attorney. The record does show that plaintiff repeatedly informed defendant of the conditions after the delay occurred; but notice of special circumstances after the shipping contract has been made, and after the goods have been shipped, will not operate to fix a liability for special damages not taken into consideration at the time the contract was made. *Hutchinson on Carriers*, vol. 3, pp. 1621-1626, and authorities cited in notes; also, *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288; *Missouri, etc. R. Co. v. Belcher*, 89 Tex. 428, 35 S. W. 6; *Illinois Central R. Co. v. Southern Seeding Co.*, 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. Rep. 933; *Gulf, etc. R. Co. v. Looile*, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; *Bradley v. Chicago Ry. Co.*, 94 Wis. 44, 68 N. W. 410; *Franklin v. L. & N. Ry. Co.* (Ky.) 116 S. W. 765.

The record shows that the gin stands should have reached their destination not later than August 11th, and that on September 6th, after nearly a month's delay, plaintiff began purchasing cotton, and continued to do so and to pile the cotton on the ground, thereby increasing the chances of loss, with full knowledge that the shipment had not only been delayed, but that the car had been lost and could not be located. Under this state of facts, considering the remote and speculative character of the loss claimed, and that the circumstances were not in contemplation when the contract was made, the carrier could not be held liable for interest paid on borrowed money, nor for damage done to cotton piled on the ground. But the evidence does show an unreasonable delay in transportation, and that the contract was of such a nature and the machinery of such character as to charge the carrier with notice of the purpose for which it was intended and the period in which it was intended to be used.

The goods were delivered to defendant company by the initial carrier July 28th; they arrived September 17th. Ten days to two weeks was shown to be reasonable time; the other machinery, shipped at the same time, came in eleven days. The excuse for the delay of the gin stands was that the car got lost in some way and could not be found. This was negligence of itself. The law of reasonable diligence imposes a higher degree of care on the part of a common carrier than to allow a freight car containing four gin stands to be totally lost for a period of 40 days. Such management is negligent, and such a delay cannot be justified on such grounds. It constitutes a degree of negli-

gence which renders the carrier liable for the actual damages thereby caused. The only question is the proper measure of damages.

In the case at bar it could not be the interest on money borrowed for the purpose of speculating in cotton, nor to the damage done to the cotton thus purchased, for the reasons above stated. Nor the rental value of the gin stands, nor interest on amount invested in idle machinery, because these elements were not alleged in the petition, nor could it be the difference in the market value of the gin stands, for they were not intended for market or sale. They were intended for a specific, mechanical use, and the detriment resulting from the delay did not grow out of the difference in market value. The difference in market value could in no way lessen or increase the detriment resulting from the delay. The detriment would have been just the same whether the difference in market value be increased or diminished, or whether such difference be \$1 or \$1,000. It was not intended for sale. It was intended for use. Whatever detriment was caused, or whatever harm was done, resulted not from any fluctuation in market values, but from being deprived of the specific, mechanical use, for which this machinery was intended, and without which plaintiff could not operate its gin. Hence it seems to us that whatever net benefit or value the use of this machinery would have been to consignee is the true measure of damages. Its use, in the specific office for which it was designed, is the thing which plaintiff lost. Now, what injury resulted from this loss, what detriment was caused, what harm was done to plaintiff by losing the use of this machinery, and what measure is to be applied in ascertaining such harm, are the questions to be determined.

In *Hutchinson on Carriers*, p. 1639, § 1378, we find the following rule: "Where the goods are not intended for sale in the market of destination, but are intended to serve some specific purpose of the owner, the rule that the carrier will be liable for depreciation in the market value during his negligent delay will, of course, not be applicable; and in the absence of special circumstances which may make the carrier liable for some special loss, or for the expense to which the owner may be put by his negligent delay, he could be held liable only for the inconvenience to which the owner had been put by being deprived of the use of his property during the time of the delay; which must be determined as a question of fact by the jury, by ascertaining from the evidence the value of its use, the criterion of which would be, in most cases, its rental value during the delay; or, in case of an absolute refusal to transport according to contract, for such time as would be requisite to obtain the articles by another conveyance or through some other source."

See, also, authorities cited in note 8, in support of the foregoing rule. We observe also, in connection herewith, the rule in division 3, in *Vicksburg & Meridian Ry. Co. v. Ragsdale*, 46 Miss. supra.

Hence, in view of the foregoing authorities, and under the pleadings, in their present state, we think the only proper elements of damage to which the plaintiff is entitled in the second cause of action were the expenses incurred by plaintiff in trying to get its machinery, and the expense of maintaining idle hands during the delay.

The judgment is therefore reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

STATE ex rel. CALDWELL v. VAUGHN,
et al.

(Supreme Court of Oklahoma, July 30, 1912.)

(Syllabus by the Court.)

1. PROHIBITION (§ 16*)—JURISDICTION.

The district and superior courts of the state have power to issue writs of prohibition to inferior courts and bodies exercising judicial power to restrain them from exercising powers not granted to them.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 64, 65; Dec. Dig. § 16.*]

2. PROHIBITION (§ 6*)—NATURE OF REMEDY—MINISTERIAL FUNCTIONS.

The writ of prohibition will not lie to an executive or ministerial board to control or regulate it in the performance of a ministerial or executive function.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 31-33; Dec. Dig. § 6.*]

3. PROHIBITION (§ 6*)—JUDICIAL POWERS—PRIMARY ELECTIONS—DUTIES OF OFFICERS.

A county election board, in placing upon the ballots for a primary election the names of candidates for nomination by the different political parties for the different officers to be elected by the county, is engaged in the performance of a ministerial duty and does not exercise judicial power.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 31-33; Dec. Dig. § 6.*]

Error from Superior Court, Custer County; J. W. Lawter, Judge.

Proceedings by the State, on the relation of Chas. Caldwell, for writ of prohibition to C. E. Vaughn and others, as the County Election Board of Custer County. From a judgment sustaining a demurrer to the petition, the relator brings error. Affirmed.

Geo. T. Webster and A. J. Welch, both of Clinton, for plaintiff in error. Charles West, Atty. Gen., and W. C. Reeves, Asst. Atty. Gen., for defendants in error.

HAYES, J. Plaintiff in error brought this action in the superior court of Custer county to obtain a writ of prohibition against the election board of that county to restrain it from placing the names of proposed candidates upon the primary election ballot for the

office of clerk of the superior court of Custer county, and to prohibit said board from placing upon the general election ballots the names of any candidate or nominee for said office. Those persons who have applied to the election board to have their names placed upon the ballots at the primary to be held on the — day of August, 1912, as candidates for nominees of the respective parties, have been made parties defendant. Plaintiff in error, relator below, brings the action in the name of the state on his own behalf, after having requested the Attorney General and the county attorney, respectively, to bring said action, and they had refused to do so. Relator is the present clerk of the superior court of Custer county. He was duly elected to that office in November, 1910, and is now in the active discharge of his duties. He contends that by chapter 47, Sess. Laws 1910, the term of his office is fixed for four years from the second Monday in January, 1911; that said office is a state office; that the foregoing statute was not amended by section 19, c. 69, of the Session Laws of 1910; and that no statute has subsequently been passed making said office a county or district office or changing the term thereof. Respondents filed a demurrer to relator's petition, which was sustained by the trial court, and it is from the judgment of that court sustaining the demurrer and dismissing plaintiff's petition that this proceeding in error is prosecuted.

[1] Of the questions presented in counsel's brief, the only two that need be considered are: First, has the superior court jurisdiction to issue writs of prohibition for any other purpose than to carry into effect its orders, judgments, or decrees; and, second, will the writ of prohibition lie to an election board to prohibit it from placing the names of candidates for nominees of the respective parties for any office upon the ballot to be used at a primary election? The general act providing for the establishment of superior courts in certain counties of the state provides that such court shall exercise concurrent jurisdiction with the district courts (section 2, art. 7, c. 14, Sess. Laws 1909); and the act creating the superior court of Custer county provides that it shall have and exercise the same jurisdiction as is provided by law for other superior courts of the state (section 1, c. 47, Sess. Laws 1910). Section 10, art. 7, Williams' Const., in part provides: "The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and other writs, remedial or otherwise, *necessary or proper to carry into effect their orders, judgments, or decrees.*" (Italics are ours.)

It is insisted by respondents that the italicized phrase of the foregoing excerpt limits the power granted to district courts to issue writs of prohibition to the issuance of same

only when they are necessary and proper to carry into effect the orders and judgments of such courts. This construction, we think, is untenable. If this phrase limits the power granted to the courts to issue writs of prohibition, it also limits the power granted to issue writs of mandamus, injunction, and writs of habeas corpus. That the district courts of the state have power to issue these last-named writs in independent actions has been universally recognized by the courts and by the bar of the state. What was intended by this provision of the Constitution was to confer upon said courts and the judges thereof the power to issue certain specifically named writs; and, in addition thereto, such other writs remedial or otherwise as might be necessary or proper to carry into effect the orders, judgments, and decrees of such courts. The phrase italicized by us was intended to limit only the purpose for which "other writs, remedial or otherwise," may be issued, and not the specifically named writs in the first phrase of the sentence; and the district courts of the state have power to issue writs of prohibition to inferior courts or tribunals exercising judicial power to restrain them from exercising powers not granted to them.

[2, 3] The function of the writ of prohibition as it existed at common law had not, prior to the adoption of the Constitution, been enlarged by statutory enactment; nor has it been so enlarged since. In conferring upon the district courts power to issue this writ, it was intended to authorize the writ as it existed at common law. *Baker v. Newton et al.*, 22 Okl. 658, 98 Pac. 931.

"At the common law the writ of prohibition was issued on the suggestion that the cause originally, or some collateral matter arising therein, did not belong to the inferior jurisdiction, but to the cognizance of some other court. 3 Shars. Blackst. Com. 112. It was an original remedial writ provided as a remedy for encroachment of jurisdiction; its office was to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction." *Spring Valley W. W. v. S. F.*, 52 Cal. 111.

Discussing the purpose of the writ, it is said at paragraph 1722, *Spelling on Injunctions and Other Extraordinary Remedies*: "Courts almost universally preserve the original common-law features of the writ of prohibition, and confine its use to the prevention of usurpation or excess of jurisdiction by courts and bodies possessing, for certain purposes and in certain instances, quasi judicial powers."

The statute makes it the duty of the secretary of the state election board to transmit to the secretary of each county election board a notice in writing, designating the offices to which candidates are to be nominated at the primary election, and, upon receipt of that notice, the secretary of the

county election board is required to give written notice to the inspectors of the election in the various precincts in which he shall state the names of all offices for which nominees are by law to be chosen at such precincts; and it is made the duty of the precinct election inspectors, upon receiving such notice from the secretary of the county election board, to post a notice in three places in the precinct in which he shall give the names of all county or township offices for which the several political parties shall nominate candidates. The person desiring to become a candidate before any such primary election for a political party nominee shall petition the proper official to have his name printed upon the ticket of the political party whose nomination he seeks. All nominating petitions for county and township offices are required to be filed with the secretary of the county election board. Sections 3278-3280, Comp. Laws 1909. The officers charged with giving notice of what officers will be elected at the coming general election and of receiving applications for nominees for such offices have construed the statute as requiring the election of the clerk of the superior court; and the county election board, respondent herein, is proceeding to place upon the ballot for the primary election the names of those who have petitioned it for such purpose. The matter of placing the names upon the ballots for these various offices is a purely ministerial duty, and involves the exercise of no judicial power. If the election board be mistaken in the requirement of the statute as to the election of the clerk of the superior court, its act binds no one; it can render no judgment; and the placing of the names upon the primary ballot, and later of the nominees of the respective parties upon the general election ballot, cannot in any way deprive relator of his office, if his term of office is for four years, instead of two years, and does not expire until January, 1915, instead of January, 1913. A certificate of election to any candidate prevailing at the general election will not have the effect to oust relator from office, for the election board is not vested with any judicial power to determine the rights between the parties.

In *Montgomery v. State Election Board et al.*, 27 Okl. 324, 111 Pac. 447, plaintiff sought a writ of certiorari to the state election board and to one of the county election boards of the state, directing them to certify to this court a record of all proceedings had by said boards with reference to the resignation of a member of the county election board and the appointment of his successor. In denying the writ, this court said: "This board is a part of the executive department of the state, charged with the duty of the execution of all laws in force in the state relating to the holding of elections. It can exercise neither legislative nor judicial func-

tions except as the same are merely incidental to the administration of its duties as a board of the executive department. It is not such a board or commission as judicial power may be vested in pursuant to article 7, § 1, of the Constitution. * * *

In *People v. Election Commissioners*, 54 Cal. 404, relator charged that the board of election commissioners had, without authority of law, called an election for the purpose of electing freeholders to prepare and propose a city charter, and he sought a writ of prohibition to restrain them from holding the election; but the court held that the acts sought to be restrained in no manner constituted the exercise of judicial power, and that, whether they were legislative or simply ministerial, a writ of prohibition would not lie to restrain them. The foregoing case, we think, is in point here, and is in harmony with the well-settled doctrine of the courts that ministerial and executive functions cannot be controlled or regulated by prohibition. *State ex rel. v. Hawkins*, 130 Mo. App. 41, 109 S. W. 77; *La Croix v. County Commissioners of Fairfield County*, 49 Conn. 591; 32 Cyc. p. 602.

In receiving applications of candidates to have their names placed upon the primary ballots and in placing the same thereon, the county election board is engaged in a purely ministerial duty, and in the exercise of a ministerial or executive power; and if it makes mistakes in the exercise of this power, by placing the names of persons on the ballot as candidates for an office for which no election under the law can be held, it does not exercise or assume any judicial power by such act; and it cannot be restrained by a writ of prohibition.

It follows from this conclusion that the judgment of the trial court sustaining the demurrer should be sustained.

WILLIAMS and KANE, JJ., concur. TURNER, C. J., and DUNN, J., not participating.

(3 Okl. Cr. 721)

ROAN v. STATE

(Criminal Court of Appeals of Oklahoma.
Aug. 21, 1912.)

CRIMINAL LAW (§ 1069*)—APPEAL—TIME FOR PERFECTING—DISMISSAL.

An appeal, not perfected within 60 days from the date of sentence, will be dismissed on motion of the state, though the time for preparation of a case-made was extended beyond such 60 days.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691-2699; Dec. Dig. § 1069.*]

Appeal from Johnston County Court; Nick Wolfe, Judge.

John Roan was convicted of violating the prohibitory law, and appeals. Dismissed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

J. S. Ratliff, Newman & Lawrence, and J. B. O'Bryan, all of Tishomingo, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

PER CURIAM. Plaintiff in error, John Roan, was convicted in the county court of Johnston county, at the April, 1911, term, on a charge of selling intoxicating liquor, and on the 7th day of said month was sentenced to pay a fine of \$250 and be confined in the county jail for a period of 90 days.

On the 5th day of May thereafter, an order was made, extending the time within which to make and serve case-made 40 days from the 7th day of May; but no order was made extending the time within which the appeal could be perfected in this court. The petition in error and case-made were not filed in this court until the 3d day of July, 1911, more than 60 days after the rendition of judgment. The Attorney General has filed a motion to dismiss the appeal, on the ground that it was not filed in this court within the time prescribed by law.

The motion is sustained, and the appeal accordingly dismissed.

FLATHERS v. STATE.

(Criminal Court of Appeals of Oklahoma.
Aug. 21, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 240½*)—APPELLATE JURISDICTION—CRIMINAL COURT OF APPEALS.

Under the Constitution (article 7, § 2) and the statute (sections 1916 and 1917, Snyder's Sta.), the Criminal Court of Appeals has exclusive appellate jurisdiction to review and correct proceedings of inferior courts in criminal cases. Neither the Constitution nor the statute has conferred on this court jurisdiction to review remedial proceedings as for a contempt.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 708-716; Dec. Dig. § 240½.*]

2. CONTEMPT (§ 40*)—PROCEEDING TO PUNISH—NATURE AND FORM.

A proceeding against a party for contempt for an alleged violation of an order of the court in a civil action is a civil proceeding.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 122-124; Dec. Dig. § 40.*]

3. CONTEMPT (§ 3*)—PROCEEDING TO PUNISH—NATURE AND FORM.

Willful disobedience of an order of the court in a civil action is not criminal contempt; in such a case the punishment is only ordered for the purpose of enforcing such order.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 4; Dec. Dig. § 3.*]

4. CONTEMPT (§ 72*)—PROCEEDING TO PUNISH—IMPRISONMENT.

A person imprisoned as punishment for criminal contempt, properly so called, is imprisoned in execution under a sentence for a crime.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249-256, 273; Dec. Dig. § 72.*]

Appeal from District Court, Ellis County; G. A. Brown, Judge.

Benjamin M. Flathers was adjudged guilty of contempt and committed to jail, and appeals. Dismissed.

C. B. Leedy, of Arnett, and J. G. Aubuchon, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen. (John H. Burford, of Guthrie, and W. H. Springfield, of Arnett, of counsel), for the State.

DOYLE, J. The judgment and order of commitment sought to be reversed in this case was rendered in a proceeding instituted against plaintiff in error for an alleged contempt of court.

Said judgment is as follows: "Emily J. Flathers, Plaintiff, v. Benjamin M. Flathers, Defendant. Case Pending in the District Court of Ellis County, Oklahoma. On this fifth day of August, 1911, this cause came on for a hearing upon the matter of contempt charged against the defendant, Benjamin M. Flathers, and the court, being fully advised in the premises, finds that the defendant, Benjamin M. Flathers, has disobeyed various orders of the court, requiring him to pay certain sums as alimony in the above-entitled cause, and especially has he disobeyed the order of this court, made on the 14th day of July, 1911, requiring him to pay \$70 to Emily J. Flathers within six days after service of said order upon him; said sum being the aggregate amount of payments ordered to be made by him as alimony up to and including the 19th day of July, 1911. And the court finds that the defendant refused to comply with the order and make said payments in the case of Emily J. Flathers against Benjamin M. Flathers, and that the defendant was able to make such payments, and that the defendant is in contempt of this court in refusing to comply with said orders. It is therefore ordered by the court that the defendant, Benjamin M. Flathers, be committed to the county jail of Ellis county, Oklahoma, until the said order of this court is complied with, or until he shall execute and deliver to said Emily J. Flathers a quitclaim deed for all claim by him in and to lots 18, 19, and 20, in block 4, of McCrate's addition to the town of Shattuck, in said Ellis county, together with the appurtenances thereunto incident and belonging. Upon the execution and delivery of the quitclaim deed as herein above stated, or upon payments of said sum of \$70 to Emily J. Flathers, together with all costs in this behalf incurred, the said Benjamin M. Flathers shall be released from said prison and custody. It is further ordered that the said defendant, Benjamin M. Flathers, who is now present, be and he is hereby committed to the custody of the sheriff of said Ellis county, who is hereby ordered and directed to enforce this order. Witness my hand in chambers in the city of Mangum, in Greer county, Oklahoma, this

fifth day of August, 1911. G. A. Brown, District Judge of the Eighteenth Judicial District of Oklahoma, including Ellis and Greer Counties.

"Filed Aug. 8, 1911. O. E. Null, Clerk Dist. Court."

[2, 4] The Attorney General has filed a motion to dismiss this appeal, because, as shown by the record, the contempt proceedings are civil, not criminal, and this court has no jurisdiction. We are clearly of the opinion that the motion should be sustained, and the only order that can properly be made by the court is one dismissing the purported appeal. While this court has jurisdiction to review an order or judgment committing a person for a criminal contempt neither the Constitution nor the statute has conferred on this court jurisdiction to review remedial proceedings as for a contempt, where the matter of contempt consists of the disobedience of orders or decrees rendered in civil actions.

At common law, judgments of superior courts of record in matters of contempt were final, and not reviewable in any other court upon appeal or writ of error. By statute in some states the remedy by appeal and writ of error has been given. There is no good reason, however, in any case that we have examined, why cases of criminal contempt are not subject to review in some manner by an appellate court.

In an able article on criminal contempts, in the Criminal Law Magazine, vol. 5, p. 647, the distinguished writer, Mr. Seymour D. Thompson, says with regard to jurisdictions in which writs of error and appeals lie: "In several of the American states, under the operation of constitutional or statutory provisions, and, perhaps, in one or two cases, by judicial decisions contrary to the general course of authority, writs of error lie in the Supreme Court, or other appellate court, to revise the final judgments or orders of the inferior courts in proceedings for contempt."

* * * Most of the decisions which relate to the inquiry under what circumstances appeals lie in proceedings for contempt arise out of that use of process of contempt which, as explained in a former article, was in courts of equity simply a process of execution—in other words, in what are called remedial proceedings as for contempt—and the inquiry, for the most part, is whether the order appealed from is final and dispositive of a substantial right, or interlocutory merely. The general rule, varied in some jurisdictions by local statutes, perhaps by judicial decisions, is that such orders are appealable. On the other hand, proceedings as for contempt, which, in their nature, are interlocutory only, are not appealable."

Contempts of court are of two kinds, civil and criminal. Much confusion exists in judicial decisions as to whether or not con-

tempt proceedings are civil or criminal. As a general rule, these designations must be considered with reference to the specific question before the court. In the article of Mr. Thompson, above referred to, he says: "The boundary between these two kinds of contempt is, in many cases, shadowy; but the substantial distinction is that one is a mode of execution of judgments and decrees in civil cases, while the other is punishment for an offense of a criminal nature. The distinction is said to be this: 'If the contempt consist in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. The order in such a case is not punitive, but executive. If, on the other hand, the contempt consists in a threatened act injurious to the other party, the process is criminal, and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. In the former case, the private party alone has an interest in the enforcement of the order, and the moment he is satisfied the imprisonment terminates; in the latter, the state alone is interested in the enforcement of the penalty.'"

In the absence of a statutory classification, it is impracticable to state a general rule by which, in all cases, to distinguish these two classes, in the one or the other of which every act of contempt must be classified. But substantially the main distinction is stated by this court as follows: "A 'civil contempt' is where a person fails or refuses to do something which he has been ordered to do for the benefit of the opposite party to the cause. The punishment by imprisonment is for the purpose of coercing the performance of the act. A civil contempt is instituted by a private individual, for the purpose of protecting or enforcing his rights. The order in such a case is not in the nature of a punishment, but is coercive to compel him to act in accordance with the order of the court. A 'criminal contempt' embraces all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority and the dignity of the courts. In the case of a criminal contempt, the proceeding for its punishment should conform as nearly as possible to proceedings in criminal cases." Ex parte Gudenoge, 2 Okl. Cr. 110, 100 Pac. 39. See, also, *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *Hake v. People*, 230 Ill. 174, 82 N. E. 561; *Vilter Mfg. Co. v. Humphrey*, 182 Wis. 537, 112 N. W. 1005, 13 L. R. A. (N. S.) 591.

[1] Under the Constitution (article 7, § 2) and the statute (sections 1916 and 1917, Snyder's Sts.), this court has exclusive appellate jurisdiction to review and correct pro-

ceedings of inferior courts in criminal cases brought before it for determination in the manner provided by law. *Eubanks v. Cole*, 4 Okl. Cr. 25, 109 Pac. 736. The appellate jurisdiction of the Supreme Court extends to all civil cases at law and in equity.

[3] Disobedience to an order of the district court, or judge thereof, to pay alimony in a divorce action is not a criminal contempt. In such a case the punishment is only ordered for the purpose of enforcing an order in a civil action.

The order allowing bail and staying execution is hereby revoked, and the purported appeal is hereby dismissed, and the case remanded to the district court of Ellis county, with direction that the plaintiff in error be remanded to the custody of the sheriff of Ellis county in accordance with the judgment and order of the court.

FURMAN, P. J., and ARMSTRONG, J., concur.

WHALEN et al. v. SMITH, Judge. (S. F. 6,018.)

(Supreme Court of California. Aug. 1, 1912.)

1. APPEAL AND ERROR (§ 1180*)—APPEAL FROM PART OF JUDGMENT—REVERSAL—EFFECT AS TO PART NOT APPEALED FROM.

Where an appeal is taken from a specific part of a judgment, as authorized by Code Civ. Proc. § 940, a reversal would ordinarily leave the parts of the judgment not appealed from unaffected, unless the part appealed from is so interwoven with the remainder, or so dependent thereon, that the appeal from part of it affects the other parts, or involves a consideration of the whole, so as in effect to amount to an appeal from the whole judgment, and if a reversal is ordered it would extend to the entire judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4626-4631, 4658, 4659; Dec. Dig. § 1180.*]

2. APPEAL AND ERROR (§ 1180*)—PART OF JUDGMENT—REVERSAL—EFFECT.

Plaintiffs, prior to the distribution of an estate, instituted a proceeding authorized by Code Civ. Proc. § 940, to determine heirship, the ownership of decedent's estate, the interest of each respective claimant, and the persons entitled to distribution. The petition presented two issues: First, that decedent had only one brother and one sister, both of whom were dead, and that plaintiffs were the only descendants; and, second, that, as such, they were entitled to one-half of the estate under the will. The heirs and successors of decedent's widow denied that plaintiffs were the descendants of the brother and sister, and claimed that they, as heirs and successors of the widow, were entitled to succeed to three-fourths of the estate. The judgment found for plaintiffs on the first issue, but held that they were only entitled to one-fourth of the estate, and that certain of the defendants were entitled to the remaining three-fourths. From this portion of the judgment only, plaintiffs appealed, and, the court holding that plaintiffs were entitled to one-half of the estate, the judgment was reversed generally. Held, that the issue on which the judgment was reversed was separable from the issue determined in plaintiffs' favor, from which no

appeal was taken; and hence such part of the judgment was final and conclusive, and not affected by the reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4626-4631, 4658, 4659; Dec. Dig. § 1180.*]

Henshaw and Melvin, JJ., dissenting.

In Bank. Application for writ of mandamus by Martin Whalen and others against Frank H. Smith, Judge of the Superior Court of San Joaquin County. Granted.

A. H. Carpenter, for petitioners. Max Crimm, for respondent.

SHAW, J. This is a proceeding to compel the defendant, as judge of the superior court, to render judgment in the matter of the action to determine heirship in the estate of George Roach, deceased, entitled "*Martin Whalen et al. v. Joshua B. Webster et al.*," in accordance with the decision of this court on appeal therein, as reported in 159 Cal. 260, 113 Pac. 373, and without taking further evidence upon the issue as to the number of surviving children of Thomas Roach, a deceased brother of said George Roach.

The contention of the petitioners is that the appeal in *Whalen v. Webster*, supra, was from a part only of the judgment in the proceeding—a part which presented but one question, namely, whether the language of the will of George Roach gave to the descendants of his brothers and sisters one-half of his estate or only one-fourth thereof; that all other matters determined by the judgment remained unaffected, and are finally adjudicated, and, hence, that this court on said appeal had no jurisdiction to reverse the whole judgment, or any part of it, except the part appealed from; and that the mandate of reversal, although general in terms, can apply only to the part appealed from. And, further, they claim that, even if the Supreme Court had jurisdiction to reverse the entire judgment on appeal from a part only, yet, in view of the record in the case, the nature of the proceeding, the judgment rendered, and the narrow question presented by the appeal, the general mandate should not be construed to apply to the whole judgment in the proceeding below, but only to that part from which the appeal was taken.

[1] There are doubtless cases of appeals from a part of a judgment where the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal from a part of it affects the other parts, or involves a consideration of the whole, and is really an appeal from the whole, and if a reversal is ordered it should extend to the entire judgment. The appellate court, in such cases, must have power to do that which justice requires, and may extend its reversal as far as may be deemed necessary to accomplish that end. The Code provides that a party may appeal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from a specific part of a judgment. Code Civ. Proc. § 940. Ordinarily such an appeal would leave the parts not appealed from unaffected, and it would logically follow that such unaffected parts must be deemed final, being a final judgment of the facts and rights which they determine. The decisions are to the effect that upon such an appeal, where the parts not appealed from are not so intimately connected with the part appealed from that a reversal of that part would require a reconsideration of the whole case in the court below, the court upon such partial appeal can inquire only with respect to the portion appealed from. Thus, in *Early v. Mannix*, 15 Cal. 150, it was said that a plaintiff in forcible entry could appeal from an order denying his motion for treble damages and, in the meantime, enforce his judgment for restitution of the premises. In *Pacific Mutual L. I. Co. v. Fisher*, 106 Cal. 237, 39 Pac. 758, it was said that the Supreme Court is not at liberty to review a part of a judgment which is not appealed from. In *Estate of Burdick*, 112 Cal. 391, 44 Pac. 734, the court below made a decree, upon the executor's petition, settling his final account and making distribution of the estate. He appealed from all of the decree, except the part thereof settling his final account. Upon the appeal he applied to review the order settling the final account; but the court refused to consider the question of its accuracy, saying: "We must not interfere with it. To attempt to do so would be an arbitrary proceeding without authority." In *Ricketson v. Richardson*, 26 Cal. 154, there were several defendants, and one alone appealed. A reversal as to all of the defendants was asked. The error consisted of a defective service of summons and affected the appellant only. A reversal as to the other defendants was refused; the court saying that it was bound to presume that there was no error as to them, since they had not taken any appeal. In *Kelsey v. Western*, 2 N. Y. 505, the court said: "It is well settled that only that part of a decree which is appealed from is brought before the appellate court for review." In *Bush v. Mitchell*, 28 Or. 92, 41 Pac. 155, the court referring to an appeal from a part of a judgment, quoted the following language from *Shook v. Colohan*, 12 Or. 243, 6 Pac. 503: "The trial of the suit anew would be confined to a trial of the case affecting the part of the decree specified in the notice of appeal." In that state the appellate court had power to try the suit anew. The following cases recognize and apply the general principle that an appeal from a distinct and independent part of a judgment does not bring up the other parts for review in the appellate court, and that a reversal of the part appealed from does not affect the portions not dependent thereon, but that they will stand as final adjudications: *Ikerd v. Postlewhaite*, 34 La. Ann. 1235; *Nelson v.*

Hubbard, 13 Ark. 253; *Scutt's Appeal*, 46 Conn. 38; *Ervin v. Collier*, 3 Mont. 189; *Hess v. Winder*, 34 Cal. 270; *Sands v. Codwise*, 4 Johns. (N. Y.) 602, 4 Am. Dec. 305; *In re Davis' Estate*, 149 N. Y. 548, 44 N. E. 185; *Leavison v. Harris* (Ky.) 14 S. W. 343; *Meadow, etc., Co. v. Dodds*, 6 Nev. 281; *Robertson v. Bullions*, 11 N. Y. 245; *Moerchen v. Stoll*, 48 Wis. 307, 4 N. W. 352.

[2] This principle is decisive of the case. If the decree appealed from in *Whalen v. Webster* had been a decree distributing the estate, it might plausibly be argued that the distribution was the final judgment, and that the decision as to the persons who are the heirs at law was a mere finding of fact, upon which the final judgment followed as matter of law, in which case a general order of reversal would open the whole matter for a new trial as to the facts. But that proceeding was instituted under section 1664 of the Code of Civil Procedure. This section provides a special proceeding for the purpose of ascertaining and determining, in advance of distribution, the persons who have succeeded to the estate and the portions inherited by or devised to each of them. Upon the trial thereof, the court must "determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof." No other judgment is to be rendered, and no disposition whatever is to be made of the estate. It is a determination, first, of the persons entitled as heirs, devisees, or legatees, or as their successors, if any have died; and, second, the interest of each one in the estate of the decedent.

The will of George Roach gave an interest in his estate, after the death of his wife, to be equally divided among his brothers and sisters or their descendants. The petition of *Whalen* and others, plaintiffs in the proceeding, alleged: First, that the decedent had only one brother and one sister, both of whom were dead, and that plaintiffs were the only descendants; and, second, that, as such, they were entitled to one-half of the estate under the will. The heirs and successors of the widow of the decedent appeared and answered, denying that plaintiffs were descendants of the brother and sister, and claiming that they, as heirs and successors of the widow, were entitled to succeed to three-fourths of the estate. The judgment therein declared, first, that the plaintiffs were the devisees and heirs at law of Roach, the descendants of his brothers and sisters referred to in his will and the persons entitled to take as devisees under his will; second, that each of them was entitled to a specific interest, the aggregate of all of them being only one-fourth of the estate; and, third, that certain named defendants, as successors of the widow, were entitled to the remaining three-fourths. There is nothing in the record to

indicate that there was any claim that there were other descendants of the brothers and sisters. The principal dispute was upon the question of law whether the fourth clause of the will gave the plaintiffs one-half of the estate or only one-fourth thereof. The plaintiffs appeal only from that part of the judgment which declared that they were entitled to take only one-fourth, and that certain defendants were entitled to three-fourths of the estate. No appeal was taken from the part declaring that the plaintiffs were persons entitled, as descendants, of the brother and sister, to take as devisees under the will. The question whether or not said brother and sister left other descendants, and whether or not there were other brothers and sisters, was in effect determined in the negative by the judgment. The plaintiffs were satisfied with that determination, no one appeared to dispute or question it, and its accuracy was not reviewed, considered, or discussed by this court in its opinion on the appeal; nor was it presented for review by the record. The only question discussed or decided was whether the fourth clause disposed of one-half of the estate or one-fourth thereof. The decision was that it gave one-half, and the judgment on that subject was accordingly reversed. The mandate did not go into specific particulars, but consisted simply of the words, "The judgment is reversed." The part of the judgment appealed from determined no question of law, except the proper construction of the will. No question of fact was involved in the appeal. The determination of the construction of the will did not require any inquiry concerning the persons who were entitled as members of the class described as descendants of the brothers and sisters of the decedent. The court was therefore without authority to consider the latter question, and it did not make any attempt to do so. In view of these considerations, the words of the mandate should be understood and construed to refer only to the part of the judgment appealed from—the part which the Supreme Court had jurisdiction to review—and to reverse that part only, without affecting the other parts not specified in the notice. It follows that the court below has no authority to retry the question whether there were other descendants of the brothers and sisters than those included in the decree previously rendered. The decision left no matter of fact to be determined, and the only duty of the court below upon the going down of the remittitur was to enter judgment in the proceeding in accordance with the facts previously found and with the decision of the Supreme Court on appeal.

It is therefore ordered by the court that a writ of mandate issue, directing the superior court of San Joaquin county to enter judgment in the proceeding of *Whalen v. Webster* upon the facts found in accordance with the opinion of the Supreme Court, and without

proceeding to retry any issues of fact determined upon the former hearing in that court.

We concur: BEATTY, C. J.; ANGELL, T. J.; SLOSS, J.; LORIGAN, J.

HENSHAW, J. I dissent. The power of this court to reverse the whole of a judgment, when a part only has been appealed from, is conceded by the prevailing opinion to exist.

The judgment delivered by this court in *Whalen v. Webster*, 159 Cal. 260, 113 Pac. 373, is in the following language, "The judgment is reversed." Language so plain and so free from ambiguity neither requires explanation nor permits construction. It either means what it says, or it means nothing. It follows, therefore (the power of the court so to do being conceded), that this court deliberately reversed, not a part, but the whole, of the judgment appealed from; for, as is said in *Glassell v. Hansen*, 149 Cal. 511, 87 Pac. 200, where a similar question was presented: "In reversing the case, this court might have directed what issues should again be tried, and what should be deemed finally settled by the first trial; however, it did not do so, and the judgment was merely in the general terms, 'The judgment and order are reversed.' This clearly left the whole case to be tried anew, as if it had not been tried before. *Falkner v. Hendy*, 107 Cal. 54 [40 Pac. 21, 386]." In *Cowdery v. London, etc., Bank*, 139 Cal. 298, 73 Pac. 196, 98 Am. St. Rep. 115, this court, in effect, refused to put any construction upon a judgment such as the one here under consideration, or to attempt to modify its plain meaning in any way. The judgment of this court in the *Cowdery Case* was: "The judgment * * * is reversed and the cause remanded, with directions that the trial court enter judgment in accordance with the views here expressed." Says this court: "The legal effect of the order of the Supreme Court was to reverse and vacate the judgment, and not merely to modify it. Upon a decision of the Supreme Court that there was material error in the action of the court below, that court may direct the character of the subsequent proceedings in the lower court, and its mandate will vary according to its views as to the proper course to be pursued. It may conclude not to reverse the judgment, but to modify it, by eliminating some portion, or by adding something to it, leaving the remaining part of the judgment below to stand affirmed and in full force and effect from the date of its original entry or rendition; or it may reverse the judgment, which means to entirely vacate it, and may remand the cause for a new trial; or, if a new trial is not necessary, it may upon the reversal remand it, with directions to the lower court to enter a particular judgment."

What this court is here doing is changing

in essential particulars a judgment which it has solemnly given, which judgment by lapse of time has passed from its control and become an absolute finality. It is doing this under the guise of construing language so plain as to forbid construction. The direct consequence, the legal effect, of this is to impair, without warrant of law, the stability and security of every judgment which this court has rendered. If this court in one case can say that its formal decree reversing the whole of the judgment of a trial court means merely the reversal of some portion of that judgment, it may say so in any case.

The judgment which this court rendered in 159 Cal. 260, 113 Pac. 373, was either mistaken or not mistaken. If it was not mistaken, there is no need for its correction. If it was mistaken, this is not a legal method for its correction. Nothing but hopeless confusion in the law and a just contempt for the law can follow, if its highest interpreters, under conditions such as those here present, shall be permitted to say that their own deliberately chosen language does not mean that which alone the words must mean to any comprehending mind. I therefore dissent under the conviction that the prevailing opinion and judgment are not alone without the sanction of the law, but are a dangerous innovation upon the law.

I concur: MELVIN, J.

453 Cal. 363

PEOPLE v. HATCH. (Cr. 1706.)

(Supreme Court of California. Aug. 2, 1912.
Rehearing Denied Aug. 31, 1912.)

1. CRIMINAL LAW (§ 1032*)—APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

An objection to the indictment, which was not taken by demurrer in the trial court, cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642, 2653; Dec. Dig. § 1032.*]

2. EMBEZZLEMENT (§ 11*)—DEMAND—NECESSITY.

To support a conviction for embezzlement, it need not be shown that after the fraudulent misappropriation of the money a demand was made on defendant.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

3. EMBEZZLEMENT (§ 44*)—DEMAND—EVIDENCE—SUFFICIENCY.

In a prosecution for embezzlement, evidence held sufficient to show that a demand was made on defendant for the money appropriated.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67-70; Dec. Dig. § 44.*]

4. CRIMINAL LAW (§ 563*)—EVIDENCE—CORPUS DELICTI.

The corpus delicti need not be proved beyond a reasonable doubt by evidence other than the admissions and declarations of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1269; Dec. Dig. § 563.*]

5. EMBEZZLEMENT (§ 6*)—ESSENTIALS.

Where accused had control over money or a bank check which could be converted into money, he may be convicted of embezzlement for his fraudulent misappropriation, although he did not take possession of actual currency.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 4; Dec. Dig. § 6.*]

6. CRIMINAL LAW (§ 1170*)—APPEAL—HARMLESS ERROR.

The erroneous rejection of a note offered in evidence is not prejudicial, where every fact which could have been shown by it has been shown by the uncontroverted testimony of the witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

7. CRIMINAL LAW (§ 670*)—TRIAL—WAIVER OF ERRORS.

In a prosecution for embezzlement, where defendant sought to introduce a note, and the court, not being fully advised in the matter, sustained an objection, but expressed a willingness to permit the note to be introduced, if connected with the case, and accused rested his case without making any attempt to connect the note, he waived the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1593-1596; Dec. Dig. § 670.*]

8. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

In a prosecution for embezzlement, where all of the facts upon which a witness' conclusions were based had been admitted in evidence and were before the jury, and the witness' conclusions were the only reasonable ones, the admission of his conclusions was not harmful.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3063, 3187-3143; Dec. Dig. § 1169.*]

9. CRIMINAL LAW (§ 371*)—EVIDENCE OF OTHER OFFENSES—EMBEZZLEMENT.

While evidence of independent crimes which have no tendency to prove a material fact in connection with the particular crime for which accused is being prosecuted is inadmissible, yet evidence of other offenses is admissible to prove motive or intent, or where the evidence of the crime is intermixed with the evidence of other crimes; and hence, in a prosecution for embezzlement, where accused had for a long time acted as agent, and had received and disbursed money, and had refused to account for a large sum of money, evidence of those facts was admissible in a prosecution for the embezzlement of a selected item.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 907, 972-976; Dec. Dig. § 371.*]

10. CRIMINAL LAW (§ 713*)—TRIAL—ARGUMENTS OF COUNSEL.

In a prosecution for embezzlement, where accused, who had for a long time acted as agent, refused to give any account of what had become of his principal's money, a statement by the district attorney in his argument, that it was the duty of a trustee to exercise the highest good faith toward his beneficiary in matters concerning the trust, was not erroneous, being applicable to the case in question and a correct statement of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1678; Dec. Dig. § 713.*]

11. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS.

Where the instructions, read as a whole, did not incorrectly state the law, and are not

contradictory, a new trial cannot be claimed because some particular instruction is not complete.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

12. CRIMINAL LAW (§ 807*)—TRIAL—INSTRUCTIONS.

Argumentative instructions are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

13. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a prosecution of an agent for embezzlement of the funds of his principal, where accused offered no evidence that the relation between him and his principal was that of debtor and creditor, an instruction on that theory was properly refused, not being applicable to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.*]

14. CRIMINAL LAW (§ 822*)—TRIAL—READING LAW TO JURY.

In a criminal prosecution, where the instructions regarding the degree of certainty required for conviction, were clear and full, and, taken as a whole, could not have conveyed any other impression than that the prosecution was bound to prove every element of the crime beyond a reasonable doubt, the reading of Code Civ. Proc. § 1826, providing that the law does not require such a degree of proof as, including possibility of error, produces absolute certainty, but that moral certainty only is required, is not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

15. CRIMINAL LAW (§ 881*)—TRIAL—VERDICT—SUFFICIENCY.

In a prosecution for embezzlement, where the indictment charged accused with the embezzlement of \$37,000, and at the outset the district attorney selected as the item to be proved the amount of \$4,000, a verdict, finding accused guilty of embezzlement as charged in the indictment and elected by the people as the substance of offense to be proved, is sufficient; the election of the people appearing from the minutes of the trial, which, under Pen. Code, § 1207, are a part of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2093; Dec. Dig. § 881.*]

Melvin, J., dissenting.

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Jackson Hatch was convicted of embezzlement, and he appeals. Affirmed.

See, also, 13 Cal. App. 521, 109 Pac. 1097.

Rehearing denied; Beatty, C. J., dissenting.

Frank Freeman, O. D. Richardson, and H. I. Stafford, for appellant. U. S. Webb, Atty. Gen., Raymond Benjamin, Chief Deputy Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. This appeal from the judgment, and from an order denying defendant's motion for a new trial, comes to this court in consequence of the inability of the Justices of the District Court of Appeal

for the First appellate district, to which the appeal was taken, to agree upon a judgment. Two of the Justices of said court were of the opinion that the judgment and order should be reversed on account of errors in the admission and rejection of evidence, while the third Justice expressed the view that the rulings in question, if erroneous, were not prejudicial to the appellant. All three Justices agreed that, except with regard to the particular rulings just referred to, the record disclosed no error affecting any substantial right of the defendant.

The following opinion, in which we express the views of this court upon the questions raised by the appeal, is taken, virtually in its entirety, from the two opinions filed in the District Court of Appeal.

This is the second appeal in the case. Upon the first appeal the judgment against the defendant was reversed, and the cause remanded for a new trial. The retrial resulted again in the conviction of the defendant, and this appeal is from the judgment and order denying his motion for a new trial.

Upon this appeal the appellant again presents the point that the court erred in overruling his demurrer to the indictment, for the reason, as he claims, that the indictment charges appellant with two offenses. It is sufficient to say that this point was decided against the appellant upon the former appeal. *People v. Hatch*, 13 Cal. App. 521, 109 Pac. 1097. However, in addition to *People v. Thompson*, 111 Cal. 242, 43 Pac. 748, cited in the opinion upon the first appeal, we may cite *People v. Shotwell*, 27 Cal. 401; *People v. Frank*, 28 Cal. 507; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480.

[1] It is further urged that the indictment does not conform to the requirements of section 954 of the Penal Code, as amended in 1905 (St. 1905, p. 772), in that the "different statements of the same offense" are not set forth in different counts. This point is not raised by the demurrer, which is simply that more than one offense is charged in the indictment. In thus disposing of the argument of counsel, we do not wish to be understood as intimating that his point would be good, if properly raised by the demurrer.

Appellant urges that the evidence is not sufficient to support the verdict of the jury, finding the defendant guilty as charged. We have carefully read all the evidence in the case, and find no merit in this contention. We do not deem it necessary to discuss the evidence in detail, but shall consider it only in regard to certain particulars, in which it is claimed to be deficient.

[2, 3] It is claimed that no demand was shown to have been made upon defendant for the money involved with which it was his duty to comply.

In the first place, the guilt or innocence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

of defendant does not necessarily depend upon the question whether or not any demand had been made upon him for the money involved. The real question is, Does the evidence show a fraudulent appropriation by defendant of the money involved? Neither *People v. Page*, 116 Cal. 387, 48 Pac. 328, nor *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524, lays down the rule that a demand is necessary, as a matter of law, to constitute an embezzlement. In each of these cases the court discussed the evidence, and held that it was insufficient to support a verdict of guilty, and in so doing adverted to the fact that no demand had been made, and in each case also adverted to the fact that it had not been shown that the defendant had in fact, or at all, appropriated the money involved to his own use, or that he did not have it on hand at all times to meet any demand, if one had been made. "No doubt embezzlement may be established under certain circumstances without proof of a demand, as where other evidence clearly shows an appropriation by an employe of his employer's funds, with intent to do so fraudulently and feloniously." *People v. Royce*, supra. In some cases, in the absence of other sufficient proof, a demand may be necessary to fix the fact of the fraudulent appropriation; but the real test always is: Does the whole evidence establish the crime charged; that is, a fraudulent appropriation as charged in the indictment. *People v. Ward*, 134 Cal. 301, 66 Pac. 372.

In the second place, there is ample evidence in the record of a sufficient demand. At the outset of the trial, the district attorney selected, as the item upon which he would rely for a conviction, the sum of \$4,100.55, received by appellant for property belonging to the prosecutrix, Mrs. Sage, known as the Lyon street property, sold by him under her instructions in June, 1907. He had been her agent for a number of years. In January, 1907, he furnished her a statement, which on its face showed that he had in his charge as her agent money loaned and bearing interest in the sum of \$34,500, and four pieces of real estate; one of them being the property above referred to as sold in June, 1907. In November, 1907, on the day following Thanksgiving day, Mrs. Sage called with her son, L. A. Sage, upon defendant and told him she would like to turn over all her affairs to her said son. The son, L. A. Sage, requested the defendant at his earliest opportunity to turn over to him all the properties and accounts of his mother in defendant's charge. Defendant stated that it would take some time to do this, as the accounts were mixed, but in effect promised to do so as soon as possible. L. A. Sage thereafter called on defendant several times, urging a settlement, but was put off with excuses. However, about the 1st of January, 1908, defendant did turn

over of cause to be delivered to Mr. Beasley, who seems to have been acting as attorney for Mr. and Mrs. Sage, some notes, the face value of which did not exceed \$5,000; while the evidence shows that he should have had in his possession at that time either money or securities to the amount of upwards of \$35,000. Thereafter, on January 8, 1908, L. A. Sage and his attorney, Mr. Beasley, had an interview with defendant in the office of Mr. Beasley concerning the affairs of Mrs. Sage. At this time Mr. Sage asked Mr. Hatch to turn over to him all securities and moneys that he held in his possession belonging to Mrs. Sage. Defendant answered, saying: "You have got to rest satisfied with my statement that there are no securities, and the money is all gone." He refused to state what had become of the money or securities. Subsequently, and before the indictment was found, Mr. Sage served on the defendant a written demand, together with a certified copy of a power of attorney from Mrs. Sage to L. A. Sage. This demand was in three parts. One part, signed by Mrs. Sage, demanded that he turn over and deliver to her son, Louis A. Sage, all moneys, notes, securities, and other evidences of indebtedness in defendant's possession belonging to Mrs. Sage. Another part demanded \$38,298.21, and the third part demanded in detail various sums of money, itemized and described, including one for \$4,356.85, described as received by defendant from the sale of the Lyon street property.

We have no doubt that the above matters show, not only one demand, but more than one demand, quite sufficient to make it the duty of the defendant to turn over all money and securities in his charge belonging to Mrs. Sage, including the money selected as the basis for his prosecution. He knew, or should have known, exactly what money and securities he held that belonged to her. As her agent, he was bound to act toward her in the utmost good faith. He had in effect been instructed by her as early as November to turn over all her property in his possession to her son. It was clearly his duty to comply with this instruction, which was a sufficient demand to charge him with compliance therewith.

[4] It is claimed that the corpus delicti was not proved by evidence outside of the declarations and admissions of defendant. It must be remembered that the rule does not require that the evidence, other than the admissions and declarations of defendant, establish the commission of the offense beyond all reasonable doubt. *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Ward*, 134 Cal. 306, 66 Pac. 372; *People v. Rowland*, 12 Cal. App. 7, 106 Pac. 428. We are satisfied that the record presents substantial and sufficient evidence, besides the admissions and declarations of the defendant to establish the commission of the crime charged.

[5] The appellant makes the point that the verdict cannot be supported, because the evidence does not show the appropriation of *lawful money* of the United States, nor, as it is claimed, of any money at all.

We find no merit in this contention. Defendant received a check for \$4,100.55 in San Francisco. He brought this to San Jose and received therefor three certificates of deposit, one for \$2,000, and two each for \$1,000. The money called for by these certificates of deposit thus came into the control of the defendant. It may be that he never had the money in specie in his hands; but it was in his control. This meets both the language of the statute and of the indictment. The certificates of deposit which he received for the check were in form as follows: " * * * Jackson Hattli had deposited in the First National Bank of San Jose, Cal. \$1,000.00; one thousand dollars, payable to the order of self on return of this certificate properly endorsed. * * * "

The money represented by such certificates was in his control, though in the possession of the bank. That the money represented by such certificates was lawful money of the United States is also sufficiently shown. When we speak or contract with reference to dollars in this country, we mean lawful money of the United States. No other sort of dollars could have been rightfully or lawfully paid in discharge of the obligations represented by the certificates of deposit. The money that came into his control by this transaction was necessarily lawful money of the United States. Again we say, after a careful examination of the evidence, we are satisfied that it is sufficient to support the verdict.

One of the matters most strongly relied upon by appellant upon this appeal concerns the ruling of the court in refusing to admit in evidence a certain promissory note for the sum of \$5,000, and executed by Mrs. Sage.

The prosecution had introduced evidence showing that on the 12th day of June, 1907, defendant had received in payment of the purchase price of the Lyon street property, sold by him for Mrs. Sage, a check for \$4,100.55. The check was drawn payable to one Murray F. Vandall, and was indorsed by him payable to the order of defendant. The evidence for the prosecution showed that defendant, on the 14th day of June, 1907, indorsed and delivered said check to the First National Bank of San Jose at San Jose, and received therefor from said bank, as previously stated, three certificates of deposit, one for \$2,000, and two for \$1,000 each, all payable to the order of defendant, and a credit to his personal account in the sum of \$100.55, thus making up the full amount of the sum of \$4,100.55. This is the amount and represents the item selected by the district attorney as the basis of the charge up-

on which he asked for a conviction. It was the theory of the prosecution that the defendant had fraudulently appropriated said sum of money and the whole thereof to his own use, and it had introduced evidence tending to support such theory.

After proving that the note in question was signed by Mrs. Sage, defendant further proved by Mr. Knox, an officer of the Commercial & Savings Bank, the payee in said note, that defendant had fully paid the principal of said note in five payments, as well as all interests, amounting to over \$500. One of these payments was shown to have been made by indorsing over to the payee in said note, on June 15, 1907, the certificate of deposit for \$2,000, above referred to, and which represented \$2,000 of the money selected as the basis of the charge against defendant.

[6] Appellant offered the note in evidence, and the court sustained the objection of the district attorney to its admission. This action of the court affords no sufficient ground for reversal, for the reasons:

(A) The error in excluding the note was not prejudicial, inasmuch as every material fact which could have been shown by the paper had already been testified to by the witness, and there was no attempt to contradict any of such facts.

[7] (B) The error in sustaining the objection to the offer of the note was waived by the appellant. When the note was first offered, the objection was sustained. It appears, however, from a colloquy which followed the ruling that the court had not fully understood the testimony of the witness Knox. It having been explained that a \$2,000 payment on the note had been made out of the proceeds of the Lyon street property (but no attempt being made to connect any of the other payments with the transaction under inquiry), the court expressed its willingness to permit the note to go in, if it were proper to admit a document which had been thus connected in part only. After some further discussion, the court stated that the ruling excluding the note would stand; whereupon the defendant rested. The discussion was so protracted that we cannot set it forth at length here. It is, however, quite apparent from a reading of the entire matter that the court intended to defer a final ruling until it could investigate the propriety of admitting in evidence such parts of the document as were connected with the transaction in controversy, and that the defendant prevented such investigation by his prompt, not to say precipitate, action in resting his case before the court was prepared to finally rule. Even after the defendant had rested, the court in effect gave him an opportunity to renew his offer of those parts of the note that had been properly connected; but no response was made to this suggestion. Under these circumstances, we

are satisfied that the error, if any, should be held to have been waived.

[8] The court permitted E. L. Peterson, the exchange teller of the First National Bank of San Jose, and a witness for the people, to testify concerning certain checks, certificates, and deposit slips. In each instance the witness was shown a deposit slip and a certain check or certificate, and was asked to explain if there was any connection between the two papers. In each case, after an examination of the papers, he stated, over the objection of the defendant, that this question called for the conclusion of the witness that the slip disclosed that the check or certificate had been deposited to the credit of the defendant. All the facts upon which the witness' conclusion were based had been admitted in evidence and were before the jury; and, as the conclusion given by the witness appeared to be the only one that could be reasonably reached, it is difficult to see how any substantial right of the defendant was prejudiced.

The appellant contends that the court erred in admitting much evidence tending to prove embezzlements other than the one for which defendant was being tried.

[9] Over the objection of defendant, the court permitted the district attorney to prove that the defendant, at various times while he was acting as the agent and attorney of Mrs. Sage, collected and received for her and as her agent various sums of money, which he deposited in bank to his personal account and never paid to Mrs. Sage or to her use. Some of this money was received before and some after the money selected as the basis of the charge for which he was being tried.

The testimony as a whole tended to show that when defendant was called upon to turn over all property and money in his hands belonging to Mrs. Sage he should have had in his charge money or securities to an amount upward of \$35,000. He did turn over securities to an amount of less than \$5,000, and a day or so afterwards, when asked by Mr. Sage, the son and authorized agent of Mrs. Sage, to turn over all the securities and money in his charge belonging to Mrs. Sage, he replied that there were no securities, and the money was all gone.

While it is true that independent crimes, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged, may not be proven against the defendant, this rule does not exclude evidence of such other crimes, when the evidence thereof does tend to prove some material element of the crime for which the defendant is on trial. This well-recognized exception to the general rule finds frequent application in cases where evidence of the crime tends to prove a motive for the commission of the crime charged, and where, a fraudulent intent being a

necessary element in the crime charged, the evidence of the other crimes tends to establish and fix the existence of such intent, and in cases where the evidence tending to establish the crime charged is intermixed with the evidence of the other crimes.

We think the character of the offense charged here and the facts of the case bring it within the two latter conditions. Money ordinarily has no earmarks, and it is frequently impossible to prove the specific act of appropriation of a designated item of such money. Especially is this true where, as here, the agent has collected and disbursed various and large sums for his principal during an agency extending over a long period. In the case at bar, it was indeed shown that defendant had collected the specific item of \$4,100.55 selected as the basis of the charge, and had deposited it to his individual account. While the fact that he thus deposited it to his individual account might be considered by the jury as tending to prove that in so doing he intended to fraudulently appropriate it to his own use, the district attorney had a right to support such inference of a fraudulent purpose, as well as the fact of the appropriation by other evidence that would legitimately tend to such support. Evidence that defendant had collected for his principal divers moneys which he had deposited to his individual credit, and that when the total which he ought to have had on hand or under his control amounted to upwards of \$35,000, including the \$4,100.55, a demand was made upon him to settle, to which his only reply in substance was that it was all gone, all tended to prove that the \$4,100.55 had been by him fraudulently appropriated, and that the deposit thereof to his individual credit was for the purpose and intent to so fraudulently appropriate it. The evidence of the fraudulent appropriation of the \$4,100.55 was intermixed in logic and in fact with the evidence as to the other items which he said were all gone.

If the evidence as to the collection of the other items and their deposit to the credit of defendant, and total amount, and the admission or statement of defendant that they were all gone, had not been furnished the jury, we doubt not that an argument to the effect that it had not been proved that the \$4,100.55 had been fraudulently appropriated, or appropriated by defendant at all, would have been given much weight. Instances where evidence of other embezzlements have been allowed are found in *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627, *People v. Rowland*, 12 Cal. App. 7, 106 Pac. 428, and *People v. Gray*, 66 Cal. 271, 5 Pac. 240, all of which cases support what we have said as to the rule to be applied in this case. See, also, the cognate cases of *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513.

The facts of this case bear little resemblance to the facts in the case of *People v. Bartnett*, 15 Cal. App. 89, 113 Pac. 879, cited by the appellant. In the *Bartnett* Case the charge of embezzlement was based upon the sale of certain identified bonds, and, as is pointed out in the opinion, the evidence as to the sale of other bonds at a prior time was in no way interblended with the evidence of the sale selected as the basis of the charge. The court did not err in permitting evidence of the other offenses.

[10] It is contended by appellant that the district attorney was guilty of misconduct in stating to the jury in the course of his argument the law concerning the duty of a trustee to act in the highest good faith toward his beneficiary in matters concerning his trust. It is not contended, and it cannot be successfully contended, that the district attorney in his remarks misstated the law in the abstract; but the contention of the appellant seems to be based upon the proposition that the law as stated has no application to a criminal case, and that such remarks as were made by the district attorney in this connection have no place in the argument to a jury, where an agent is charged with the embezzlement of the funds of his principal. This contention seems to be based upon a misapprehension of the effect of what was said by the District Court of Appeal in this case with regard to an instruction given by the court upon the first trial of this case.

Upon such trial the defendant was a witness, and claimed that the money which he was charged to have embezzled had been loaned to him by his principal, Mrs. Sage. Upon cross-examination he was obliged to admit that at the time he claimed he had obtained the alleged loans he was insolvent, but made no disclosure of such condition to Mrs. Sage. This fact had been much emphasized in the cross-examination. The court in its charge, without explanation or limitation, after stating, "You will observe that the essential element of the offense of embezzlement of which defendant is charged is the fraudulent conversion or misappropriation by the defendant of property received by him in a trust capacity," proceeded to state the rule as to the good faith required of an agent or trustee in dealings with his principal. The District Court of Appeal in its opinion pointed out the circumstances under which the instruction was given, and its tendency, in the manner in which it was given, to mislead the jury, and concluded with the statement that "under the condition of the evidence as above indicated, and in the connection in which the latter part of the instruction was given, it was erroneous, and, we think, clearly prejudicial to the rights of the defendant." As a reading of the opinion will show, the conditions under which the instruction was given were exceptional, and the instruction came from the court without such explanation as would

limit it in its proper application; no such conditions exist upon this appeal. What the district attorney said was correct as a principle of law, and had a just application to the circumstances of the case. Especially did it have application to the conduct of defendant in refusing in effect at the interview with Mr. Sage, at the office of Mr. Beasley, to give any account of what had become of the money of Mrs. Sage, except to say that it was all gone. The rule stated by the district attorney was correct, both in law and in good morals, and was a very proper subject to call to the attention of the jury in discussing the conduct of defendant in his dealings with Mrs. Sage and her property intrusted to him as her agent. Nothing that is found in the opinion upon the former appeal, when read in its true connection, justifies the criticism of the district attorney made by appellant concerning this particular matter.

The district attorney, evidently in the heat engendered by a hotly contested trial, did make some comments that should have been omitted. Thus, although the defendant did not become a witness, the district attorney made a remark in a discussion with the court to the effect that he (the defendant) could testify to a certain matter. The court, however, promptly, upon objection being made, correctly admonished the jury in regard to such remark. Some other remarks were made which might better have been omitted; but none of them were of sufficient importance to justify a reversal.

[11] Appellant also contends that the court erred in refusing to give certain instructions requested by defendant, in modifying others, and in giving certain instructions upon its own motion. The instructions given are long and, we think, quite complete, and properly guarded the rights of the defendant. Some particular instructions, when read alone and without regard to their connection, may be subject to some criticism; but the instructions must be read as a whole, and if, when so read, they do not incorrectly state the law, and are not contradictory, a new trial should not be ordered because some particular instruction is not in itself a complete statement of the law.

[12, 13] Defendant complains of the refusal of the court to give several instructions, based upon the theory that there was evidence in the case that tended to support the theory that the relations between Mrs. Sage and defendant were those of debtor and creditor. Most of these instructions are argumentative, and for that reason objectionable. Furthermore, we find nothing in the record that tends to support the theory upon which they were based. There is nothing in the evidence that in any way tends to show that the relations between Mrs. Sage and the defendant were those of creditor and debtor, except in so far as it may be said that every agent who receives money for his principal and

converts or withholds it becomes indebted to his principal for the amount thereof as for money had and received for the use and benefit of his principal.

There is in the record one statement, and one statement only, rendered by defendant to Mrs. Sage of receipts and disbursements by him for her. The receipts are listed under the heading "Receipts," and the disbursements under the heading "Disbursements." There is absolutely nothing in the statement to indicate anything other than the ordinary relation of principal and agent. The terms "credit" and "debit" do not even appear in the statement; nor does it appear from such statement that any of the money collected for Mrs. Sage was, either with her knowledge or without such knowledge, mingled with the money of defendant. By this statement we do not mean to suggest that such fact would be important if it did appear. This statement tends to show that defendant was dealing with the moneys and property of Mrs. Sage as agent, and not otherwise.

Appellant in his brief has several times stated that defendant rendered to Mrs. Sage between 60 and 70 statements. He has not pointed to any place in the record where such fact appears, and we have been unable to find it. Certain it is that it nowhere appears what the statements contained. If they were of the form of the one that was introduced in evidence, they would not tend to support any such theory as that upon which the rejected instructions were based. It is not error for the court to refuse to give an instruction that is predicated upon a theory that finds no support in the evidence.

[14] We think the jury could not have been misled to defendant's prejudice by the action of the court in reading section 1826 of the Code of Civil Procedure. The instructions regarding the degree of certainty required for a conviction were clear and full, and the charge, taken as a whole, could not have conveyed any other impression than that the prosecution was bound to prove every element of the crime charged beyond a reasonable doubt.

[15] Appellant contends that the verdict returned by the jury is not sufficient in form to support the judgment, and that defendant is entitled in consequence to be discharged. We find no merit in this contention. The verdict returned by the jury is as follows: "We, the jury in the above-entitled action, find the defendant guilty of embezzlement [a felony] as charged in the indictment and elected by the people as the substantive offense to be proved herein." The indictment charged the defendant with the embezzlement of \$37,075.42, and at the outset of the trial the district attorney selected as the item to be proved, as constituting the basis of the charge, a sum of money in the amount of \$4,100.55, received by defendant in June, 1907, from the sale of the Lyon street prop-

erty. This appears from the minutes of the trial, which are a part of the record of the action. Pen. Code, § 1207. The verdict must be read in the light of the facts disclosed by the "record of the action," and so read it is in no way uncertain or indefinite.

Other points are made by the appellant, but none of them seem to us to be of sufficient consequence to require discussion. Upon the whole record we think the defendant was properly convicted of the offense charged, and that no error substantially affecting his rights was committed.

The judgment and order appealed from are affirmed.

BEATTY, C. J., and LORIGAN, J., do not participate in the foregoing.

MELVIN, J. I dissent. I think the court erred in refusing to admit in evidence the note signed by Mrs. Sage and paid by defendant, and I do not think that the error was waived by the failure of the defendant to assent to the admission of parts of the note only. I agree with the opinion prepared by Mr. Justice Hall, in which Mr. Presiding Justice Lennon concurred, wherein this matter is discussed as follows:

"Appellant offered the note in evidence, and upon the objection of the district attorney the court sustained the objection. The defendant was thus denied the right to prove the direct evidence that a portion at least of the money which he was charged with embezzling had in fact been applied to the payment of an obligation of Mrs. Sage. Furthermore, the other payments on this note tended to account for some of the money that the prosecution claimed and proved had been received by defendant as the agent of Mrs. Sage. The evidence of Mr. Knox showed that defendant had made payments on the instrument, which was then exhibited to him, in the amount of over \$5,000, and that over \$4,000 of this was paid shortly after the receipt by defendant of the \$4,100.55, which he was charged with fraudulently appropriating to his own use. But by the ruling of the court, made at the insistence of the district attorney, the defendant was prevented from proving that the payments were made to discharge an obligation of Mrs. Sage.

"This was a vital matter. The important fact to be established in regard to these payments was that they were made for the benefit of Mrs. Sage and in discharge of her debt. It is not for the court to say that the offered evidence would not establish a completed defense. If it tended to meet and overcome any portion of the evidence presented by the prosecution, the defendant was entitled to have it placed before the jury. The ruling of the court deprived the defendant of the benefit of important and material evidence.

"The note, in connection with the evidence

of payments made thereon by defendant, given by the witness Knox, directly tended to account for a portion of the \$4,100, as well as for other sums of money received by defendant for Mrs. Sage. The evidence of these payments was of practically no value without the introduction of the note. It was the note that would supply the important evidence that these payments were made to discharge an obligation of Mrs. Sage. It is thus manifest that the court erred in a vital matter to the prejudice of appellant in sustaining the objection of the district attorney to the introduction of the promissory note of Mrs. Sage."

MARRON v. MARRON et al.

(Civ. 1,008.)

(District Court of Appeal, First District, California. June 24, 1912. Rehearing Denied by Supreme Court Aug. 23, 1912.)

1. TRIAL (§ 165*)—MOTION FOR DISMISSAL—EVIDENCE CONSIDERED.

On motion for nonsuit, only the evidence tending to prove plaintiff's case, with the fair inferences and presumptions deducible therefrom, disregarding contradictions, is to be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. DEEDS (§ 196*)—UNDUE INFLUENCE—EVIDENCE.

Evidence, in a suit to set aside a conveyance by one having a wife and child, to whom he was fondly attached, of practically all his property, of the value of \$15,000, for a consideration of \$10, that his mind was weakened by years of drinking, is sufficient to raise the inference of undue influence, putting on the grantee the burden of showing its absence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587-593; Dec. Dig. § 196.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Nellie Marron, administratrix of Thomas J. Marron, deceased, against Mary Marron and another. Judgment for defendants, and plaintiff appeals. Reversed.

Edward C. Harrison and Daniel A. Ryan, for appellant. Lewis F. Byington and R. V. Whiting, for respondents.

KERRIGAN, J. This is an appeal from a judgment following the granting of a motion for nonsuit in an action brought by the plaintiff to set aside a transfer of real and personal property.

On and prior to the 22d day of April, 1907, Thomas F. Marron was the owner of certain pieces of real property situated in the city and county of San Francisco. He was married and had one child, aged four months. On the above-mentioned date, he made a deed and an assignment, purporting to convey to Mary Marron, one of the defendants, the real and personal property described

in the complaint. About three months thereafter he died, and subsequently the plaintiff, his wife, was appointed the administratrix of his estate; whereupon she brought this action to set aside the deed and bill of sale to said properties, upon the grounds that Thomas F. Marron was of unsound mind at the time the instruments of conveyance were executed; that they were procured from him by undue influence and by fraud practiced upon him by the defendant Mary Marron.

After the plaintiff had closed her case, the court granted a motion for nonsuit, on the ground that plaintiff's evidence failed to show that, at the time of making the instruments, the deceased was incompetent, or that the execution of those documents was the result of fraud or undue influence exercised upon him as charged in the complaint. Upon this order judgment was regularly entered. Plaintiff excepted to the ruling granting the motion, and now assigns that ruling as error. We think the ruling cannot be sustained.

[1] A motion for nonsuit assumes as true every fact which the evidence, and presumptions fairly deducible therefrom, tend to prove, and which was essential to entitle the plaintiff to recover. *Estate of Arnold*, 147 Cal. 583, 84 Pac. 252. On such motion the evidence must be taken most strongly against the defendant. Contradictory evidence must be disregarded (*In re Daly*, 15 Cal. App. 329, 114 Pac. 787), and the motion denied, if there is any substantial evidence tending to prove plaintiff's case without passing on the sufficiency of such evidence. *Zelmer v. Gerlechten*, 111 Cal. 78, 43 Pac. 408; *Vermont Co. v. Declez*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143. The rules as to a nonsuit are the same, whether the trial is by the court or by a jury. *Freese v. Hibernia S. & L. Co.*, 139 Cal. 394, 73 Pac. 172.

In the case of the *Estate of Arnold*, supra, where the court passed upon a motion for nonsuit at the close of plaintiff's case in a will contest, Mr. Justice Shaw, after declaring that in a motion for nonsuit the same rules obtain in proceedings to contest a will as apply in civil suits, said: "Every favorable inference fairly deducible, and every favorable presumption fairly arising, from the evidence produced must be considered as facts proved in favor of contestants. When evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to contestants. All the evidence in favor of contestants must be taken as true; and, if contradictory evidence has been given, it must be disregarded. If there is any substantial evidence tending to prove, in favor of the contestants, all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits."

[2]. Following the doctrine laid down in those cases, and therefore disregarding contradictions, and considering only the evidence tending to prove the allegations of plaintiff's complaint, and the fair inferences and presumptions deducible therefrom, the facts in the case are these:

On April 22, 1907, in consideration of the sum of \$10, the deceased made a deed and assignment to his mother of property estimated to be of the value of about \$15,000, and being nearly all of his real and personal property. He was then about 33 years of age. "He was fragile, and a man of very nervous temperament," was married, and had a child, a girl, about four months old. At the time of his marriage in February, 1901, he was accustomed to drink occasionally intoxicating liquor, and in the spring of the following year commenced to drink such liquor to excess, and continued to do so until the time of his death. In February, 1907, at the request of his wife, he took a solemn pledge to abstain from the use of all such liquor for one year. Between this date and the date of making the deed and assignment, he had been in several medical institutions for treatment for alcoholism. His craving for liquor was so strong that he broke his pledge the day he took it. On this way home from one of the hospitals where he had been treated for his unfortunate habit, he obtained and drank liquor. It was his custom for several months prior to making the transfers in question to take whisky or beer to bed with him to drink during the night. In brief, according to testimony introduced by plaintiff, he had become an habitual drunkard. On the day he made the deed and assignment, he was drunk, stupid, and appeared irrational. "He was not in his right mind, and he didn't know what he was doing." His mother and other members of her family were probably present when he executed the instruments, but his wife, whom he held in high regard, was absent, and knew nothing about the transaction until several days afterwards. The notary before whom the acknowledgment was made, believing that the deceased was conveying his property to his wife, explained to him that "under the instrument his wife could sell the property if she wanted to," and he made a note of such explanation in his official record. The deceased made no answer to this explanation. The family of the deceased was very unfriendly to the plaintiff, and had accused her of many delinquencies, among others of being a drunkard and of caring nothing for her husband. She had never had any trouble with her husband, and was kind and devoted to him. He always expressed himself as fond of her and of his little girl. On the morning of April 26th, three days after the documents were executed, a sister and two brothers of the deceased forced an entrance into the

plaintiff's home by smashing the back door, for the purpose of handing to plaintiff's husband, as they told her, a telegram, and collecting 25 cents for its transmission. On that occasion they took deceased away with them, and the plaintiff never afterwards had an opportunity to confer with her husband alone; for he was always accompanied by some member of his mother's family or a caretaker, presumably employed by them. From the date of the instruments plaintiff never saw her husband sober during the remainder of his life. He died July 1, 1907, at a medical institution, where he was being treated for alcoholism. He left no will. The defendant Mary Marron was unable, when her deposition was taken, and at the trial, several months later, to produce the deed, claiming on both occasions that it had been mislaid in her home, and that she was unable to find it.

The evidence shows that the deceased for a number of years was continually becoming intoxicated. He was drunk and appeared stupid and irrational on April 22d; and yet on that day and in that condition his mother accepted the instruments in question, transferring substantially all of his property to her, and, according to a fair inference from the testimony, without any, or, if any, a totally inadequate, consideration. This left him and his wife and baby, to whom he was fondly attached, with so small a portion of his property that his act may be regarded as an unusual one, and one inconsistent with his duties and obligations to his wife and child, as well as to himself.

Other facts tending to show imposition and undue influence are that Mary Marron failed to produce the documents, so that the signature thereon could be compared with the deceased's usual handwriting, which might afford some inference as to his physical and mental condition at the very time the instruments were executed; and this circumstance we regard as distinctly suspicious. For months the deceased was never permitted to see and confer with his wife alone. Was this because the deceased "did not know his own mind," and that it was feared that his wife would exercise some influence over him inimical to the interest of his mother? It is also worthy of note that the notary public felt called upon to explain to the deceased that if the deed were executed the grantees thereunder could dispose of the property to whomever she pleased, and that the deceased failed to correct the notary's impression that the deed was being made to his wife. All the circumstances taken together are certainly sufficient to cast the burden upon the defendant Mary Marron to show that no imposition was practiced on the deceased.

Woolen & Thornton, in their work on Intoxicating Liquors, say: "The inadequacy of

the consideration, or its manifest unfairness, is a weighty factor in securing the annulment of a drunkard's contract."

In *Swan v. Talbot*, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066, an intoxicated person sold property of the value of about \$12,000 for \$200. The court held that, while equity would not assist a man to avoid a contract which he had entered into when drunk, merely because he might wish, when in his sober senses, he had not entered into it, still equity will not countenance fraudulent imposition; and gross inadequacy of consideration is always received as evidence of imposition, justifying the interference of equity to set aside the contract.

In *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519, it was declared to be the settled rule that, while equity would not interfere to assist a person to annul his contract on the ground of intoxication merely, nevertheless, if any unfair advantage has been taken of his situation, it will render him proper aid; and it was there further held that where the grantor is intoxicated the inadequacy of the price is direct evidence of fraud.

In *Moore v. Moore*, 56 Cal. 89, it is said: "The fact of there being no consideration, or a grossly inadequate one, is a circumstance which may be considered in determining the condition of the plaintiff's mind at the time of her signing the deeds. She signed instruments which transferred her entire estate, and thereby reduced herself to a state of destitution. The fact of her having done so without consideration, or any apparent motive, would indicate great weakness or unsoundness of mind. One of the indicia of a weak or disordered mind is that its possessor is quite liable to act against his own plain interest in cases where the act could not be imputed to mistake. * * * Taking an unfair advantage of another's weakness of mind is undue influence, and the law will not permit the retention of an advantage thus obtained."

In *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260, Field, J., delivering the opinion of the court, says: "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition or undue influence will be inferred."

Generally, when there is weakness of mind in a person executing a conveyance of land, arising from age, sickness, intoxication, or any other cause, although not amounting to absolute disqualification, an inadequate con-

sideration, imposition, or undue influence will be presumed. *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575; *Boyd v. Boyd*, 66 Pa. 283; *Samuel v. Marshall*, 3 Leigh (Va.) 567; *Fitch v. Reiser*, 79 Iowa, 34, 44 N. W. 214; *Woodroof v. Howes*, 88 Cal. 184, 26 Pac. 111; *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1037; *Hays v. Feather*, 244 Ill. 172, 91 N. E. 97, 18 Ann. Cas. 538.

The circumstances under which a conveyance was made, the conditions of the grantor at the time, and the injustice to him and his heirs if it is upheld, may cast on the grantee the burden of showing the absence of undue influence or imposition. *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994.

The other matters discussed in the briefs do not require detailed notice.

For the reasons above indicated, we think the trial court erred in granting the motion for nonsuit. The judgment is therefore reversed.

We concur: LENNON, P. J.; HALL, J.

(19 Cal. App. 220)
BOYER v. GELHAUS et al. (Civ. 999.)
(District Court of Appeal, First District, California. June 21, 1912. Rehearing Denied by Supreme Court Aug. 20, 1912.)

1. TAXATION (§ 734*)—TAX SALE—DELINQUENCY.

Unless there is in fact a delinquency, a sale by a tax collector is unauthorized and void; and a tax deed given in pursuance thereof conveys no title.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.*]

2. TAXATION (§ 788*)—TAX SALE—DEED—"PRIMARY EVIDENCE."

Pol. Code, § 3786, provides that a tax collector's deed shall be "primary evidence that the taxes were not paid. Held, that the word "primary" was used in the sense of *prima facie*; and hence the presumption of nonpayment arising from such deed may be rebutted by proof that the taxes were in fact paid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5552.]

3. TAXATION (§ 709*)—TAX SALES—REDEMPTION—"SUBSEQUENT ASSESSMENTS."

Pol. Code, § 3815, provides that no redemption of property sold to the state for delinquent taxes shall be permitted without payment of all subsequent assessments, costs, fees, penalties, and interest. Held, that by "subsequent assessments" is meant all taxes levied against the property subsequent to the tax for which the sale was made.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1430-1435; Dec. Dig. § 709.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6734.]

4. TAXATION (§ 788*)—TAX SALES—REDEMPTION.

Certain property in question was sold to the state in 1898 for the second installment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of unpaid delinquent taxes levied against it in 1897. On December 31, 1898, the property was redeemed by a mortgagee by paying to the county treasurer the amount required for redemption, as certified by the county auditor, and the redemption was entered on the assessment roll of 1898. After July 1, 1899, the tax collector sold the property to the state as for the nonpayment of the second installment of taxes for the year 1898, and on July 5, 1904, issued a deed to the state therefor. The taxes, for the alleged nonpayment of which the sale was made in 1899, under which plaintiff claimed title, became a lien on the property on March 1, 1898, and the amount thereof had been fixed and the assessment and levy completed, before the redemption occurred from the first sale. Held that, since by the terms of Pol. Code, § 3817, any tax for the year 1898 should have been included and paid to effect a redemption on December 31, 1898, if it had not been previously paid, the certificate of the auditor to the redemptioner, specifying the amount due to redeem, constituted prima facie evidence that all other taxes then due had been paid, which was sufficient to overcome the presumption raised by the tax deed that the taxes for which the land was sold were unpaid, so as to sustain a finding that there were no taxes due on the land for which the second sale was made.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. § 788.*]

5. QUIETING TITLE (§ 44*) — POSSESSION — PROOF OF TITLE.

Actual possession of real property is sufficient proof of title as against one out of possession, and who establishes no title in himself.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by L. I. Boyer against Frank A. Gelhaus and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James H. Boyer and H. M. Anthony, for appellant. F. S. Brittain, for respondent Frank A. Gelhaus. Tobin & Tobin and Stoney, Rouleau & Stoney, for respondent Hibernia Savings & Loan Society. Alexander McCulloch, for respondent Joseph F. Boeddeker.

HALL, J. This is an action to quiet title to certain real property, situate in the city and county of San Francisco, brought by appellant, who bases her title upon a certificate of sale to the state for delinquent taxes and a tax deed executed on behalf of the state to appellant's predecessor in interest, F. J. Ghiselli.

The respondents Gelhaus filed an answer denying the allegations of ownership by plaintiff and a cross-complaint, in which, among other things, they set up that they were in possession of the real property claimed by plaintiff, and were the owners thereof, and prayed for a decree affirmatively quieting their title as against appellant. The court found that appellant was

not the owner of the property in suit, and that respondents Gelhaus were, and entered a judgment accordingly quieting the title of respondents Gelhaus as against the claim of plaintiff. The appeal by plaintiff is from this judgment.

The property in question was sold to the state in 1898 for the second installment of unpaid and delinquent taxes levied against the property in 1897. Subsequently, on December 31, 1898, the property was redeemed from such sale by the Hibernia Savings & Loan Society, a mortgagee thereof, by the payment to the county treasurer of the amount required for redemption, as certified by the county auditor, and the words "Redeemed December 31st, 1898," were stamped on the assessment roll for the year 1898. Subsequently, on the 1st day of July, 1899, the tax collector sold the property to the state as for the nonpayment of the second installment of taxes for the year 1898, and subsequently, on the 5th day of July, 1904, issued to the state a deed therefor. This deed was introduced in evidence by plaintiff, and is in the usual form. Appellant derails her title through this deed.

The defendants Gelhaus, at the beginning of the action and for some time prior thereto, were in possession of the property, claiming under a deed from the administrator of the estate of John McDonald, dated April 3, 1904.

The defendants introduced in evidence a duly certified copy of the recorded certificate of redemption given by the county auditor in pursuance of section 3817 of the Political Code. This certificate contained a statement of the amount of delinquent taxes for the year 1897 for which the property was first sold to the state and the interest and the penalty thereon, and gave the total amount necessary to redeem as \$9.86. The statement of the auditor contained no statement of any other taxes that were a lien upon the property at the time said taxes became delinquent, nor of any subsequent tax.

As before stated, the court found that plaintiff was not the owner of the property, and also specially found, among other things, that at the time of the redemption of the property on December 31, 1898, all taxes levied or assessed upon said land for each year since the sale to the state, made in 1898, including the taxes for the fiscal year 1898–99, were paid, and that there was no delinquency of taxes on said property for the second installment of taxes thereon for the fiscal year 1898–99. If these facts find support in the evidence, the judgment should be affirmed, for appellant's title is based upon the sale made as for the delinquency of the second installment of taxes for the year 1898; that is to say, for the fiscal year 1898–99.

[1] Unless there was in fact a delinquency, a sale by the tax collector is unauthorized and void, and the tax deed given in pursuance of such sale conveys no title. *Randal v. Dailey*, 66 Wis. 285, 28 N. W. 352.

[2] The only evidence introduced by appellant to prove that any taxes for the year 1898 were unpaid was the deed of the tax collector to the state, which recited such fact. Section 3785 of the Political Code, in terms, makes such deed "primary" evidence that "the taxes were not paid." The word "primary," as used in the statute, manifestly means *prima facie* (see *De Frieze v. Quint*, 94 Cal. 653-659, 30 Pac. 1, 28 Am. St. Rep. 151), and, of course, such evidence is subject to be controverted. If there is in the record any evidence in contradiction of the presumption of nonpayment of the tax for the year 1898 arising from the tax collector's deed, the finding of the court that such taxes were paid, and that there was no delinquency of taxes on said property for the year 1898, is supported, and the judgment of the court cannot be reversed for want of evidence to support the findings.

We think this evidence is found in the certificate of redemption given by the auditor, upon which the redemption was made on December 31, 1898, from the first sale for unpaid taxes. This statement calls for an examination of the law as to what is necessary to effect a redemption from a sale to the state and the duty of the auditor in relation thereto. After property is purchased by the state for unpaid taxes, it must "be assessed for each subsequent year for taxes until a deed is made to the state therefor, in the same manner as if it had not been so purchased." Section 3813, Pol. Code.

[3] Section 3815 of the Political Code provides that no redemption shall be permitted of property sold to the state for delinquent taxes without payment of all subsequent assessments, costs, fees, penalties, and interest. By "subsequent assessments," as used in this section; we think is meant all taxes levied against the property subsequent to the tax for which the sale was made. That such is its meaning is made quite clear by the language of section 3816 of the Political Code, which provides for the distribution between the state and county of "the original and subsequent taxes and percentages, penalty and the interest paid on redemption."

[4] Section 3817 of the Political Code, as it stood prior to 1905, gave the right to redeem at any time prior to a sale by the state "by paying to the county treasurer of the county wherein the real estate may be situated, the amount of taxes due thereon at the time of said sale, with interest thereon at the rate of seven per cent. per annum; and also all taxes that were a lien upon said real estate at the time said taxes became delinquent; and also for each year since the sale for which taxes on said land have not

been paid, an amount equal to the percentage of taxes for the year upon the value of the real estate as assessed for that year."

From these various sections, it is perfectly clear that under the law no redemption from a sale to the state for unpaid taxes could be effective without payment, not only of the taxes for which the sale was made, but also all subsequent taxes levied against the property up to the time of redemption. In other words, any taxes that were a lien upon the property at the time the taxes became delinquent, for which the sale was made, as well as all subsequent taxes, must be paid to effect a redemption from the sale to the state.

In the case at bar, the taxes, for the alleged nonpayment of which the sale was made in 1899, under which alone appellant claims title, became a lien upon the property upon the 1st day of March, 1898, and the amount thereof had been fixed and the assessment and levy completed before the redemption occurred from the first sale. By the clear terms of the statute, any tax for the year 1898 should have been paid to effect a redemption on the 31st day of December, 1898, if it had not previously been paid.

In order to enable a redemptioner to comply with the requirements of the redemption law, section 3817 of the Political Code, as it stood when the redemption in this case was made, and as it now stands, further provides that "the county auditor shall, on the application of the person desiring to redeem, make an estimate of the amount to be paid, and shall give him triplicate certificates of the amount, specifying the several amounts thereof, which certificates shall be delivered to the county treasurer, together with the money," etc.

The giving of this certificate is an official duty of the auditor. It authorizes the county treasurer to accept redemption according to the face thereof (section 3817, Pol. Code), and is *prima facie* evidence of the facts stated therein. Sections 1926, 1963, subd. 15, Code Civ. Proc.

As before stated, the certificate given in this case contained a statement of the amount of the original tax for which the property was sold to the state, and gave the total amount necessary to be paid to effect a redemption as the sum of \$9.86, which was made up of the original tax, penalties, and interest. The certificate further stated that the statement contained a full and correct statement of all unpaid taxes and penalties thereon up to the day of redemption. If the statement of the certificate be taken as true, it necessarily followed, that all the taxes subsequent to the tax for which the first sale to the state was made had been paid before such redemption. In other words, this certificate was *prima facie* evidence that the tax of 1898, for the supposed nonpayment of which the sale under which appellant's claim was made, was not unpaid and never became delinquent.

The assessment rolls for the year 1898, it was conceded, had been destroyed in the conflagration of April, 1906. The deed to the state, under which appellant claims, and which shows a sale to the state for a sum less than \$10, is *prima facie* evidence that the tax of 1898 was unpaid.

The certificate of the auditor is *prima facie* evidence that it had been paid. The court found in accordance with the evidence furnished by this certificate; and, in accordance with the well-established rule that, where there is a conflict in the evidence, this court will not interfere with the findings of the trial court, the findings in this case must stand.

There being no unpaid taxes for the year 1898, the sale to the state, under which appellant claims, was void and gave no title.

[5] The appellant, having no title, cannot prevail against one in actual possession. Such possession is sufficient proof of title as against one out of possession, and who establishes no title in himself. Civil Code, § 1006; McGovern v. Mowery, 91 Cal. 383, 27 Pac. 746; Stephenson v. Deuel, 125 Cal. 656-663, 58 Pac. 258; White v. McGillifard, 140 Cal. 654, 74 Pac. 298. Respondents Gelhaus proved their possession without dispute.

Appellant also complains of some rulings of the court in admitting evidence. We have examined these rulings. Such of them as are erroneous could not have affected the result, and will not justify a reversal.

The judgment appealed from is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

PEOPLE v. MARTIN. (Cr. 823.)

(District Court of Appeal, First District, California. June 20, 1912.)

1. CRIMINAL LAW (§ 1160*)—APPEAL—REVIEW—CREDIBILITY OF WITNESSES.

The credibility of witnesses is, in the first instance, for the jury, and then, on motion for new trial, for the trial judge, whose determination is conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

2. CRIMINAL LAW (§ 510½*)—ACCOMPLICE TESTIMONY—CORROBORATION.

The finding near a house, shortly after dynamite was exploded on its porch, of a newspaper, with words thereon in defendant's handwriting, coupled with her denial, when shown it, of all previous knowledge of it or the writing, tending to show a consciousness of guilt, tended to connect her with the commission of the crime, and therefore to corroborate the testimony of the accomplice that, just prior to commission of the crime, he had, at defendant's direction, wrapped the dynamite in a copy of such paper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1136; Dec. Dig. § 510½.*]

3. CRIMINAL LAW (§ 511*)—ACCOMPLICE TESTIMONY—CORROBORATION.

The evidence corroborative of the testimony of an accomplice need not tend to establish the precise facts testified to by him, but, though slight, is sufficient if, in and of itself, it tends to connect accused with the commission of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

4. CRIMINAL LAW (§ 511*)—ACCOMPLICE TESTIMONY—CORROBORATION.

Evidence, on a prosecution for exploding dynamite in a house with intent to injure the inmates, held sufficient to corroborate the testimony of the accomplice, not only that the crime was instigated by defendant, but that she actively aided and abetted its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

5. CRIMINAL LAW (§ 338*)—EVIDENCE—STATEMENT OF DEFENDANT.

Anything that defendant may have said having a tendency to show that she induced the commission of the crime being relevant and material to the issue of her guilty participation, testimony of J. that shortly before commission of the crime by his exploding dynamite in the house of O. defendant told him she would hit him on the head with a sledge hammer, and then blow him up, if he failed to explode the dynamite in O's house, is admissible, though also tending to prejudice her in the eyes of the jurors by showing her little, if any, regard for human life.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752-757, 787, 788, 801, 855; Dec. Dig. § 338.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Isabella J. Martin was convicted and denied a new trial, and appeals. Affirmed.

See, also, 13 Cal. App. 96, 108 Pac. 1034.

Isabella J. Martin, in pro. per. Attorney General Webb and W. H. L. Hynes, Asst. Dist. Atty., for the People.

LENNON, P. J. The defendant in this case, Isabella J. Martin, was charged, in an information filed in the superior court of the county of Alameda, with the crime of felony, as defined in section 601 of the Penal Code. The information in substance charges that on the 19th day of March, 1907, the defendant willfully and maliciously deposited and exploded dynamite in a house which was then occupied as a dwelling house by Frank B. Ogden and his family in the city of Oakland, all with the intent to injure, intimidate, and terrify the occupants of said house.

The defendant was convicted and sentenced to life imprisonment, and this appeal is from the judgment, and from an order denying defendant's motion for a new trial.

Once before the defendant was convicted of the same offense upon the same information; but upon appeal to this court the judgment was reversed and a new trial ordered. 13 Cal. App. 96, 108 Pac. 1034.

While the same questions of law upon which the first judgment was reversed are

not involved in the present appeal, the controlling facts upon which the charge against the defendant was founded and a conviction had are, as shown by the records before us, practically the same in both cases; and, as the opinion of this court, written by Mr. Justice Hall, upon the former appeal contains a clear and concise statement of the immediate circumstances of the crime and the manner of its perpetration, we herewith quote and adopt the statement of facts as therein contained:

"The crime with which defendant was charged was not committed by her in person, but was in fact committed by John B. Martin at her instigation. * * * John B. Martin was, at the time of the commission of the crime, 16 years of age, and, though he had been reared by defendant from babyhood, he was not her child. He was the principal witness for the prosecution, and testified in detail to all the circumstances of the commission of the crime, from which it appears that the defendant had for a considerable time before the commission of the crime contemplated the deed, and with the aid of the witness had made careful preparation therefor. Her motive grew out of the result of some litigation which she had had in a department of the superior court of Alameda county, presided over by Hon. Frank B. Ogden, although the action was not finally tried before Judge Ogden. The witness and defendant discussed the contemplated crime, months before its commission, at Weaverville, in Trinity county, where defendant had a home and certain mining properties. Early in January, 1907, they came to Oakland, Alameda county, where defendant owned a home and other property. Under the house belonging to defendant, and in which she and the witness took up their residence, was stored a quantity of dynamite. This was by the witness taken from under the house by the direction of defendant, and placed upon a shelf to dry. Subsequently a portion of it, about 12 sticks, was made into a bomb by the witness and defendant, for the purpose of dynamiting the residence of Judge Ogden. A long fuse was furnished by defendant and carefully prepared for subsequent use. A bicycle was rented by defendant to enable the witness to escape from the scene of the intended crime. Careful preparations were made to enable an alibi to be proved for the witness in case they were suspected or charged with the crime, and on the night of the 18th of March, 1907, the witness, at the direction of defendant, took the bomb and fuse to the residence of Judge Ogden, about a mile distant from the residence of defendant, in which she remained, and, after observing that the residence of Judge Ogden was then occupied by members of his family (wife, four children, and a maid), placed the bomb upon the front porch of the house, carefully adjusted the fuse, lighted the same, mounted his

wheel, and rode away to his home, where the defendant awaited his coming. The explosion occurred before the witness reached his home, and, though badly injuring the dwelling of Judge Ogden, did no harm to the unsuspecting members of the household sheltered therein, other than such as may have arisen from fright and nervous shock at the dastardly crime attempted against their home and, possibly, lives."

[1] In support of her present appeal, the defendant urges the insufficiency of the evidence to support the verdict, and insists also that the trial court erred to her prejudice in its rulings upon the admission and rejection of evidence. Defendant's opening and closing briefs contain in the aggregate some 500 pages of typewritten matter, which is devoted chiefly to a discussion of the weight of the evidence and an attack upon the credibility of the several witnesses who testified upon behalf of the people. It would serve no useful purpose to set out in detail the many minute particulars in which the defendant claims the evidence to be insufficient to support the verdict. It will suffice to say that defendant's contention in this behalf is made up largely of references to slight and immaterial discrepancies and contradictions appearing in the testimony of some of the witnesses, all of which should have been and doubtless were, upon the argument of the case, called to the attention of the jury, and presumably duly weighed and considered by them when deliberating upon the question of the guilt or innocence of the defendant. In any event, the credibility of the witnesses was, in the first instance, a matter solely for the jury to determine; and finally, upon the hearing of the defendant's motion for a new trial, it was the right and duty of the trial judge, in weighing the sufficiency of the evidence upon which the verdict was had, to consider the credibility of the witnesses. The trial judge's determination of the question of such credibility is conclusive upon us.

Of the many objections made by the defendant to the sufficiency of the evidence to support the verdict, but one is worthy of more than passing notice; and that involves the point that the evidence shows the chief witness for the people, John B. Martin, to be an accomplice of the defendant, and that his testimony was not sufficiently corroborated to warrant a conviction.

[24] It must be conceded that the evidence shows clearly and conclusively that this witness was an accomplice of the defendant; but we are satisfied, after a careful reading of the record, that the evidence offered and received upon the whole case reveals ample corroboration of his testimony and fully justifies the verdict of the jury.

Among the many matters and things testified to by other witnesses, which as a whole tended strongly to support the testimony of John B. Martin, which was to the effect that

the defendant instigated the crime and actively participated in its preparation, may be instanced the fact that shortly after the explosion there was found on the Ogden premises a copy of the Bulletin, a San Francisco evening newspaper, upon which was written the words "goodie man." After her arrest the defendant was shown the newspaper by Detective Hodgkins, and asked if that inscription thereon was in her handwriting. The defendant denied all knowledge of the newspaper, and disputed that the handwriting thereon was hers. It was subsequently established on the trial by competent and sufficient evidence that the handwriting on the newspaper was that of the defendant. The circumstance that a newspaper containing the handwriting of the defendant was found at the scene of the crime shortly after the explosion may not, in and of itself, have been entitled to any weight as a piece of evidence; but, when considered in conjunction with the defendant's denial of all previous knowledge of the paper or the handwriting thereon, it had a strong tendency, we think, to show a consciousness of guilt on the part of the defendant, and to that extent, at least, tended to connect the defendant with the commission of the crime, and thereby corroborate the testimony of John B. Martin that, just previous to the commission of the crime, he had wrapped the dynamite which caused the explosion in a copy of the Bulletin, at the direction of the defendant.

Other evidence appearing in the record, which also tends to connect the defendant with the commission of the offense charged against her, is to be found in the testimony of several witnesses, which may be summarized as follows: The defendant, on more than one occasion previous to the explosion, openly manifested her malice and ill will toward Judge Ogden, which finally culminated in the threat that when she got through with the civil case then pending in the department of the superior court of Alameda county over which Judge Ogden presided she would "get" him. The defendant was familiar with the use of dynamite; and some time previous to the Ogden explosion had purchased in Weaverville, Trinity county, 25 pounds of dynamite, a portion of which, it was claimed by the prosecution, she wrapped in a mattress and shipped to her home in Oakland. Shortly after the explosion, the defendant's home in Oakland was searched by detectives, and they discovered, secreted in various parts of the house previously pointed out and designated by John B. Martin, not only dynamite and dynamite caps, but a piece of fuse similar to the fuse found upon the Ogden premises after the explosion. The defendant at first denied any knowledge of the fuse found in her home, but subsequently admitted to the detectives that it belonged to her.

Added to these and to the many other cir-

cumstances revealed by the record which point to the guilt of the defendant is the fact that some months after the explosion an anonymous letter was received by Judge Ogden, wherein the writer, referring to the dynamiting of his home, stated, among other things, that Judge Ogden was "nowhere near the true solution of the perpetrator of the dastardly deed. It was not done to revenge the cause you suspect; for I myself heard just such an attack planned and discussed, and this was carried out just as it was planned. It was not their intention to kill you then, only to cause you intense suffering by seeing your family and home destroyed, and your turn will come later on. * * * When you pass into that other life, you will see that is why the avenger is following hard on your path, only waiting for time and strength to carry out their hellful designs. * * * I have no means of knowing when the former attempt is to recur for I could not swear they did it, but it was all carried out just as I heard it planned and decided on."

When confronted with this letter by the detectives, the defendant denied all knowledge of it, and expressly declared that it was not in her handwriting. Upon the trial, however, it was fully established by expert evidence that the letter was written by the defendant.

The statute does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative evidence is not necessary to support a judgment of conviction founded upon the testimony of an accomplice. Even though the circumstances constituting the evidence offered and received in corroboration of the testimony of an accomplice be slight, such evidence is nevertheless sufficient to meet the requirements of the law if, in and of itself, it tends to connect the accused with the commission of the offense. *People v. Barker*, 114 Cal. 620, 46 Pac. 601; *People v. Cleveland*, 49 Cal. 577; *People v. Clough*, 73 Cal. 348, 15 Pac. 5.

Surely the several circumstances hereinbefore enumerated, in and of themselves, tended, in some slight degree at least, to connect the defendant with the crime charged against her, and, when taken altogether, abundantly corroborate the testimony of John B. Martin, not only that the crime was instigated by her, but that she actively aided and abetted its commission.

[5] The defendant complains of the ruling of the trial court, whereby the witness John B. Martin was permitted, over the objection of the defendant, to narrate a conversation which the witness had with the defendant on the evening of the crime and shortly before its commission, wherein the defendant in effect stated to the witness that she would hit him on the head with a sledge hammer,

and then put a stick of powder under him and blow him up, if he failed to explode the dynamite on Judge Ogden's porch as she had directed. There was no error in permitting the witness to so testify. Clearly anything that the defendant may have said which had a tendency to show that she induced the commission of the crime charged against her was relevant and material to the issue of her guilty participation therein; and, being relevant and material for that purpose, such testimony was rightfully admitted in evidence, notwithstanding that it may also have tended to prejudice the defendant in the eyes of the jury by showing that she had little, if any, regard for human life, and that she possessed an abandoned and malignant heart.

There is no merit in the defendant's contention that the former judgment of conviction against her was reversed by this court because of the admission upon the first trial of testimony similar to that now complained of. This contention of the defendant is based upon an erroneous conception of the scope and effect of the decision of this court rendered upon the former appeal. The theory of the prosecution upon the first trial was that John B. Martin was not an accomplice of the defendant in the ordinary legal acceptance of the term, because, as it was claimed, he was inspired and compelled to commit the crime charged through fear of immediate death resulting from the duress and menace of the defendant. From this it was argued and successfully maintained upon the first trial that, although John B. Martin had in fact committed the crime, nevertheless, having committed it under the compulsion of the defendant, the law excused him from the criminality of the act, and he could not, as a matter of law, have been prosecuted and convicted as a principal, from which it followed that he was not an accomplice, whose testimony came within the rule requiring corroboration.

In support of this theory, the prosecution was permitted to show, over the objection of the defendant, that, by previous persistent intimidation and threats, the defendant had so completely dominated the will of the witness John B. Martin that he had at various times, prior to the dynamiting of the Ogden residence, committed numerous misdemeanors and felonies at the instigation of and under the coercion of the defendant. This court, in reviewing the evidence presented by the record on the former appeal, in effect found that there was no foundation for the claim that the witness John B. Martin was compelled to commit the crime charged while acting under the duress and menace of the defendant; but that, on the contrary, it was clearly shown that when he committed the crime he was not in any immediate danger to his life at the hands of the de-

fendant; and that the defendant's threat of a future, remote, and contingent infliction upon him of death or great bodily harm did not, in law, constitute such duress and menace as would excuse the crime and dispense with the necessity for corroboration of his testimony.

No question of duress and menace was involved in the evidence offered and received in support of the prosecution's case upon the second trial. On the contrary, the prosecution proceeded solely upon the theory that John B. Martin was an accomplice of the defendant, and that his testimony was fully corroborated. True there was quoted in the former opinion of this court an excerpt from the testimony of John B. Martin given upon the first trial, which shows substantially the same testimony now complained of; but it is clear upon a first reading of our former opinion that the quotation of the testimony referred to was made, not because it was claimed or held that the admission of that precise piece of testimony was error, but solely for the purpose of making clear and emphasizing the point that in dynamiting the house of Judge Ogden the witness John B. Martin could not have been actuated by any fear of immediate danger to his life at the hands of the defendant; and that the only fear, if any, which impelled him to commit the crime was the fear that the defendant might at some future time, and in some remote place, kill him if he failed to do her bidding. Such fear, it was held, did not constitute duress to such an extent, and within the meaning of section 28 of the Penal Code, that it could be invoked as a valid legal defense for the doing of an act which was otherwise criminal. Accordingly it was further held that all of the evidence upon the former trial, relating to the defendant's brutal treatment of the witness John B. Martin, and her instigation of and active participation in numerous other crimes, had not the slightest relevancy to the question of her guilt or innocence of the crime for which she was being tried; and that therefore the defendant's objection to such testimony should have been sustained and her motion to strike out granted.

Numerous other points, many of them relating to the rulings of the trial court upon the admission and rejection of evidence, are presented and discussed in a haphazard way throughout the voluminous briefs of the defendant. Upon a patient and painstaking investigation of the record, we find that some of the objections relied upon were not made at the trial in the lower court, and that all of them are without merit and unworthy of detailed mention or discussion. We are satisfied upon a careful reading of the whole record that the second trial of the defendant was free from error, and that the evidence upon the whole case is amply sufficient to support the verdict and the judgment.

It is therefore ordered that the judgment and the order appealed from be, and they are hereby, affirmed.

We concur: HALL, J.; KERRIGAN, J.

REPUBLIC IRON & STEEL CO. v. PATILLO et al. (Civ. 1,016.)

(District Court of Appeal, Second District, California. June 20, 1912.)

1. APPEAL AND ERROR (§ 931*)—PRESUMPTION.

Though the complaint, in an action on a bond given for protection of materialmen and laborers under a contract with a city for street improvement, does not allege, and it is not made the subject of any finding, that the bond was given under authority of the statute, yet, the city being only authorized to act under permission of statutory authority in making the improvement, and the bond being phrased according to the statutory authority, it must be assumed the contract was so made, and the bond given in connection therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3723, 3762-3771; Dec. Dig. § 931.*]

2. MUNICIPAL CORPORATIONS (§ 347*)—STREET IMPROVEMENTS—CONTRACTOR'S BOND—ACTION BY LABORER OR MATERIALMAN—FILING OF CLAIM.

Under section 6½, added to the Vrooman street act (St. 1885, p. 147) by St. 1899, p. 23, requiring, in case of a contract for street improvement, the filing of a bond for the benefit of materialmen and laborers, and authorizing any of them, whose claim has not been paid by the contractor, to file with the superintendent of streets, within 30 days from completion of the work, a statement of his claim, and to commence action on the bond within 90 days after filing his claim, such filing is essential to a cause of action, and must be alleged in the complaint and found by the court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.*]

3. BONDS (§ 35*)—STATUTORY BOND—COMMON-LAW OBLIGATION.

A bond given as a statutory bond cannot be considered as a common-law obligation.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 40, 40½; Dec. Dig. § 35.*]

4. MUNICIPAL CORPORATIONS (§ 348*)—STREET IMPROVEMENTS—CONTRACTOR'S BOND—ACTION BY LABORER OR MATERIALMAN.

Under section 6½, added to the Vrooman street act (St. 1885, p. 147) by St. 1899, p. 23, authorizing a materialman or laborer, whose claim has not been paid, to file, within 30 days from completion of the work of a street improvement, his unpaid claim, and to commence his action on the contractor's bond within 90 days after such filing, the claim cannot be properly filed till completion of the work; and such action, if before such completion, or before such events as would make a showing of formal completion unnecessary, would be premature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 878; Dec. Dig. § 348.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Republic Iron & Steel Company against J. N. Patillo and another.

Judgment for plaintiff, and defendant A. J. Sherer appeals. Reversed.

Arthur G. Baker and Edward Winterer, for appellant. W. W. Butler, for respondent.

JAMES, J. This action was brought against defendants as sureties on a bond given for the protection of materialmen and laborers, under a contract made by the Patillo Contracting Company with the city of Hollywood for the doing of certain street work. Defendant Patillo made default, and defendant Sherer has appealed from a judgment entered against him, and also from an order made denying his motion for a new trial.

Plaintiff in its complaint set out that the Patillo Contracting Company, on or about the 13th of August, 1909, entered into a contract with the street superintendent of the city of Hollywood, a municipal corporation, for the improvement of Highland avenue, a public street within said city; that contemporaneously with the execution of said contract the contracting company, as principal, and defendants, as sureties, executed and delivered to the city of Hollywood their undertaking in writing in the sum of \$10,000, a copy of which was attached to and made a part of the complaint. It was then alleged that plaintiff furnished to the contracting company materials of the value of \$1,085, for which said contracting company had refused to pay. A demand was alleged to have been made upon the contracting company and upon the defendants, as sureties, prior to the commencement of the action. The complaint contained no allegation as to any claim having been filed with the superintendent of streets of the city of Hollywood on behalf of the plaintiff within 30 days after the work of improvement was completed; neither did it appear from the complaint as to when such work was completed, if at all. Upon trial being had, the court made its findings in favor of the plaintiff, following the allegations of the complaint, and made no finding as to the time of completion of the work, or as to whether plaintiff had filed any claim with the superintendent of streets. In our opinion, these findings do not sustain the judgment.

[1] It must be assumed from the facts found that the city of Hollywood entered into the contract with the Patillo Contracting Company under authority of the statute permitting it so to do, and that the bond upon which appellant was a surety was given pursuant to such statute. Section 6½ of the Vrooman street act (St. 1885, p. 147), as amended in 1899 (Stats. 1899, p. 23), provides that where contracts for street improvement are made by a municipality a bond shall be required to be filed with the superintendent of streets, which bond shall be made to inure to the benefit of any and

all persons, companies, or corporations who perform labor or furnish materials to be used in the work of improvement. It is provided further in this section as follows: "Any materialman, person, company, or corporation furnishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim the person, company, or corporation filing the same, or their assigns, may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action." While it was not alleged in the complaint, nor made the subject of any finding by the court, that the bond was given under authority of the statute, considering that the municipality was only authorized to act under permission of statutory authority in making the street improvement, and, further, that the bond in its terms was phrased according to the statutory requirement, it must be assumed that the contract was so made and the bond given in connection therewith accordingly. *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192, 72 Pac. 964.

[2, 3.] With these considerations in mind, we then find a failure on the part of plaintiff to allege, and the court to find, that plaintiff had filed any verified statement with the street superintendent, setting forth the amount of its claim, within 30 days from the time the improvement was completed. It was necessary, in order that a cause of action might be stated, for the plaintiff to allege this fact and the court to make a finding thereon. It cannot be said that a compliance with the statutory requirement in this regard would prove of no benefit to the sureties, and that therefore it may be disregarded. The first answer that might be made to such a contention would be that, where street improvement proceedings depend upon statutory provisions as giving authority to make such contracts, persons claiming the benefit of such provisions must make substantial compliance with the requirements thereof. The second answer that may be made is that as to the sureties the filing of the verified claim with the public officer, showing that the bounden principal has failed to pay for materials, furnishes a means of notice to such sureties, and by timely action they may be able to protect themselves, where, without such notice, their remedy might be

lost. That the bond, having been given as a statutory bond, cannot be considered as a common-law obligation is held in the case of *San Francisco Lumber Co. v. Bibb*, supra, and also in the cases of *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701, and *Montague & Co. v. Furness*, 145 Cal. 205, 78 Pac. 640.

[4.] It may be added that, until the street improvement work had been completed, under the terms of the statute, the notice of plaintiff's claim could not have been properly filed; and any action brought on the bond prior to such completion, or before the occurrence of such events as might make a showing of formal completion unnecessary, would be premature.

For the reasons stated, we are of the opinion that the findings do not sustain the judgment, and that it must be reversed. In view of this conclusion, other points made by appellant need not be discussed, further than to say that we have considered the argument advanced to sustain them, and are of the opinion that none of those contentions possess substantial merit.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

PEOPLE v. MARUYAMA. (Cr. 372.)

(District Court of Appeal, First District, California. June 20, 1912.)

1. CRIMINAL LAW (§ 1160*)—APPEAL—REVIEW—FINDINGS—CONCLUSIVENESS.

A jury finding in a criminal case, approved by the trial court's refusal to grant a new trial, will not be disturbed on appeal, though the evidence sustaining it is weak and unsatisfactory.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

2. INDICTMENT AND INFORMATION (§ 125*)—JOINDER OF OFFENSES—RAPE.

A single count in an indictment for rape properly charged that the crime was committed with a female under the age of consent, and with force and against her will.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

3. RAPE (§ 52*)—EVIDENCE—SUFFICIENCY.

On appeal from a conviction under a count charging rape upon a female under the age of consent, by force and against her will, evidence tending to show that the crime was committed by force may be considered in support of the verdict, on objection that a finding that prosecutrix was under the age of consent was against the evidence.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 71-74, 76; Dec. Dig. § 52.*]

4. CRIMINAL LAW (§ 1168*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

On a trial for rape, it was not prejudicial error to permit the prosecution to identify a letter received by a witness from prosecutrix's father, where the letter was merely marked for identification and was not introduced.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3124, 3125, 3129-3136, 3144; Dec. Dig. § 1168.*]

6. CRIMINAL LAW (§ 1171*)—HARMLESS ERROR—EXHIBITING ARTICLES TO JURY.

In a prosecution for rape, it was not error, prejudicial to accused, for the district attorney to exhibit to the jury undergarments worn by prosecutrix when she was assaulted, though they were not in evidence, where she identified them in her testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

8. CRIMINAL LAW (§ 940*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

Newly discovered evidence in a prosecution for rape, that prosecutrix was over the age of consent at the time of the offense, was immaterial, where the verdict appears to have been founded, in part at least, upon proof that the assault was committed with force.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327; Dec. Dig. § 940.*]

7. CRIMINAL LAW (§ 941*)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Newly discovered evidence does not entitle accused to a new trial, where it is merely cumulative and would not in itself, even if uncontradicted, justify an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2328; Dec. Dig. § 941.*]

8. CRIMINAL LAW (§ 939*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A new trial, asked on the ground of newly discovered evidence, is properly refused accused, where he does not show diligence to produce the evidence at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

H. Maruyama was convicted of rape. From the judgment, and from an order denying a new trial, he appeals. Affirmed.

David C. Clark, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant was convicted of the crime of rape. He has appealed from the judgment of final conviction, and from the order denying him a new trial.

The information charges the crime in two counts. While the first count proceeds in part upon the theory that the defendant committed an act of sexual intercourse with a female child under the age of 16 years, and not the wife of the defendant, it also charges that the defendant willfully, feloniously, and unlawfully made an assault upon the said female, and by means of force and violence accomplished with her an act of sexual intercourse, against her will and consent. The second count makes no mention of the age of the female; but it specifically states that the crime charged therein arises out of the same transaction upon which the first count is founded, and then proceeds to charge the crime solely upon the theory that it was committed by the defendant by means of force and violence, and against the will and consent of the prosecutrix. The jury

found the defendant guilty as charged in the first count of the information.

[1] It seems to be the contention of the defendant that, because the first count of the information, under which the defendant was found guilty, specifically sets forth the age of the female, only the evidence offered and received in proof of her age can be considered in support of the verdict; and that, inasmuch as the testimony adduced at the trial upon the subject of the age of the prosecutrix was, as the defendant claims, doubtful and contradictory, the verdict must be set aside.

The contention of counsel for defendant that the evidence offered to prove the age of the prosecutrix was so weak and unsatisfactory as to be insufficient to support a verdict grounded solely upon the theory that the crime was committed upon a female under the age of consent is but an argument directed against the weight of the evidence and the credibility of the witnesses. There was some evidence, however weak and unsatisfactory it may have been, which tended to show that the female assaulted was under the age of 16 years at the time of the assault; and the weight of the evidence and the credibility of the witnesses ordinarily are questions, once the verdict of the jury has been rendered, solely for determination by the trial judge in passing upon a motion for a new trial.

[2, 3] If the first count of the information had merely charged the crime to have been committed upon a female under the age of 16 years, there would have been much force in the claim of counsel that, by the verdict of the jury, the defendant was acquitted of the charge contained in the second count. The first count of the information, however, did not confine itself to charging an act committed with a female under the age of consent, but set forth the accompaniment of force and violence and lack of actual consent. It includes and charges much more than the mere fact that the defendant accomplished an act of sexual intercourse with a female child under the age of consent. It charges, also, that he, by means of force and violence, did carnally know and ravish one Masaye Ita, and accomplish with her an act of sexual intercourse against her will and by force. The allegation that the crime was committed with a female under the age of consent was not inconsistent with the allegation that it was committed by force and violence, and against the will and consent of the prosecutrix. Both allegations were properly united in the first count of the information; and therefore the second count was a needless repetition, which might well have been omitted altogether. Under the facts alleged in the first count of the information, the prosecution was not limited merely to proof of the age of the prosecutrix. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury having found the defendant guilty under a count in the information which in itself completely charged the crime under subdivisions 1 and 3 of section 261 of the Penal Code, the evidence offered upon the whole case which tended to show that the crime was committed by force and violence may be considered in support of the verdict. *People v. Snyder*, 75 Cal. 323, 17 Pac. 208; *People v. Vann*, 129 Cal. 118, 61 Pac. 776; *People v. Jalles*, 146 Cal. 381, 79 Pac. 965. Inasmuch as the evidence offered and received upon the whole case is amply sufficient, irrespective of the age of the prosecutrix, to show that the crime was committed by force and violence, and without the consent of the prosecutrix, it cannot be said that the verdict of the jury was founded solely upon the evidence adduced as to her age, or that it is not supported by the evidence adduced upon the whole case.

[4] There is no merit in the point that the trial court erred in permitting a witness for the prosecution, over the objection of the defendant, to identify a letter which he had received from the father of the complaining witness a few days prior to the commencement of the trial. In response to the objection of the defendant, the district attorney stated that it was not his purpose to introduce the letter in evidence at that time, and that his only purpose was to identify it and have it marked for identification for future use as evidence, if necessary. The district attorney was clearly within his rights in seeking to have the letter identified; and he was not compelled to offer it in evidence immediately upon its identification, or at any other stage of the case. Inasmuch as the letter was never thereafter introduced in evidence, we cannot conceive how the mere fact of its identification could have possibly prejudiced the defendant.

[8] It is contended that the district attorney was permitted, over the objection of the defendant, to exhibit to the jury the undergarments worn by the complaining witness at the time of the assault, without first offering the same in evidence. In that behalf the record, at the pages cited to us, shows merely that during the direct examination of the complaining witness she was permitted, without objection, to identify the undergarments worn by her at the time of the assault, and then to testify, also without objection, as to the manner in which they were torn from her body by the defendant. True the district attorney did not formally offer the garments in evidence; but, inasmuch as it was shown that they were worn by the prosecutrix at the time of the assault, that they were torn by the defendant in making the assault, that they were afterwards produced in court in the same condition as they were immediately after the crime was committed, which would have

been a sufficient foundation for allowing them in evidence, the fact that they were not formally offered or received in evidence worked no injury to the defendant. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794.

[6] Newly discovered evidence was one of the grounds of the defendant's motion for a new trial. The only showing made in that behalf was the filing of the affidavits of two Japanese, to the effect that each of the affiants knew the prosecutrix before she came to the United States, and knew her age, and that she was then, on November 24, 1911, of the age of 17 years and 6 months.

[7] This showing was wholly insufficient to warrant or justify the trial court in granting a new trial. Presumably the verdict of the jury was founded, in part at least, upon evidence that the assault was committed with force and violence, and against the will of the prosecutrix. In this view of the verdict, it is readily apparent that the age of the prosecutrix was of no consequence upon the hearing of the motion for a new trial. Testimony as to her age was not material in the face of the verdict, which was sufficiently supported by the proof of violence. Moreover, the alleged newly discovered evidence was at best accumulative, and would not in any event have been sufficient in and of itself, even if uncontradicted, to justify an acquittal of the defendant in the face of the evidence bearing upon other ingredients of the crime.

[8] In addition to all of this, there was absolutely no showing made that with reasonable or any diligence the testimony contained in the affidavits could not have been produced at the trial.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

CUTHILL v. PEABODY et al. (Civ. 991.)

(District Court of Appeal, First District, California. June 20, 1912.)

1. CORPORATIONS (§ 121*)—SALE OF STOCK—ACTION FOR PRICE—PLEADING.

In an action for the price of certain corporate stock, it was not necessary that the complaint should allege that the contract sued on was founded on a consideration.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

2. PLEADING (§ 7*)—MATTERS OF PRESUMPTION.

Where a contract for the sale of corporate stock, in order to be valid, must have been in writing, the law presumes that it was in writing, which presumption is necessarily pleaded by an allegation of the making of the contract.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 7.*]

3. CONTRACTS (§ 88*)—CONSIDERATION—PRESUMPTION.

Every contract expressed in writing carries with it the presumption of a consideration

for its execution; and the burden of showing want of consideration is on the party seeking to avoid it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 403-405, 407; Dec. Dig. § 88.*]

4. SALES (§ 340*)—BREACH OF CONTRACT—SELLER'S REMEDY.

A seller of personal property, on the buyer's refusal to take the same and pay the price, may retain the property for the buyer and sue for the purchase price; acting as the buyer's agent, he may resell the property, and then recover the difference between the contract price and the price obtained at the resale; or he may treat and keep the property as his own, and recover the difference between the contract price and the market price at the time and place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

5. SALES (§ 369*)—CONTRACT—BREACH—SELLER'S REMEDY.

Where the title of property contracted for has not passed to the buyer, the seller, on the buyer's breach of the contract, has no action for the purchase price, but is limited to an action for damages, founded on a breach of the buyer's contract to accept and pay for the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1068, 1084; Dec. Dig. § 369.*]

6. CORPORATIONS (§ 121*)—SALE OF STOCK—BREACH OF CONTRACT—ACTION—NATURE.

Plaintiff sued for breach of a contract to purchase certain stock, alleging that defendants promised to purchase the stock for \$1,000 after one year from February 11, 1905, in the event plaintiff desired to sell, and that on February 11, 1906, plaintiff notified defendants that he desired to sell at that price, and tendered the stock, duly indorsed for transfer, but that defendants refused to pay for the same, notwithstanding plaintiff had kept and performed all of the conditions required of him by the contract. *Held* that, while such agreement at its inception was but a mere unilateral offer to purchase, lacking in mutuality, yet plaintiff's allegation that on the expiration of the time specified he promptly exercised his option to sell by acceptance of the offer to purchase, and then made an immediate tender of the stock, duly indorsed for transfer, showed a transformation of the offer into an unconditional contract of purchase and sale, so that, if after that time title vested at any time in the defendants, plaintiff could treat the transaction as closed and sue for the price.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

7. CORPORATIONS (§ 121*)—SALE OF STOCK—CONTRACT—BREACH—ACTION.

Civ. Code, § 1411, provides that an offer to perform an executory contract for the purchase and sale of personal property is tantamount to a performance, and vests title to the thing sold in the buyer; that title is transferred by an executory contract of sale when the seller prepares the thing sold for delivery, and offers it to the buyer with the intent to transfer the title. *Held* that, where plaintiff averred that defendants agreed to purchase certain stock from him after a year from February 11, 1905, in the event plaintiff desired to sell, and that on that date plaintiff notified defendants that he desired to sell at the price stated, and tendered the stock, duly indorsed for transfer, to defendants, such offer to perform was sufficient to vest the title in defendants, so as to authorize plaintiff to sue for the price.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

[Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.]

Action by A. Cuthill, Jr., against G. L. Peabody and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Welles Whitmore, for appellant. Ira S. Lillick, for respondents.

LENNON, P. J. This is an appeal from a judgment rendered and entered in favor of the defendants upon an order sustaining defendants' demurrer to plaintiff's third amended complaint, without leave to amend.

The plaintiff sought to recover from the defendants the sum of \$1,000 as the purchase price of 100 shares of the corporate capital stock of the Sunset Dredging & Development Company, which stock, it is alleged, the defendants contracted to buy from plaintiff.

The contract sued on is not alleged in the complaint to have been expressed in writing; nor is it pleaded in *hæc verba*. The gist of the action, however, is to be found in those allegations of the complaint wherein, in substance, it is averred that the defendants promised and agreed to purchase said stock from plaintiff for the sum of \$1,000 "after one year from February 11, 1905" in the event that plaintiff desired to sell the same; that on February 11, 1906, plaintiff notified defendants that he desired to sell the specified stock at the price stated, and thereupon tendered the stock, duly indorsed for transfer, to the defendants, but that they refused to purchase or pay for the same, as agreed, notwithstanding that the plaintiff had kept and performed all of the conditions required of him by the contract.

It is apparent that the defendants' demurrer was sustained upon the ground that the facts pleaded did not constitute a cause of action.

In support of the demurrer, it is urged that the complaint is defective in not alleging that the contract in suit was founded upon an adequate or any consideration.

[1, 2] As a matter of pleading, the plaintiff was not required to allege that the contract sued on was founded upon a consideration. To be valid under the statute of frauds, the contract must have been in writing, and the law presumes that such a contract was in writing. Presumptions of law need not be pleaded; and in the present case the presumption that the contract was in writing necessarily followed the allegation of its making. *Brennan v. Ford*, 46 Cal. 7; *Emerson v. Bergin*, 76 Cal. 202, 18 Pac. 284; *Broder v. Conklin*, 77 Cal. 336, 19 Pac. 513; *Regan v. Justice's Court*, 75 Cal. 255, 17 Pac. 195; *Barnard v. Lloyd*, 85 Cal. 131, 24 Pac. 658; *Bradford v. Joost*, 117 Cal. 204, 48 Pac. 1083.

[3] Every contract expressed in writing

carries with it the presumption of a consideration for its execution; and the burden of showing a want of consideration is upon the party who seeks to avoid the contract. Civ. Code, §§ 1814, 1815; *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965; *Henke v. Eureka Endowment Association, etc.*, 100 Cal. 429, 34 Pac. 1089; *Rogers v. Schulenberg*, 111 Cal. 281, 43 Pac. 899. Presumptively the contract sued on in the case at bar was expressed in writing; and, that being so, the further presumption that it was founded upon a consideration necessarily follows as a matter of law; and therefore it was not necessary to a good complaint that the consideration for the contract should be specifically pleaded.

The defendants' contention in this regard is based in part upon the assumption that the plaintiff is seeking relief by the remedy of specific performance, and that therefore plaintiff's complaint should allege and show, not only an adequate consideration for the contract, but that, as between the parties thereto, it was fair and just.

The complaint, however, contains none of the essentials of a cause of action for the specific performance of a contract for the purchase of personal property; and as it is readily apparent from the allegations of the complaint that the plaintiff is not seeking specific performance of the contract, it will be neither necessary nor profitable to follow counsel for defendants in his discussion of what is required to constitute a good complaint in an action for specific performance.

Plaintiff's complaint evidently proceeds upon the theory that the contract for the sale of the stock was fully executed upon the exercise of the option to sell, and that when delivery of the stock, duly indorsed for transfer, was tendered to the defendants, title to the same at once became vested in them, and that upon their refusal to pay the plaintiff, electing to consider the stock as sold, was entitled to recover the purchase price thereof.

[4] Ordinarily the vendor of personal property, upon the refusal of the vendee to take the property and pay the agreed price therefor, may resort to one of three remedies, viz.: (1) Standing on the sale, the vendor may retain the property for the vendee and sue for the purchase price; (2) acting as the agent of the vendee, the vendor may resell the property, and then sue to recover the difference between the contract price and the price obtained on the resale; or (3) the vendor may treat and keep the property as his own, and recover from the vendee the difference between the contract price and the market price at the time and place of delivery. 2 Sedg. on Dam. (8th Ed.) § 753; *Lewis v. Greider*, 49 Barb. (N. Y.) 606; *Pol-len v. LeRoy*, 30 N. Y. 549; *Dustan v. McAndrew*, 44 N. Y. 77.

[5] Of course, in a case where the title to

the property contracted for has not passed to the vendee, the vendor, upon a breach of the contract, would have no cause of action for the purchase price. In such a case the vendor would be compelled to recoup his loss, if any, solely by an action for damages founded upon a breach of the vendee's contract to accept and pay for the property. Civ. Code, § 3311.

If, in the present case, the sale was completed, and the title to the property sold had actually, or in contemplation of law, passed to the defendants, plaintiff was within his rights in electing to sue for the purchase price of the stock; and the sufficiency of the facts stated in the complaint to constitute a cause of action for the recovery of the purchase price, rather than for damages for breach of contract, depends upon whether or not the pleaded facts show a completed sale, with title to the property sold in the defendants at the time the action was instituted. Civ. Code, § 3310; *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Bement v. Smith*, 15 Wend. (N. Y.) 493.

[6] While it may be conceded, as contended by counsel for defendants, that the contract in controversy was at its inception but a mere offer to purchase, and therefore unilateral and lacking in mutuality, nevertheless if it be a fact, as alleged in the complaint, that plaintiff promptly, upon the expiration of the time specified in the contract, exercised his option to sell by an acceptance of the offer to purchase, and then made an immediate tender of the stock, duly indorsed for transfer, the original contract was thereby and thereupon transformed from a mere offer to purchase into an absolute, unconditional binding contract of purchase and sale; and from that time on, if title to the stock had vested in the defendants, the plaintiff was justified in treating and suing upon the completed transaction as if it were an ordinary contract of purchase and sale. Civ. Code, § 3310; *Keller v. Ybarry*, 3 Cal. 147; *Lassing v. James*, supra; *Los Angeles, etc., Co. v. Wiltshire*, 135 Cal. 658, 67 Pac. 1086; *Cook on Stockholders*, § 334; *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Sedg. on Dam.* 282; *Struthers v. Drexel*, 122 U. S. 487-493, 7 Sup. Ct. 1293, 30 L. Ed. 1216.

[7] It seems clear to us that the allegations of the plaintiff's complaint are sufficient to show that title to the stock was transferred to and vested in the defendants. By the provisions of section 1411 of the Civil Code, an offer to perform an executory contract for the purchase and sale of personal property is tantamount to performance, and vests the title to the thing sold in the vendee. That section in substance provides that the title to personal property is transferred by an executory contract for the sale thereof when the seller prepares the thing sold for delivery, and offers it to the buyer with the intent to transfer the title thereto

to the buyer. That, in substance, is what the plaintiff alleges he did in the case at bar; and if it be true, as we think, that the defendants' original offer to purchase was merged into a completed contract of sale by the plaintiff's acceptance of the defendants' proposal, and that a tender of delivery vested title in the defendants, then it must follow that the plaintiff's complaint states a cause of action for the purchase price of the stock. *Orr v. Bigelow*, 20 Barb. (N. Y.) 21; *Bement v. Smith*, supra; *Lassing v. James*, supra.

The judgment appealed from is reversed, with instructions to the trial court to overrule the defendants' demurrer and require them to answer.

We concur: KERRIGAN, J.; HALL, J.

(19 Cal. App. 310)

KEEFE v. KEEFE et al. (Civ. 1,095.)

(District Court of Appeal, First District, California. June 20, 1912.)

1. SPECIFIC PERFORMANCE (§ 86*)—ADEQUACY OF OTHER REMEDIES.

The contract on which one conveyed to his mother his interest in real estate, that she would return it to him at her death, entitles him to specific performance, she not having done so, and not having sold the land; the remedy at law being inadequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.*]

2. LIMITATION OF ACTIONS (§ 86*)—STATUTE APPLICABLE.

Though the agreement on which one conveyed land to his mother, that at her death she should return it to him, was oral, yet under it, the land being impressed with the qualities of a resulting trust in the hands of those to whom she devised it, the four years' limitation, and not the two years' limitation, for action on an oral contract applies.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 168-181; Dec. Dig. § 38.*]

3. FRAUDS, STATUTE OF (§ 122*)—RETROACTIVE OPERATION.

The amendments of Civ. Code, § 1624, and Code Civ. Proc. § 1973, to require contracts of a certain nature to be in writing, are not retroactive, with the effect of making void a prior oral contract, valid when made.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 271; Dec. Dig. § 122.*]

4. WILLS (§ 58*)—CONTRACT TO DEVISE.

The rights of one with whom his mother agreed that at her decease she would leave certain property to him are the same as though she expressly agreed to make a will in his favor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. § 58.*]

5. PLEADING (§ 72*)—COMPLAINT—PRAYER.

A complaint showing plaintiff may be entitled to judgment in damages states a cause of action, though its allegations do not show he is entitled to the relief demanded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 143, 144; Dec. Dig. § 72.*]

6. DISMISSAL AND NONSUIT (§ 58*)—GASCHIDA.

Objection that a complaint does not state a cause of action is not available on motion for nonsuit.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134-139; Dec. Dig. § 58.*]

7. APPEAL AND ERROR (§ 241*)—OBJECTIONS BELOW—NONSUIT.

Variance, not having been specified as one of the grounds of motion for nonsuit, is not available in support of a judgment of nonsuit on appeal therefrom. It should have been called to plaintiff's attention that he might remedy it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 642; Dec. Dig. § 241.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Charles Ignatius Keefe against Elizabeth A. Keefe and others. Judgment for defendants; plaintiff appeals. Reversed.

Arthur W. Perry and Henry Conlin, for appellant. Bartlett & Langdon and Cullinan & Hickey, for respondents.

KERRIGAN, J. This is an appeal from a judgment entered upon an order of nonsuit in an action to enforce specific performance of an agreement alleged to have been made between plaintiff and his mother, Susan Keefe, deceased, where she promised to make a certain provision for him in her will.

Michael Keefe, the plaintiff's father, died intestate leaving at the time of his death two parcels of valuable real estate in the city and county of San Francisco, which estate was community property. One-half of his property was given his widow, Susan Keefe, and the other one-half descended to the five children of Michael and Susan Keefe. As one of such children, plaintiff's interest in the estate was therefore one-tenth.

At the time of the death of Michael Keefe, the plaintiff was in military service to the United States, and stationed in the Philippine Islands. With a view to looking after his interest in the estate, he secured his discharge from the army, went to San Francisco, called upon his mother, the administratrix of the estate, and demanded his share of the property left by his father. The property was still in probate, undistributed, and this request, of course, could not be complied with. The next day, at the request of Susan Keefe, she and the plaintiff met at the office of her attorney. There were also present her attorney, and her daughters, with whom she was at the time living, and who are the principal beneficiaries under her will. After considerable conversation, the plaintiff was ultimately persuaded to make a transfer of his interest in his father's estate to his mother for her better maintenance and protection during her life, with the understanding that upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note, Series, & Rep.'s Indexes

his mother's death his share in his father's estate would be returned to him.

Susan Keefe died in San Francisco March 12, 1909, leaving a last will and testament, according to the terms of which she in effect failed to carry out her contract with the plaintiff. Her will was subsequently, to wit, April 6, 1909, admitted to probate, and on April 14, 1911, this action was commenced.

Upon the trial thereof, as before stated, a judgment of nonsuit was entered against the plaintiff. The motion for nonsuit was made upon the following grounds: (1) That the cause of action asserted by the complaint on the contract alleged and sought to be established and specifically enforced is barred by section 339 of the Code of Civil Procedure. (2) That the contract sought to be established and specifically enforced is within subdivision 7 of section 1973 of the Code of Civil Procedure. (3) That the contract alleged is not specifically enforceable.

Taking up the last ground of the motion first, defendants contend in effect that equity ought not to interpose and grant relief in this case, because the contract is vague and indefinite, and because the plaintiff may be fully and adequately compensated in money for the breach of the alleged contract.

The testimony shows that immediately upon the plaintiff's arrival in San Francisco he, at the suggestion of his mother, met her at the office of her attorney; that the attorney asked him if he had received a letter requesting him to deed his share of his father's estate to his mother, and, upon receiving a reply in the affirmative, asked him what he was going to do about it. Plaintiff replied that he was going to take his share of the estate; whereupon his mother commenced to cry, and said, "Charlie, are you going to take my property? * * * * * Charlie, you will be getting old one of these days, and if you take your share you will only squander it. Let me have it, and I will give it back to you on my death." He told his mother that upon those conditions she could take it. At this point the attorney came forward with the deed, and said: "Charlie, remember; now, this share that you are giving to your mother will be given back to you on her death." "These are the conditions," said the plaintiff, "upon which I am going to give it to my mother."

The attorney, who was a witness for the plaintiff, testified that at this meeting he explained to plaintiff that the latter's two sisters had conveyed, or were going to convey, their interests to their mother, and it was desired that he should do likewise, in order that his mother might have an income for the rest of her life sufficient to keep her comfortable; that to this plaintiff was agreeable, but that he did not want the property sold. In reply the witness informed him that his mother considered the land in question as five pieces of property, producing

a good income, and had no idea of selling it; that nevertheless, if plaintiff conveyed his share to her, it would be hers absolutely, and if so advised she might sell it. In effect the plaintiff still objected; but when he was informed that, if he persisted in receiving his share, his mother would not hold the land with him, and that it could be sold in partition proceedings, he finally acquiesced in making a deed to her, with the understanding that the share so conveyed should be returned to him on his mother's death.

Prior to receiving a conveyance of their interest in the land from all of her children, the mother made a will in which she stated that it was proposed that her sons and daughters should deed to her their five-tenths interest in their father's estate, and in the said will she devised and bequeathed to each of her children, who should thus convey to her their said interest, a one-tenth interest in her estate. This will was subsequently revoked, and another one executed in which the mother left all her property to her daughters.

[1] We think the contract disclosed by the evidence is neither uncertain nor unenforceable in equity. Even if Susan Keefe had sold the land perhaps, under a fair interpretation of the contract, the plaintiff would have been entitled to a one-tenth interest in the proceeds; and possibly in that event the proceeds would have been in such shape that an action at law would have been entirely adequate. But under the circumstances presented by the evidence it is quite clear, we think, that Susan Keefe agreed to return to the plaintiff, at the time of her death, his one-tenth interest in this land, provided she had not in the meantime sold the same. She did not sell the property; she failed to keep her contract, which is definite, certain, and valid. He was therefore entitled to some remedy; and, as land was the subject-matter of the agreement, as well as of this suit, the inadequacy of the legal remedy is well settled, and the jurisdiction of equity firmly established. *Cordano v. Feretti*, 15 Cal. App. 670, 115 Pac. 657; 2 Pom. Eq. Rem. § 745.

[2] As before indicated, this action is based upon an oral contract; and, if it is governed by the provisions of section 339, limiting the time to commence actions on such contracts to two years, it is, of course, barred. But under the terms of the contract the property involved is impressed with the qualities of a resulting trust in the hands of the defendants. *Duvall v. Duvall*, 54 N. J. Eq. 581, 35 Atl. 750; *Best v. Gralapp*, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491; 2 Pom. Eq. Rem. § 746; 1 Underhill on Wills, § 286. See cases cited in note to *Johnson v. Hubbell*, 68 Am. Dec. 787. In such a case an action may be brought at any time within four years. *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Piller v. S. P. Ry. Co.*, 52 Cal. 42; *Chapman v. Bank of*

Cal., 97 Cal. 155, 31 Pac. 896; Nouguls v. Newlands, 118 Cal. 102, 106, 50 Pac. 338.

[3] Since this contract was made, sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure have been amended so as to require contracts like this one to be in writing; and at the trial defendants insisted that this contract came within those sections as amended. They have not pressed the point in this court, and may be deemed to have abandoned it, as well they might; for it is wholly without merit. The case was not within the sections as they read at the time this contract was made. *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667. And certain it is that the amendments should not have a retroactive effect, and operate to make void a contract valid at the time of its execution. 29 Am. & Ency. of Law, 814; 20 Cyc. 281.

[4] There is no merit in the suggestion that there was no agreement to make a will. It is sufficient that Susan Keefe promised to leave the property to the plaintiff at her decease. *Best v. Gralapp*, supra.

[5, 6] One other matter is suggested in the brief of respondent, which we will notice. While it may be that the allegations of the complaint do not show that the plaintiff is entitled to the relief demanded, still, if it shows, as is admitted by the defendants, that he may be entitled to a judgment in damages, it follows, of course, that the complaint states a cause of action. *Swan v. Talbot*, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066. But, even if the complaint did not state a cause of action, this objection could not be availed of on a motion for nonsuit. *Pacific Pav. Co. v. Vizelick*, 141 Cal. 410, 74 Pac. 352.

[7] If the allegations of the complaint and the proof do not correspond, there is a variance; but, the defendants not having specified this as one of the grounds of their motion for nonsuit, we cannot here consider it for the first time. The attention of the plaintiff should have been called to the supposed defect, so that he might have an opportunity to remedy it, if he desired. 1 Hayne on New Trial and Appeal [Revised Ed.] §§ 115, 116, pp. 561 and 577.

The judgment appealed from is reversed.

We concur: LENNON, P. J.; HALL, J.

(19 Cal. App. 255)

BAGLEY v. CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1,041.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

1. LIMITATION OF ACTIONS (§ 95*)—EXECUTORS' SALE—EXCUSE FOR DELAY.

Where plaintiff's action to set aside an executors' sale, made in good faith for value to an innocent purchaser, was not brought until nearly 20 years after she reached her majority and 33 years after the sale, her mere want of knowledge of the sale, when all the

proceedings were of record and could have been discovered by inquiry, did not excuse her long delay, nor prevent the action from being barred by Code Civ. Proc. §§ 1573, 1574, providing that no action shall be brought to set aside an executor's sale, unless commenced within three years after final settlement, or discovery of the grounds for setting it aside, or within three years after the removal of any legal disability; and it was immaterial whether the purchaser was in possession of the land.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 837, 473, 474; Dec. Dig. § 95.*]

2. JUDGMENT (§ 517*)—COLLATERAL ATTACK—CONFIRMATION OF EXECUTORS' SALE.

The confirmation of an executors' sale by a court of competent jurisdiction in a decree finding that the sale was without notice, but interpreting the will to authorize sale without notice, was not subject to collateral attack in a suit instituted long afterwards to set aside the sale, nor could the correctness of such interpretation of the will be inquired into; it being essential to any such attack and inquiry to consider the terms of the will—a course not permitted in a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 960; Dec. Dig. § 517.*]

3. JUDGMENT (§ 495*)—JURISDICTION—PRESUMPTION.

All intendments are in favor of the validity of the judgments of courts of general jurisdiction and of the jurisdiction of such courts to render a particular judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.*]

4. EXECUTORS AND ADMINISTRATORS (§ 138*)—SALE—NOTICE.

An executors' sale of land pursuant to Probate Act (St. 1851, p. 470) § 177, in effect in 1872, which provides that notice shall be given by an executor of the sale of a testator's estate, unless there are special directions given in the will, in which case he shall be governed by such directions, and also pursuant to a will which makes no specific directions as to whether the sale shall be with or without notice, but provides that the executors, within a reasonable time and when they think it advisable to do so, shall sell the property, is not invalid, though no notice of the sale is given.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560-566, 568-575; Dec. Dig. § 138.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Mary C. Bagley against the City and County of San Francisco and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John Hubert Mee, for appellant. Olney, Pringle & Mannon and Page, McCutchen, Knight & Olney, for respondent Walker. Edwin T. Cooper, for respondent Bennett. A. H. Redington, for respondents Redington. Solomon Bloom, for respondent David O. Bloom. Stoney, Rouleau & Stoney, for respondents Solomon Bloom and others.

BURNETT, J. The action was brought to quiet title to certain real property in San Francisco, and the judgment in favor of defendants was rendered upon an agreed statement of facts. It appears that, on Novem-

ber 9, 1869, one Charles F. Hamilton and Monroe Greenwood became the owners of the premises by virtue of a deed from the city and county of San Francisco. Hamilton died on November 14, 1872, leaving a will, by which he disposed of all of his personal property and directed, in a codicil thereto, that his executors sell all of his real property in the city and county of San Francisco and invest the proceeds thereof in United States government bonds for the benefit of his widow, Mary C. Hamilton, and his only child, Mary C. Hamilton, now Mary C. Bagley, plaintiff herein. The will was admitted to probate on December 8, 1872, and the executors, acting under the authority contained in said codicil proceeded, on March 3, 1875, to sell the real property at private sale and without any notice to the public. The executors rendered to the court a proper return and account of the sale, showing that they had sold to Monroe Greenwood, for the sum of \$3,991, the various tracts of land described in the return, and they prayed for an order of confirmation. At the hearing of the return, on March 19, 1875, after proper notice given, the court appointed Timothy D. Reardon attorney to represent the minor heir in the proceeding and made its decree, adjudging that "said sales were duly made under the powers conferred on said executors under the will of deceased, and that the same are hereby confirmed, approved, and declared valid, and said executors are hereby authorized and empowered to execute conveyances of said land to said purchaser upon receiving the purchase price aforesaid." The court found that "said sale was at private sale, and no notice of the time or place of said sale was given previous to the sale," and "that the executors were fully authorized and empowered by said will to sell the estate of the deceased without any order of court, and that said sales were legally made and fairly conducted, and that the sums bid for said lots were not disproportionate to the value thereof, and that a sum exceeding such bids by at least 10 per cent. cannot be obtained." A deed of the interest of said estate to Monroe Greenwood was executed by the executors on the 25th day of March, 1875, and recorded in the office of the county recorder on April 2, 1875. The defendants thereafter, by payment of what was considered the full value of said property and without knowledge of any claim of plaintiff, succeeded to all the right, title, and interest of Greenwood in and to the premises in controversy. On April 29, 1875, a decree of final distribution was made in the estate of Hamilton, which, after distributing certain personal property not involved herein, distributed all of the rest, residue, and remainder of the property of the decedent, whether then known or discovered, to the widow of deceased and plaintiff herein, share and share alike; no specific mention being

made in said decree of any real property. A certified copy of said decree was recorded the same day in the county recorder's office. Monroe Greenwood and his successors in interest have paid all taxes levied or imposed upon the property and also all street assessments.

With the exception of the pieces claimed by W. P. Redington, George M. Rolph, and Margaret Jane Walker, the property involved has at all times been vacant, open, unfenced, uncultivated, and unused. On December 1, 1907, W. P. Redington and George M. Rolph inclosed by a substantial fence the land claimed by them, and, between the 1st day of July and the 1st day of November, 1907, Margaret Jane Walker built substantial improvements upon the lot claimed by her, of the value of \$11,000; but these improvements were made without the knowledge or consent of plaintiff. Plaintiff made no claim to any of the property until February 1, 1908, and since that date she has asserted her right to an undivided one-fourth interest therein. As to her claim, the various defendants had no knowledge, other than such knowledge as was imparted by the public records of the various documents set forth in the agreed statement of facts. At the time of the said probate sale, plaintiff was of the age of four years. She reached her majority in 1889, and she brought this action 19 years thereafter, to wit, on the 11th day of January, 1908.

The answers denied plaintiff's title, averred ownership in defendants, pleaded the statute of limitations as embodied in sections 318, 343, and 1573 of the Code of Civil Procedure, set up the facts in reference to said probate sale, and presented, also, the defense of laches and estoppel.

All the various contentions made and argued by counsel in their exhaustive briefs revolve about the vital consideration as to the legal effect of the said probate sale made by the executors to Greenwood. In fact, appellant's cause is grounded upon the proposition that "the attempted sale in probate to Monroe Greenwood was a nullity, for the reason that it was made at private sale and without notice as required by law." The basis for the contention is that the law in force at the time of the death of Hamilton controlled the proceeding, and that its mandate required the executors to give notice of the sale. Section 177 of the Probate Act (St. 1851, p. 470), in effect at that time, November 14, 1872, directed that, "if the testator shall make provision by his will, or designate the estate to be appropriated for the payment of his debts, the expenses of administration or family expenses, they shall be paid according to the provisions of the will and out of the estate thus appropriated, so far as the same may be sufficient," and the following section, 178, as amended by St. 1861, p. 645, provided that "when such

provision has been made, or any property directed by the will to be sold, whether for payment of debts, or expenses, or for any other purpose, the executor or administrator with the will annexed may proceed to sell without the order of the probate court but he shall be bound, as an administrator, to give notice of the sale, and to return accounts thereof to the court, and to proceed in making the sale in all respects as if it were made under the order of the court, unless there are special directions given in the will, in which case he shall be governed by such directions; but in all cases, no sale shall be valid unless confirmed by the court under the rules prescribed in cases of sales of real estate by an administrator." The clause of the will involved herein is: "And I declare it to be my desire that my executors within a reasonable time, and when they think it advisable to do so, to sell all my real estate in the city of San Francisco, and invest the proceeds from such sale in United States government bonds." It is contended that this does not amount to a direction for the sale of any real property, and, since there is no provision in the will for the payment of debts, expenses of administration, or family allowance, the case is not brought within the exception that obviates the order of sale by the court, and the notice required by the statute; or, at any rate, if said language of the will is construed as equivalent to a direction to sell, it was still necessary to give the proper notice to make the sale valid.

Against this view thus generally stated are opposed various contentions of respondents, among them, that the action is barred by section 1573 of the Code of Civil Procedure; that, having received the purchase money for the said probate sale, appellant is deemed to have ratified the proceeding, and it is now too late for her to question it; that the failure to give notice of said sale is not a defect that can be taken advantage of in a collateral attack; that the law in effect at the time of sale, and not that at the time of the death of the testator, applies, and under said law no notice was required; and that, under a fair construction and reasonable application of said section 178 of the Probate Act, as it stood in 1872, the sale must be held to be regular and valid.

Said section 1573 of the Code of Civil Procedure reads as follows: "No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based." Section 1574, following, provides that "the

preceding section shall not apply to minors or others under any legal disability, to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability."

[1] As we have seen, 19 years elapsed after plaintiff ceased to be a minor before she brought the action, and this was 33 years after said probate sale. It thus appears that plaintiff is unmistakably brought within the clearly expressed inhibition of said statute of limitations, unless it can be said that, by reason of the want of actual knowledge of the claim of respondents, the bar of the statute does not operate against her. The portion of the stipulated facts in point is as follows: "The said Monroe Greenwood and his grantees and his successors in interest after him claimed ownership of said real property under said will and probate proceedings and other documents hereinbefore set out, but as to said claims plaintiff had no knowledge, other than such knowledge as can be imputed to her from the existence of the records hereinafter set out and referred to, * * * until the commencement of this action." It might be claimed, therefore, that, since plaintiff acquired knowledge of the probate sale within 3 years of the beginning of the action, this circumstance constitutes one of the "other grounds upon which the action is based," and that she is thus brought within the exception provided for in said section 1573. But the want of actual knowledge of the sale does not justify her long delay in bringing the action. The burden was obviously cast upon her to excuse her ignorance of the proceedings in her father's estate. They were matters of public record, and it was her legal duty, at least after reaching her majority, to make inquiry concerning them. If she had so inquired, the result would have been the discovery of the fact that this identical property was sold in 1875, for its full value, by the executors of her father's estate, and she would have known that, in order to maintain an action to recover said property, or any portion of it, she must proceed not later than 1892. The situation, in brief, is simply this: With the means of knowledge available, and without offering any excuse for her failure to make inquiry, plaintiff waits for nearly 20 years after reaching her majority and then institutes proceedings to set aside a sale made to an innocent purchaser for value by the executors of her father's estate in the utmost good faith and by virtue of a purported power in the will, and afterwards confirmed by a solemn decree of the court. No judicial tribunal, with proper regard for vested interests and that wise public policy which fosters the stability of titles, should allow her want of actual knowledge of the adverse claims to operate, under such circumstances, to protect her from the bar of the statute. In *Dennis v. Birt*, 122

Cal. 39, 54 Pac. 378; 68 Am. St. Rep. 17, the action was to recover possession of a tract of land and to set aside a sale thereof made in probate, and it was stated in the opinion by Commissioner Britt, referring to the same statute of limitations, that "it is further claimed that the case is taken from the operation of the statute by the averment that the grounds of the action were discovered within a year next before the commencement of the suit. Aside from other considerations which may bear on this point, the statement of the complaint is insufficient for the purpose claimed, because unaccompanied by any explanation of the failure to acquire knowledge earlier—so as regards the adult plaintiffs, at least." If a mere allegation in the complaint of the want of knowledge is insufficient, clearly a stipulation of like import falls short of meeting the requirement of the rule. The Chief Justice, in his concurring opinion, discusses the matter at length, and declares that "under this section [1574, supra] I think it appears from the complaint that the action of the two plaintiffs herein, who were more than three years past their majority when the original complaint was filed, was barred, and that the ruling of the court sustaining the demurrers as to them was correct, and that the judgment as against them should be affirmed upon this ground alone. They are not saved by their allegation that the facts upon which their action is founded came to their knowledge within three years of the commencement of the action, because they offer no explanation or excuse for their ignorance."

In *Moore v. Boyd*, 74 Cal. 171, 15 Pac. 671, it is said: "For the purposes of the statute of limitations, if the means of knowledge exist, and the circumstances are such as to put a man of ordinary prudence on inquiry, it will be held that there was knowledge of what could have been readily ascertained by such inquiry. This rule is applied both in equity (*New Albany v. Burke*, 11 Wall. 107 [20 L. Ed. 155]; *National Bank v. Carpenter*, 101 U. S. 576 [25 L. Ed. 815]) and at law (*Bailey v. Glover*, 2 Wall. 349 [22 L. Ed. 636]; *Wood v. Carpenter*, 101 U. S. 141 [25 L. Ed. 807])."

The effect of the corresponding section 190 of the Probate Act received consideration in the early case of *Harlan v. Peck*, 33 Cal. 515, 91 Am. Dec. 653. The only substantial difference between the language of that section and the provision before us is that the former required the action to be brought within three years next after the sale, instead of the settlement of the final account as now. In the *Harlan* Case the court, through Mr. Justice Sanderson, said: "Whether this language embraces sales which are made under order of the probate courts which are void for the want of jurisdiction, or only such sales as are merely voidable, is the question. There is nothing in the policy or language of

the statute which excludes void sales from its operation. The policy of the statute is to quiet titles to real estate sold by order of the probate courts. In view of that policy merely, there can be no distinction between sales which may be termed void for the want of jurisdiction and those which are voidable only. Nor is there anything in the language of the statute which creates such a distinction. * * * To the phrase in question there is added no qualification; and hence, if it restricts the limitation at all, it excludes all sales which are not 'according to the provisions of the chapter,' which includes voidable as well as void sales." The authority of this case is recognized in subsequent decisions of the Supreme Court, and it would probably be admitted as decisive of the controversy, were it not for some expressions used in the opinion found in *Gage v. Downey*, 94 Cal. 241, 20 Pac. 685, and in *Campbell v. Drals*, 125 Cal. 253, 57 Pac. 994. But those cases in their facts are so dissimilar to the case at bar that they can be of little, if any, assistance here. The distinction is clearly pointed out by respondents, and it is manifest that these cases are not inharmonious with the other decisions of the Supreme Court.

In the *Gage* Case the defendants did not claim under the probate sale at all. They set up a sale to a man by the name of Carlisle, with whom they were not in privity. The sale to Carlisle was unquestionably void, and the contention of defendants was that plaintiff could not recover of them because there had been a void probate sale to a stranger, which sale had remained untackled for more than three years. The decision is grounded upon the well-known doctrine that the statute of limitations creates a personal privilege that may be waived, and that, in order to be available, it must be claimed by one upon whom the privilege is conferred.

While not actually determined by the court, it seems to have been conceded that if the action had been against Carlisle he might have urged successfully the statute of limitations; the court stating: "Here it is conceded that no title vested in Carlisle under the probate sale, and that the facts exist which, under this section of the Code, deprive plaintiffs of the right to bring an action for the recovery of the land"—that is, as against Carlisle. Appellant calls attention to the fact that in the *Gage* Case, supra, the purchaser under the probate sale had not taken possession of the property, and that this circumstance was considered of some importance by the court. But it is obvious that the court was considering this particular statute of limitations in connection with the question of title. The purpose was to make the position plain that a void sale of itself could not create and it would not ripen into title, no matter how much time had elapsed,

but that, under the provisions of the statute, it could be set up simply as a bar to prevent the assertion of title in another. It occurred, however, to the author of the opinion that, if possession were taken under a void sale, then the purchaser might assert title in himself. This is true, because occupancy confers a species of title which may be purchased and sold, and for the recovery of which an action may be maintained against one having no better title (section 1006, Civ. Code; *King v. Gotz*, 70 Cal. 240, 11 Pac. 656); and possession, when adverse, as is well known, may ripen into a perfect title. This accounts for the expression in the opinion: "It appears that Carlisle never entered into possession of this land, under his purchase, and to hold that, under the circumstances as here depicted, the interest of the heirs was transferred to Carlisle would be novel in the extreme; but we do not deem it necessary to discuss that question." The case does not decide that, in order to take advantage of this statute of limitations, the purchaser must enter into actual possession of the property. This would be adding something that the Legislature has not provided. Of course, there may be circumstances where the question of possession would affect the application of the statute, but to agree with appellant's contention here would be to exclude unoccupied land altogether from the operation of said section 1573 of the Code of Civil Procedure. We can find no warrant for this position.

In the *Campbell Case*, supra, it was held that the probate sale to one Hewitt was void. He held and occupied the premises for a few days and, on March 11, 1874, he conveyed the land to one Cross, who occupied it till February, 1876, when he conveyed the whole in severalty to one Church, who had entered into possession of the property and was occupying it at the time of the trial. While Cross was in possession, he allowed the widow of John A. Campbell, deceased, to build a house upon a portion of the land and to occupy it with her minor children, and in 1876 Church married the widow, and the children continued to live there with Church and their mother. They were raised and treated by Church substantially as if they had been his own children, and he recognized their interest in the property, and, before the execution of the mortgage under which appellants claimed, he said to all the plaintiffs that they owned one-half of the property, and he told the mortgagee that the children owned one-half and called his attention to an abstract of title showing that fact, and the mortgagee thereupon agreed to take the mortgage with the knowledge that, although it covered the whole title to the land, yet it probably would be good for only an undivided one-half. All the plaintiffs had attained their majority a little more than three years, and the final account of the administration

of the estate of Campbell had been settled more than three years, before the commencement of the action. It was therefore argued that the action was barred by section 1573 of the Code of Civil Procedure; but the Supreme Court held that it had no application, since "plaintiffs had no cause of action against Church, for he acknowledged their title and was holding for them as a tenant in common, and they could not have litigated their title in the foreclosure suit because they held by a paramount title, and not under the mortgagor."

Neither of these cases can be said to favor the addition of a new element to the said statute, or to manifest a purpose on the part of the Supreme Court to depart from the plain and unequivocal language of the legislative intent.

[2] But the contention of appellant in effect is that the executors, by reason of their failure to give notice of the sale, did not properly exercise the power committed to them by the will. This question, however, as already indicated, was determined by the court in a solemn judgment confirming the sale, and it cannot be again litigated in this collateral proceeding. There is no dispute that the statute required the court to determine whether the sale was valid. By virtue of the decree, whose terms have already appeared, the court did determine that the sale was legally made, and that the executors, in making the sale, properly exercised the power conferred upon them by the will of the deceased. It cannot be doubted that the court had jurisdiction to render this decree. The will had been admitted to probate; it contained a direction to the executors as to the sale of the real property; they had proceeded to make a sale, and had filed in the court a proper return, which, after due notice, came on for hearing. The court found, it is true, that no notice of the sale was given by the executors; but the court so interpreted the will that no notice was required, and appellant now seeks, more than 30 years thereafter, to reverse that ruling. The only possible question of controversy before the court was the proper construction of the will, as to whether it authorized the executors to sell without notice. The court determined that it clothed the executors with that power, and if we are to attribute to judgments their necessary incidents it must be held that the construction of the will can no longer be open to dispute. If the decree showed upon its face that it was necessarily invalid, a different question might be presented; but it cannot be declared, from an inspection of the decree, that the judgment was even erroneous—much less that there was any want of jurisdiction on the part of the court. To reach even the conclusion that the court committed an error in confirming the sale, we must travel beyond the decree and consider the terms of the will; in other

words, a part of the evidence upon which the court based its judgment. This is not permitted in a collateral proceeding. *Emery v. Kipp*, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792. But if we were to do so the result would be, under well-established principles, to leave the judgment undisturbed and unaffected by this action.

[3] Of course, "all intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts in rendering a particular judgment is conclusively presumed to have been acquired, unless the record itself shows to the contrary." *Morrissey v. Gray* (Sup.) 124 Pac. 246.

There would be more plausibility in appellant's contention if there were no pretense of power to sell conferred by the will, and her claim would undoubtedly possess merit if such power were prohibited by law; but no situation of that kind is presented.

The two cases cited by respondents, *Richardson v. Butler*, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101, and *Zilmer v. Gerichten*, 111 Cal. 73, 43 Pac. 408, affirm the principle that is applicable here to the said judgment of confirmation. In the former, the action being to quiet title, one of the contentions was that notice of the probate sale was not posted as required by law; but the Supreme Court, through Mr. Justice McFarland, said: "The probate court, in its order confirming the sale, declared that the notice was posted in three public places. Respondent introduced evidence against the objection of appellants, with intent to show that one of the places was not a public place, within the meaning of the Code. But surely the court, having jurisdiction of the proceeding, could, within that jurisdiction, find the fact that the place was a public place; and such finding cannot be attacked collaterally." Furthermore, we may adopt as peculiarly appropriate in this case the following language of the court: "It may be remarked that there is no pretense that the sale under which appellants claim was in fact fraudulent, or without adequate consideration, or in any way unfair. To the objections made to it may well be applied that often abused word 'technical'; and we do not think they are sufficient to overturn, for want of jurisdiction, the solemn judgment of a court, or to destroy a title to realty honestly acquired."

In the *Zilmer Case*, supra, it is said that, "conceding, however, that the proceeding for confirmation of the sale was irregular as claimed, and that notice of the sale was not published for the time required by the order of the court, yet these irregularities or errors in the exercise of unquestionable jurisdiction would not invalidate the sale nor the administrator's deed to the extent of making them vulnerable to the collateral attack

made upon them in the court below. Jurisdiction existing, any order or judgment is conclusive in respect to its own validity in a dispute concerning any right or title derived through it, or anything done by virtue of its authority."

The vice of appellant's argument, let it be repeated, is in the assumption that the court confirmed the sale in the face of an affirmative showing that the notice required by the statute was not given; whereas the truth is the court determined that, under the provisions of the will, no notice was required, and thus was effect given to the intent of the testator as found by the court. This judicial construction of the will is as effective now as it would be if it had been made in a decree of distribution, instead of an order confirming the probate sale.

In the cases cited by appellant, there was either a direct attack upon the judgment, or else it appeared that the court had no jurisdiction, either of the person or of the subject-matter; and hence the judgment was void.

In *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617, the order to show cause why the sale should not be made was not published four weeks as required by the statute. The statute indubitably required such publication, and the probate court, in its order confirming the sale, expressly found that the order to show cause had been duly advertised for three weeks. It was held that the order confirming the sale was without jurisdiction, and could be collaterally attacked. The court said, through Mr. Justice Shafter: "The sale being void, there was no subject-matter upon which the order of confirmation could act. If the court had no jurisdiction to order the sale, it had none to confirm it. Where there is no power to render a judgment or to make an order, there can be none to confirm or execute it, or none, at least, without the help of legislation." The order to show cause is the process in this probate proceeding, and it is manifest that a compliance with the mandate of the statute as to its service is as indispensable to the jurisdiction of the court as an obedience to the requirement of the law as to jurisdiction of the person, where reliance is had upon the publication of summons in an ordinary action.

So in *Smith v. Olmstead*, 88 Cal. 582, 26 Pac. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336, there was a sale under a power conferred by the will of one Z. B. Smith, deceased; but it was properly held that the sale did not transfer an interest upon which the will did not operate; that the pretermitted child succeeded "immediately by operation of law to the same portion of the testator's real property as if no will had been made; that as to such portion the testator is to be regarded as dying intestate, and its succession is directed by law, and not by the will. And

as a necessary legal consequence of this contention, it would follow that every provision in the will directly or indirectly attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts, or other charges accruing in due course of administration, is inoperative as against such child." The court concluded that "the order of confirmation imparted no validity to the sale in this case; it only adjudicated that the power contained in the will had been followed, and that the sale was for a fair price." If we accept this as a correct statement of the effect of the order of confirmation, it is manifest that it sets at rest the disputed point here, as the vital question is whether the "power contained in the will has been followed."

Again, it would seem that the manner in which the power of sale shall be exercised—in other words, the mode of procedure for the execution of the authority conferred on the executors—should be determined by the provisions of the statute in force at the time of the sale, rather than by the law as it existed at the time of the death of the testator. The position of appellant is that at the time of the death of Hamilton the title to the real property vested in his devisees, subject only to such conditions of administration as the statute imposed at that time, and that the Legislature could not enlarge those conditions or divest or impair the title of said devisees by subsequent legislation. The theory is sound; but it is believed that it has no application to the situation here. In brief, whether, technically speaking, there was or not an equitable conversion of the real into personal property at the time of the death of the testator, it is at least true that the devisees took the real estate subject to the power of sale vested in the executors, and the amendment of the statute left this interest unaffected, but dispensed with the necessity for giving notice of the sale, thereby simply changing the form of procedure for the enforcement of a right or the exercise of a power that was created by the will. The law, as it existed at the time of the sale, provided that "when property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales, as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court."

The case in principle is not unlike *Murphy v. Farmers', etc., Bank*, 131 Cal. 115, 63 Pac. 368, 731, where it was held that "a subse-

quent statute, permitting a mortgage of the unadministered estate to pay the debts, passed after the death, does not create a new burden, nor interfere with the vested rights of the heirs, but provides merely for a change in the form of the burden, which is within the power of the Legislature."

The cases cited by appellant, as pointed out by respondents, relate to statutes which increased the instances in which the power of sale might be exercised, or enlarged the powers of the executor conferred by the will. An example is afforded in the leading case of *Brenham v. Story*, 39 Cal. 179. At the time of the death of the intestate in that case, the law allowed the sale of the real property of an estate only for the purpose of paying the debts of the deceased, for the support of the family, or for the expenses of administration. While the estate was being administered, the Legislature passed a special act authorizing the administrator, at his discretion, to sell any portion of the real estate of the deceased held or owned by him at the time of his death as in the judgment of the administrator would best promote the interest of those entitled to the estate. A sale under this act was held to be invalid, for the obvious reason that it impaired the vested rights of the heirs. The court said: "Upon the death of the ancestor, the heir becomes vested at once with the full property, subject to the liens we have mentioned; and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has. His estate is indefeasible, except in satisfaction of these prior liens; and the Legislature has no more right to order a sale of his vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way."

[4] But, conceding that the sale must be tested by the law of procedure as it existed at the time of the death of Hamilton, still, under a reasonable construction of the power of sale conferred by the will, it cannot be held that the sale was invalid. The act, as it was in 1872, provided, as we have already seen, that the executor was bound to give notice of the sale, "unless there are special directions given in the will, in which case he shall be governed by such directions." While there are no specific directions as to whether the sale shall be with or without notice, it is fairly inferable that the testator intended to leave this for the executors to determine. He expressed his desire that his executors, "within a reasonable time and when they think it advisable to do so," sell the property. The discretion

to sell when they should consider it advisable plainly implies an option to sell without the delay that would be caused by giving notice. As to this, the case of *Larco v. Casaneuava*, 80 Cal. 560, is somewhat instructive. The land in controversy there was sold under a power conferred by the will, as follows: "I hereby appoint my brother, Francisco Casaneuava, my executor of this my last will, with power to sell, dispose of and convey all my said property, both real and personal, for the benefit of my said sister, without obtaining any order of any court therefor." The law then, as far as notice of the sale is concerned, was the same as in 1872, and there was no more explicit direction in said will as to the manner of sale than in the case at bar. It was held, however, that the sale was valid without regard to a compliance with the provisions of the statute; the court saying: "The language is broad and general, and clearly shows that the intent of the testator was to withdraw his estate from the operation of the probate act and vest in his executor full power to convert in his own way the estate into cash for the benefit of his sister." The specific point that the sale was made without notice does not appear to have been urged, but the record shows that an objection was made to the sale, on the ground that there was not shown "a compliance with the law in any respect as to sales by executors," and therefore the deed was void. The logic of the decision, though, necessarily involves the proposition that, under such donation of power to the executor, he is not required to give any notice of the sale. The language of the power here is somewhat different, but it seems equally potent to clothe the executors with authority to sell the real estate at their discretion.

It may be said, finally, that there is respectable authority for holding that the want of notice of the sale is not jurisdictional, and does not invalidate the order of confirmation. In *Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250, the Supreme Court of South Dakota held that "the failure to publish notice for the required time did not render the proceedings void, but only irregular, and this irregularity does not affect the validity of the sale in this collateral proceeding."

In *McNair v. Hunt*, 5 Mo. 309, the Supreme Court of Missouri declared that, although the law required notice of the sale to be given, yet, in the absence of notice, the sale was merely voidable, and could not be questioned in a collateral suit.

In *Matheson's Heirs v. Hearin*, 29 Ala. 210, the court declared that a certain sale made by the administrator under a "purported order of the orphan court was a judicial sale; and that, although there may

be irregularities in it, such as the omission of the administrator to give the notice of it directed by law, it is not void, and cannot be collaterally impeached for such irregularities."

In *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458, it is held that, under the statute, the filing of a petition for an order of sale and the giving of notice of the hearing of the petition are jurisdictional and essential to the power of the court to order the sale; but if the court has thus acquired jurisdiction errors afterward in the exercise of it, however gross, will not render the decree invalid, and that if the court erred in ordering a private sale, instead of a public sale, as it ought to have done, this was mere error, and did not affect the validity of the sale. Here, as we have seen, no order for the sale was required, and the foregoing case would seem to be authority for the position that the fact of the sale being private—that is, without notice—is not jurisdictional. There is, of course, a distinction between this circumstance and the service of the order to show cause why an order of sale should not be made. The latter is without doubt a jurisdictional matter.

For further discussion of the question of jurisdictional defects, reference may be had to the following cases: *Dennis v. Winter*, 63 Cal. 16; *Richardson v. Butler*, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101; *Smith v. Biscailuz*, 83 Cal. 359, 21 Pac. 15, 23 Pac. 314; *Zilmer v. Gerichten*, 111 Cal. 73, 43 Pac. 408; *Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572; *Matter of Devincenzi*, 119 Cal. 498, 51 Pac. 845.

It is believed that no substantial reason has been or can be advanced why a court of equity should disturb these titles that have been unquestioned for so many years, and the judgment is therefore affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(19 Cal. App. 273)

BAGLEY v. LILIENTHAL et al.
(Civ. 1,042.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge. Action by Mary C. Bagley against Jesse W. Lilienthal and others. From judgment for defendants, plaintiff appeals. Affirmed.

John Hubert Mee, for appellant. Olney, Pringle & Mannon, for respondents.

BURNETT, J. This case involves the same questions as *Bagley v. City and County of San Francisco et al.* (No. 1,041) 125 Pac. 931, and, for the reasons stated in the opinion this day filed therein, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

BAGLEY v. DEVLIN. (Civ. 1,048.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge. Action by Mary C. Bagley against Frank J. Devlin. From judgment for defendant, plaintiff appeals. Affirmed.

John Hubert Mee, for appellant. Robert T. Devlin and George Clark, for respondent.

BURNETT, J. Respondent relies upon adverse possession, in addition to the defenses presented in the case of Bagley v. City and County of San Francisco et al. (No. 1,041) 125 Pac. 931, but it is unnecessary to give the questions specific attention.

For the reasons stated in the opinion filed this day in Bagley v. Bloom et al., supra, the judgment is affirmed.

We concur: **LENNON, P. J.; KERRIGAN, J.**

RULAND v. ALL PERSONS. (Civ. 1,023.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge. Action by Charles Ruland against All Persons. From the judgment, Mary C. Bagley, defendant, appeals. Affirmed.

John Hubert Mee, for appellant. McNair & Stoker, for respondent.

BURNETT, J. This case also involves the same questions as those decided in Bagley v. City and County of San Francisco et al., 125 Pac. 931, and, for the reasons stated in the opinion therein filed, the judgment is affirmed.

We concur: **LENNON, P. J.; KERRIGAN, J.**

BAILLEY v. ALL PERSONS. (Civ. 1,025.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge. Action by Thomas E. Bailley against All Persons. From the judgment, Mary C. Bagley, defendant, appeals. Affirmed.

John Hubert Mee, for appellant. F. O'Callaghan and George A. Connolly, for respondent.

BURNETT, J. The questions involved herein are the same as those in the case of Bagley v. City and County of San Francisco et al. (No. 1,041) 125 Pac. 931, decided this day, and, for the reasons stated in the opinion filed therein, the judgment is affirmed.

We concur: **LENNON, P. J.; KERRIGAN, J.**

(89 Wash. 567)

STATE v. NEITZEL

(Supreme Court of Washington. Aug. 21, 1912.)

1. VAGRANCY (§ 1*)—"FORTUNE TELLING."

Rem. & Bal. Code, § 2688, which defines one who practices "fortune telling" to be a va-

grant, is constitutional, and extends to the vocation of professing to tell future events in one's life by casting horoscopes, etc., though the principles of astrology be followed.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7287-7289.]

2. CONSTITUTIONAL LAW (§ 84*)—RELIGIOUS BELIEF—FORTUNE TELLING.

Accused's guilt of vagrancy, under Rem. & Bal. Code, § 2688, for practicing fortune telling is not affected because he was a regularly ordained minister in the "National Astrological Society," since harmful practices may be prohibited, though religious beliefs and opinions may not be interfered with.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 152-154; Dec. Dig. § 84.*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

F. F. Neitzel was convicted of vagrancy, and he appeals. Affirmed.

Crandell & Crandell, for appellant. Jno. L. Willey, Robt. L. McWilliams, and Geo. B. Lovejoy, all of Seattle, for the State.

MOUNT, J. [1] The defendant was convicted for vagrancy under a statute which provides: "Every person who asks or receives any compensation, gratuity or reward for practicing fortune telling, palmistry or clairvoyance . . . is a vagrant." Rem. & Bal. Code, § 2688. He has appealed from a judgment based upon the verdict of a jury.

The evidence shows that the prosecuting witness was a police officer in the city of Spokane. He went to the defendant's office and requested the defendant to tell his fortune. The defendant replied that he could not tell his fortune, but that he could "figure it out," and that his charges therefor would be one dollar. The defendant then, after inquiring the date of birth of the witness, proceeded to make some figures upon a diagram or horoscope, and then explained to the witness that these figures indicated past and future events in his life, which the defendant proceeded to tell to the prosecuting witness, for which the witness paid to the defendant the sum demanded. In defense counsel sought to show that astrology is a science, and that the chart or horoscope made by the defendant was correct and in harmony with the principles of astrology. The court denied this offer, for the reason that the statute prohibits fortune telling, and that it was therefore unimportant that the means of telling fortunes was based upon a science. In his brief counsel for defendant states that the "vocation of the defendant was casting horoscopes, drafting a map of the heavens at the time of one's birth, and the interpretation of horoscopes by tracing the movements of the planets to ascertain their relative positions at a given date, the aspects resulting therefrom, and their influences upon life." He

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

then proceeds to argue and cite authorities to the effect that the right to pursue a lawful calling is a constitutional right, which cannot be invaded. The authorities cited are not in point, because the statute makes fortune telling for compensation unlawful; regardless of the means employed. It is plain that the defendant was engaged in fortune telling; for he was professing to tell future events in the life of the witness. The statute is clearly valid. *State v. Kenilworth*, 69 N. J. Law, 114, 54 Atl. 244; *People v. Elmer*, 109 Mich. 493, 67 N. W. 550.

[2] The fact that defendant was a regularly ordained minister in "National Astrological Society," and that the principles of religion as laid down by that society include the practice of casting and reading horoscopes, was equally unimportant, because, while religious beliefs and opinions may not be interfered with, harmful "practices" may be prohibited. *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244; *Smith v. People*, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. (N. S.) 158.

The alleged errors based upon the instructions are decided by what is said above. We find no error.

The judgment is therefore affirmed.

MORRIS, FULLERTON, ELLIS, and CROW, JJ., concur.

(60 Wash. 538)

CITY OF TACOMA v. BROWN et al.

(Supreme Court of Washington. Aug. 20, 1912.)

1. EMINENT DOMAIN (§ 198*)—CONDEMNATION OF LAND—WIDENING STREETS—ORDER OF NECESSITY.

Where a proceeding to condemn land to widen a street was instituted under Laws 1907, c. 153, objecting property owners were not deprived of any recognized or guaranteed right, in that the order, of necessity, was made by the court when such property owners were not present; and while a motion to make more definite and certain was pending.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 525, 526, 528, 535-539; Dec. Dig. § 198.*]

2. EMINENT DOMAIN (§ 68*)—CONDEMNATION OF LAND—WIDENING STREETS—NECESSITY.

Where a city has jurisdiction to extend or widen its streets for any purpose, a determination of the question of public necessity by the municipal officers is conclusive on the courts, in the absence of fraud.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 168-170; Dec. Dig. § 68.*]

3. EMINENT DOMAIN (§ 19*)—WIDENING STREETS—"PUBLIC USE."

Since streets in cities must of necessity be given over at times to the use of railways and transportation companies, and such use is itself a public one, an objection that a city desired to condemn land to widen a street to permit a railway company having a franchise

thereon to double its tracks, and that the same was a 'private,' and not a public, use, was unsustainable.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 56-58; Dec. Dig. § 19.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5825-5837; vol. 8, p. 7774.]

4. EMINENT DOMAIN (§ 262*)—CONDEMNATION—DAMAGES—REVIEW.

The Supreme Court will not substitute its judgment for that of the jury as to the damages to be awarded for the condemnation of property for public use, especially where there was a view of the property by the jury.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.*]

5. EMINENT DOMAIN (§ 262*)—APPEAL—RIGHT TO ALLEGE ERROR.

Where a verdict in condemnation proceedings was not in proper form as to the distribution of the award, but, on a statement by the foreman of the jury that the award was intended to cover all damages suffered by objectors, their counsel stated that no question as to the form of the verdict would be made, whereupon the trial judge announced that he would not send the jury back to correct the verdict, objectors were thereafter estopped to question the form of the verdict.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.*]

Department 1. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Proceeding by the City of Tacoma to award damages for the taking of property belonging to H. H. Brown and others for the widening of a street. From an award of damages, Brown and others appeal. Affirmed.

L. C. Whitney and Browder D. Brown, for appellants. T. L. Stiles, F. R. Baker, and F. M. Carnahan, all of Tacoma, for respondent.

CHADWICK, J. This is an appeal from an award of damages for the taking of certain property by the city of Tacoma. Two questions are raised on this appeal. The one is that the property so taken is not taken for a public use, and that the parties appellant have been deprived of an opportunity for a hearing upon that question; the other that the damages are insufficient to compensate appellants, and that the form of the verdict does not conform to the statutory requirements. The necessity for the taking of appellants' property was declared by ordinance, and thereafter a petition was filed in the superior court, asking that the court declare a public necessity, and that it thereupon call a jury to assess damages.

[1] We take it that this proceeding was instituted under the Laws of 1907, c. 153, p. 316. If this be so, appellants have not been deprived of any right recognized or guaranteed by law, because, as it is contended, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

order, of necessity, was made by the court at a time when they were not present, and a motion to make more definite and certain was pending."

[2] Nor were they prejudiced by the fact that the court, upon motion, struck their answers, setting up a lack of public necessity; for the law is that, if the city has jurisdiction to extend or widen its streets for any purpose, the determination of the question of public necessity by the municipal officers is conclusive upon the courts, in the absence of fraud. This rule has been laid down in many cases, all of which are collected and referred to in *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827. We cannot, therefore, review either the will of the council in passing the ordinance under which the work was to be done, or the judgment of the court in holding the use to be public.

[3] It is insisted that the purpose of the city is not to serve the convenience of travel, but rather to so widen the street as to permit a railway company having a franchise thereon to double its tracks. While we doubt whether this question is properly before us, it would not follow that it would be a fraud upon the rights of the property owner if it were so. Streets in cities must, of necessity, be given over at times to the use of railways and transportation companies. Such use is itself a public use, and this court has held that the necessity for giving over a part of the public streets to railway companies is not, because of that reason alone, a fraud upon the property owner; and the act of the council will not be reviewed or called in question, in the absence of positive fraud, when so made by the courts. *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886.

[4] The only question remaining is the amount and distribution of the damages. This court has uniformly held that it will not substitute its judgment for that of the jury as to the amount of damages, especially so when there was a view of the property. In *re Mercer Street*, 55 Wash. 116, 104 Pac. 133.

[5] As to the distribution of the award, the verdict was not in proper form; but, upon a statement by the foreman of the jury that the award was intended to cover all damages suffered by the appellants, their counsel stated that no question as to the form of the verdict would be made. Whereupon the trial judge announced that he would not send the jury back to correct their verdict. Appellants are not, therefore, in position to question the verdict.

We find no error in the record, and the judgment of the lower court is affirmed.

PARKER, CROW, and GOSSE, JJ., concur.

(59 Wash. 638)

WODNIK v. LUNA PARK AMUSEMENT CO. et al.

(Supreme Court of Washington. Aug. 21, 1912.)

1. MASTER AND SERVANT (§ 816*) — INJURIES TO THIRD PERSON — INDEPENDENT CONTRACTOR — AMUSEMENT PARK.

Where defendant amusement company operated an amusement park open to the public on payment of an admission fee, the fact that defendant company let space on the grounds to another to operate a striking machine, in consideration of receiving 35 per cent. of the gross receipts of the concession, did not relieve it from liability for injuries to a patron, caused by a defect in a mallet used in operating the machine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 816.*]

2. THEATERS AND SHOWS (§ 6*) — AMUSEMENT PARK — INJURIES TO PATRON — RES IPSA LOQUITUR.

Proof that the head of a mallet, used in operating a striking machine in an amusement park, flew off while being used by a patron for the purpose for which it was offered to him, resulting in his injury, was sufficient, under the doctrine of *res ipsa loquitur*, to establish a prima facie case of negligence on the part of the operators of the park.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. § 6.*]

3. THEATERS AND SHOWS (§ 6*) — AMUSEMENT PARK — DANGEROUS INSTRUMENTALITIES — CONTRIBUTORY NEGLIGENCE.

Where plaintiff, a patron of an amusement park, was injured while operating a striking machine by the falling off of the head of the mallet, and there was no evidence that the defect was so patent that he should have observed it without inspection, he was entitled to assume that it was fit for the purpose, and was not bound to inspect it.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. § 6.*]

4. THEATERS AND SHOWS (§ 6*) — AMUSEMENT PARK — INJURIES TO PATRON — RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* is applicable to a case where a customer or patron of an amusement park is present by invitation, and is injured by an instrumentality under the exclusive control of the operators of the park or their agents.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. § 6.*]

5. THEATERS AND SHOWS (§ 6*) — INJURIES TO PATRON OF AMUSEMENT PARK — CONTRIBUTORY NEGLIGENCE.

Where plaintiff was injured, while operating a striking machine in an amusement park, by the head of the mallet flying off, and he had no reason to believe that the mallet was defective, and there was no evidence that he did not use it as it was intended to be used, he was not negligent in taking hold of the mallet too near the upper end.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. § 6.*]

Department 2. Appeal from Superior Court, King County; H. A. P. Myers, Judge. Action by Matt Wodnik against the Luna Park Amusement Company, and another.

Judgment for plaintiff, and defendants appeal. Affirmed.

Thomas Byron MacMahon and George McKay, for appellants. J. P. Ball, of Seattle, for respondent.

ELLIS, J. This is an appeal by the defendants Luna Park Amusement Company and William Looft from a judgment rendered upon the verdict of a jury for damages for personal injuries to the plaintiff, which, it is charged, were caused by their negligence.

The complaint, so far as material to the questions presented, in substance alleged: That the defendants were the owners and managers of a place of public amusement at West Seattle, called "Luna Park," and had, by extensive and broadcast advertising, made the resort well known to the public, and that it was largely patronized by the public; that among the amusements there maintained was a mechanical device, called a "striking machine," so arranged that a person, by striking with a long-handled, heavy mallet upon a movable scale or balance, was enabled to register thereon the force of the blow; that on April 30, 1911, the plaintiff visited Luna Park, and accepted an invitation of the defendants, through their agent or employé in charge of the striking machine, to use the same, paid the money demanded therefor, and was given and used a mallet which was unsafe, in that the head was not securely fastened to the handle; that in using the mallet he swung it above his head with both hands, intending to strike the machine, when the head of the mallet flew off, and the handle being released, he struck himself therewith a violent blow upon the knee, inflicting the injuries complained of. The negligence charged is that the defendants, their agents or employés, furnished to the plaintiff a mallet which they knew, or in the exercise of proper care, inspection, and supervision could have known, was unsafe for the purpose intended.

The answer admitted the ownership, management, and extensive advertisement of the park as a place of amusement by the defendants, denied the allegations of negligence, denied that the defendants owned or operated the striking machine, and set up as an affirmative defense in general terms that the injury was the result of the plaintiff's own negligence. This was traversed by the reply.

[1] The evidence showed that one Friedle was the sole owner of the striking machine, and personally operated it on April 30, 1911, under a lease or concession of space from the defendants for the amusement season, paying the defendants 35 per cent. of the gross receipts for the concession; that he hired and discharged his own employés; and that the defendants never exercised, or

attempted to exercise, any authority over him. The appellants contend that under this evidence they cannot be held responsible for the injury. This position is not tenable. They were admittedly the owners, managers, and operators of Luna Park, and advertised its amusement features as a means of procuring the patronage of the public for their own pecuniary advantage. They received a part of the proceeds from the specific amusement feature, in patronizing which the respondent was injured. He was there by their invitation. There was an implied representation that the instrumentalities for amusement which they advertised were reasonably safe. The fact that the amusement was furnished by a third party under an independent contract with the appellants in no manner relieved them from the duty to see that the appliances were reasonably safe for the use intended. The duty of exercising reasonable care for the safety of their patrons, while engaged in the performance of the very purpose for which they were invited, cannot be avoided in any such way. *Thompson v. Lowell, Lawrence & H. St. R. Co.*, 170 Mass. 577, 49 N. E. 918; 40 L. R. A. 345, 64 Am. St. Rep. 323; *Richmond & Manchester Ry. Co. v. Moore's Adm'r*, 94 Va. 496, 27 S. E. 70; 37 L. R. A. 253. We think that, as between the respondent and the appellants, the owner and operator of the striking machine must logically be held the appellants' agent.

[2] The appellants also contend that there was no evidence of negligence on their part. The respondent's testimony as to how the injury occurred was substantially as alleged in the complaint. We think that the fact that the head of the mallet flew off while the mallet was being used by the respondent for the very purpose for which it was furnished to him was sufficient to cast the burden of explanation upon the appellants. No explanation being offered, the jury was warranted in inferring that the head of the mallet came off because it was negligently and insecurely fastened to the handle.

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from a want of care." 1 *Shearman & Redfield on Negligence* (5th Ed.) § 59.

"The doctrine of *res ipsa loquitur* means that the jury, from their experience and observation as men, are warranted in finding that an accident of this kind does not ordinarily happen, except in consequence of negligence. As was said in *Griffin v. Boston & Albany R. Co.*, 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526: 'All that the plaintiff upon this branch of his

case was required to do was to make it appear to be more probable that the injury came, in whole or in part, from the defendant's negligence than from any other cause." *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 328, 109 Pac. 1016, 1017.

[3] There was no duty of inspection resting upon the respondent. There was no evidence of any defect so patent that he ought to have observed it without inspection. He had the right to assume that the mallet was fit for the purpose for which it was furnished him. He cannot be held to have assumed the risk of injury from any defects not so patent as to have been apparent to the casual observer. This court is committed to the rule that the doctrine *res ipsa loquitur*, under conditions where there is no duty of inspection upon the servant, is applicable even as between master and servant. *La Bee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405; *La Bee v. Sultan Logging Co.*, 51 Wash. 81, 97 Pac. 1104; *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016; *Clary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888.

[4] A fortiori is the doctrine applicable in a case of this kind, where a customer or patron is present by invitation, and is injured by an instrumentality under the exclusive control of the defendant or his agents. *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 16 L. R. A. (N. S.) 931, 126 Am. St. Rep. 870. And for a still stronger reason should the doctrine be invoked where, as here, the instrumentality which caused the injury was handed to the patron for use in the very purpose for which he was invited. In the very nature of the case, the respondent could not be expected to prove the specific defect in the mallet which caused the head to separate from the handle. That could only have been determined by inspection. The duty of inspection was upon the appellants. They offered no evidence of such inspection. The jury was warranted in finding them negligent.

[5] The appellants further contend that the respondent's own act in taking hold of the mallet handle near the upper end, as he testified he did, was the proximate cause of the injury, and that in so doing he was guilty of contributory negligence. The proximate cause was that cause without which the accident could not have happened. It is plain that, had the head of the mallet been securely fastened to the handle, the accident would not have happened, no matter where the respondent grasped the handle. It is equally plain that he was not guilty of contributory negligence. He had no reason to assume that the head of the mallet would fly off. In fact, as we have seen, he had the right to assume that it would not. There was no evidence that he was not using the mallet as it was intended to be used. We

fail to find any evidence whatever of contributory negligence. Nor do we find any merit in the argument that the accident was one which could not reasonably have been anticipated. It was the natural and probable result of the insecure fastening of the head of the mallet to the handle. This or some similar accident would reasonably be expected from such a condition.

Many assignments of error are based upon the giving of certain instructions by the court, and upon the refusal to give certain others requested by the appellants. These, however, are sufficiently covered by what we have said of the law as applied to the facts. The case was submitted to the jury upon instructions fairly presenting the law applicable to the evidence. We find in the record no error which would justify a reversal.

The judgment is affirmed.

MOUNT and FULLERTON, JJ., concur.

RINGEL et al. v. NEWMAN.

(Supreme Court of Washington. Aug. 21, 1912.)

1. MECHANICS' LIENS (§ 122*)—ITEMIZED STATEMENT—NECESSITY.

A subcontractor, under an agreement for the erection of a building, will not be denied a lien because no itemized statement of the material and labor furnished was given the owner. Under Rem. & Bal. Code, § 1133, where the subcontract was recognized by the owner through her agent, who joined in directing the subcontractor to proceed with the work, the subcontract becoming in effect a contract with the owner.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 165-170; Dec. Dig. § 122.*]

2. MECHANICS' LIENS (§ 122*)—STATEMENTS—SUFFICIENCY—PRICE OF MATERIAL.

Under Rem. & Bal. Code, § 1133, which requires a subcontractor in furnishing materials to the principal contractor, to furnish a statement of such materials to the owner, the statement need not specify the price or prices.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 165-170; Dec. Dig. § 122.*]

Department 1. Appeal from Superior Court, Spokane County; R. H. Sullivan, Judge.

Action by W. H. Ringel and cross-complaint by others against Rachel Newman. From the judgment, defendant and certain cross-complainants appeal. Partly reversed and partly affirmed.

Campbell & Goodwin, for Empire Tile & Mantel Co. and others; Cain & Macdonald, for Rachel Newman; W. W. Zent, for O. A. Lamb; Peacock & Ludden, of Spokane, for Moss-Berry Elec. Const. Co.

PARKER, J. The plaintiff and cross-complainants in this action seek foreclosure of their several lien claims for material and labor furnished by them respectively, and used in the construction of a building for

the defendant. A trial before the court resulted in a decree foreclosing certain of the claimed liens, and in the denial of the foreclosure of others. Appeals have been taken by the defendant and also by certain of the claimants, who were denied foreclosure. The controversies are only between each claimant and the defendant; there being no contest of priority or otherwise between the several claimants.

[1] In October, 1910, C. H. Moller and E. Z. Little, copartners, doing business as the Empire Tile & Mantel Company, entered into a contract with the Pettifer Construction Company, defendant's contractor, for the construction of the building, whereby they agreed to do all of the tile and mantel work in the building for the sum of \$1,000. At the time of the commencement of this work, they gave notice of the making of their subcontract with the Pettifer Construction Company, and of the commencement of the work thereunder, to J. D. Newman, the son and agent of defendant having in charge the construction of the building for her; but they never furnished to him or to the defendant any itemized statement of the materials used in carrying out their subcontract. About the time of the commencement of the work under this subcontract, the Pettifer Construction Company became involved and went into the hands of a receiver. Thereafter, and before any material part of the subcontract work was done, both the receiver and the agent of the defendant directed the Empire Tile & Mantel Company to proceed with the work in pursuance of their subcontract. The trial court denied foreclosure of the lien claimed for a balance due upon this work, and the Empire Tile & Mantel Company have appealed therefrom. The grounds of the denial of foreclosure by the trial court was that no itemized statement of the material and labor furnished had been given to the owner under section 1133, Rem. & Bal. Code. In view of the manner in which this subcontract was recognized by the defendant through her agent, and his joining with the receiver in directing the Empire Tile & Mantel Company to proceed with the work, it became in effect a contract with the owner. Under our decision in *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177, the Empire Tile & Mantel Company were not materialmen, within the requirement of section 1133, and were not required to give the defendant any further notice of the work or material furnished in the construction of the building, in view of the knowledge of their contract and directions to proceed thereunder on the part of defendant through her agent. It is but fair to the trial court to state that this decision was rendered by this court after the entering of the decree in this case. The decision of the trial court, refusing foreclosure of the claimed lien of the

Empire Tile & Mantel Company, is reversed, with directions to enter a decree of foreclosure therefore for the sum of \$500, with legal interest; that being the conceded amount of the balance due upon their claim.

[2] The defendant has appealed from so much of the decree of the trial court as awarded the foreclosure of the lien claim of C. A. Lamb, who furnished material for the construction of the building to the Pettifer Construction Company. Lamb furnished an itemized statement of the materials furnished by him to the defendant; but the statement so furnished did not show the price he charged or was to receive for such materials. It is contended by counsel for defendant that the failure to specify the price or the prices of such materials in the statement so furnished renders it fatally defective as a basis for a lien claim, and that the trial court erred in foreclosing the lien claim for that reason. The statute in force at that time required only that the owner shall be furnished a "statement of all such materials or supplies delivered," etc. Section 1133, Rem. & Bal. Code. That section is silent as to the statement specifying the price of such material. We are of the opinion that the furnishing of a statement showing the kind and quantity of materials furnished is a sufficient compliance with the statute; and it appears to have been complied with by Lamb to this extent. The decree is therefore affirmed, in so far as it foreclosed this lien claim. This disposes of all the law questions presented by the briefs of counsel.

Other appeals involve only questions of fact. We have carefully read all of the evidence which has been called to our attention bearing upon these questions of fact, and deem it sufficient to say that we are convinced therefrom that the trial court was fully warranted in its disposition of all such claims. The decree is reversed, in so far as it refused foreclosure of the lien claim of the Empire Tile & Mantel Company; and, in so far as it disposes of all the other claims, it is affirmed.

MOUNT, GOSE, MORRIS, and CHADWICK, JJ., concur.

CARVER-SHADBOLT CO. v. KLEIN.

(Supreme Court of Washington. Aug. 21, 1912.)

SALES (§ 383*)—BREACH OF CONTRACT—DAMAGES—PROOF.

Where, in an action for breach of contract to purchase hogs, there was evidence that plaintiff exercised due diligence in selling the remainder of the hogs which defendant had refused to accept, and made as advantageous a sale as the circumstances would permit, both as to time and price, and that plaintiff's loss, made up of his loss in price and his expense in feeding the hogs after defendant's breach, was no greater than it would have been, had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the hogs been sold on the day of the breach, defendant was not prejudiced because there was no direct evidence of the market value of the hogs on the day of the breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. § 383.*]

Department 1. Appeal from Superior Court, Franklin County; Thomas Neill, Judge.

Action by the Carver-Shadbolt Company against G. C. Klein. Judgment for plaintiff, and defendant appeals. Affirmed.

Moulton & Henderson, of Kemewick, for appellant. Parker & Richards, of North Yakima, and H. B. Noland, of Pasco, for respondent.

PARKER, J. This is an action to recover damages which the plaintiff alleges resulted to it from the breach of a contract upon the part of the defendant, by which contract he agreed to purchase from it 202 hogs. A trial before the court, without a jury, resulted in findings and a judgment in favor of the plaintiff for damages in the sum of \$466.51. The defendant has appealed.

The court found, in substance, as follows: On September 22, 1909, respondent sold to appellant 202 hogs at the agreed price of 8½ cents per pound f. o. b. at Wapato Station, in Yakima county. He then paid upon the purchase price \$1,643.48 and took 86 of the hogs, leaving 116 in possession of respondent. Appellant having failed to take and pay for the 116 hogs, on the 4th day of November respondent notified him that if he did not take the hogs within three days it would sell them and charge the loss and any damage and expense incurred by it to him. Under the original contract of sale, respondent was to feed the 116 hogs until October 19th, and between that time and November 4th appellant still signified his intention of taking the hogs, and did not repudiate the contract prior to November 4th. On November 18th respondents sold 86 of the hogs at 7¼ cents per pound, and on November 23d it sold the remaining 30 at 8 cents per pound, realizing on these sales \$294.07 less than it would have realized, had it received 8½ cents per pound, the agreed price in its sale contract with appellant. During the period from the giving of the notice by respondent to appellant that it would sell the hogs if he did not take them, until the hogs were sold by respondent, it incurred an expense in feeding the hogs amounting to \$172.44. The damages awarded to respondent by the court was the aggregate amount of this sum and the \$294.07, difference between the contract price and the amount respondent sold the hogs for. The hogs were sold by respondent at the market price. It is apparent that the court proceeded upon the assumption that the following facts also appeared from the evidence, though no specific findings were made thereon: The

weight of the 116 hogs did not materially change between the time of giving the notice on November 4th and the sales of them by respondent, and in making the sales of the hogs respondent used due diligence, and made as advantageous sale as the circumstances would permit, both as to time and the price he procured at those sales.

The argument of counsel for appellant is addressed largely to the question of the sufficiency of the evidence to establish the facts found by the court, and the facts which we have noticed must have been assumed by the court as proven by the evidence. We have carefully read all of the evidence, and deem it sufficient to say that we are convinced that the trial court was fully warranted thereby in proceeding upon the theory that the facts were proven substantially as we have above briefly narrated.

The arguments of counsel for appellant upon law questions have but little application to these facts, but to other facts, which they contend were shown by the evidence. It is insisted, however, that even these facts fail to disclose any proper measure of damage as a basis for the judgment; it being argued that the market value of the hogs on the 7th day of November, which, under the facts, would be the date of the breach of the contract by appellant, does not appear, and that the only proper measure of damage would be the difference between the market value on that day and the agreed contract price. We think, while there was no direct evidence to show the market value on that day, it is a fair conclusion from the evidence, showing due diligence on the part of respondent in selling the hogs, both as to time and price obtained, that the amount of respondent's loss, made up of his loss in price and his expense in feeding the hogs thereafter, was no greater than it would have been, had it then made sale of the hogs for whatever it could have gotten on that day. It is evident that respondent's diligence made its damage as small as possible.

The judgment is affirmed.

MORRIS, CROW, CHADWICK, and GOSE, JJ., concur.

HICKS v. HICKS et al.

(Supreme Court of Washington. Aug. 21, 1912.)

1. DIVORCE (§ 326*) — DECREE — COLLATERAL ATTACK.

Where plaintiff instituted a suit for divorce and for a division of community property against her former husband, and also prayed for the annulment of a prior foreign divorce decree obtained by him, the annulment of such decree was a mere incident to the primary purpose of plaintiff's action, and constituted a collateral attack on such decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827-830, 840; Dec. Dig. § 326.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. DIVORCE (§ 323*) — FOREIGN DECREE — COLLATERAL ATTACK.

Where a foreign divorce decree, obtained by plaintiff's husband against her, was entered by a court having general jurisdiction of the subject-matter, on service by publication, based on an affidavit reciting that the place of the wife's residence was unknown, and that her last known place of residence was San Diego, Cal., and the decree recited that she had been duly served with summons by publication, as required by law, and then proceeded to grant the husband a divorce, the decree was valid on its face and conclusive against collateral attack.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831-834; Dec. Dig. § 823.*]

3. DIVORCE (§ 326*) — DECREE — COLLATERAL ATTACK—FRAUD.

A foreign divorce decree is not subject to collateral attack for fraud.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 827-830, 840; Dec. Dig. § 826.*]

4. DIVORCE (§ 322*) — COMMUNITY PROPERTY — DIVISION.

Where a foreign divorce decree was confined to a dissolution of the marriage, and did not provide for division of the community property or contain any provision for the wife's maintenance, the community being terminated by the divorce, the parties became tenants in common of the property, and the divorced wife was thereafter entitled to sue for partition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-825; Dec. Dig. § 822.*]

5. TENANCY IN COMMON (§§ 15*) — ADVERSE POSSESSION—DIVISION.

Since a divorce, secured by a husband without any division of the community property, vested the title to such property in the parties as tenants in common, the wife's right to sue for a division was not affected by limitations.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

Department, 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Suit by Maggie Hicks against Hansel Harrison Hicks and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

J. P. Ball and Frank E. Green, for appellants. Gled R. Metsker, of Fairbanks, Alaska, for respondent.

ELLIS, J. The plaintiff and the defendant Hansel Harrison Hicks were married at Reno, Nev., in August, 1892. They lived together in California until April, 1895, when the defendant went to Alaska, where he has since resided. No children were born of the marriage. In March, 1904, the defendant Hansel Harrison Hicks brought an action for divorce against the plaintiff in the United States District Court for Alaska, Third Division, and on May 2, 1905, procured in that court a decree of divorce, which, after reciting that the defendant [plaintiff here] "was duly served with summons by publication, as required by law," decreed as follows: "Wherefore it is here ordered, adjudged and decreed that the marriage between the plaintiff, Hansel Harrison Hicks, and the said defendant, Maggie Hicks, is dissolv-

ed, and the same is hereby dissolved, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof." Some time in 1906 the defendant Hicks married Ida Allen, his correspondent herein. On September 21, 1911, the plaintiff (respondent here) brought this action in the superior court of King county to procure a decree of divorce from the defendant Hansel Harrison Hicks, on the ground of desertion and infidelity, naming the other defendant as co-respondent. Both defendants were served personally with summons in King county. In this action the plaintiff sought to procure a division of property, and also to have canceled and annulled the Alaska decree, upon the ground that it was entered without jurisdiction over the plaintiff herein, in that the summons was published upon a false and fraudulent affidavit, and that the publication of summons in the Alaska action and the decree founded thereon were void. The complaint alleged that when he deserted the plaintiff the defendant took with him \$1,100, all of which was community property, and \$600 of which was earned by plaintiff's labor, and that with this money as a capital he has since accumulated a large amount of property, and has conveyed a large part of such property to the co-respondent. The answer denied the principal allegations of the complaint, and set up as affirmative defenses estoppel of the plaintiff by her laches to question the Alaska decree, and that any attack upon that decree for fraud was barred by the statute of limitations. A trial was had to the court, which found facts substantially as set out in the complaint, and entered a decree declaring null and void the Alaska decree, and dissolving the marriage tie between the plaintiff and the defendant Hansel Harrison Hicks, and awarding the plaintiff judgment for \$2,500 for maintenance and support and \$250 as an attorney's fee. The defendants have appealed.

[1] The appellants contend that the trial court erred in declaring the Alaska decree void. This contention must be sustained. The main purpose of this action was to obtain a decree of divorce and a division of community property, not simply to annul the Alaska decree. The annulling of that decree was a mere incident to the primary purpose of this action. This action is therefore a collateral attack upon that decree. 1 Black on Judgments (2d Ed.) § 252; Peyton v. Peyton, 28 Wash. 278-300, 68 Pac. 757.

[2] That decree was valid upon its face. It was entered by a court of general jurisdiction. The subject-matter was within its jurisdiction. The complaint in this action alleges that in the Alaska suit an affidavit stated that the place of residence of the plaintiff here (defendant there) was unknown, and that her last known place of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

residence was San Diego, Cal. No irregularity in the affidavit is claimed. It is attacked solely as being false—a matter which could only be established by evidence outside of the Alaska record. The proof of the publication of summons appearing in that record is regular. The decree recites that the defendant was served by publication, as required by law. This adjudication of valid service is as conclusive as that upon any other question in the case as against collateral attack. *Peyton v. Peyton*, 28 Wash. 278-298, 68 Pac. 757.

[3] As did the plaintiff in the *Peyton* Case, the respondent here seeks to avoid the former decree as having been obtained by fraud. The following language there quoted with approval is equally applicable here: "Fraud in procuring a judgment cannot be shown by the parties to such judgment in any collateral proceeding." 1 Freeman on Judgments (4th Ed.) § 132. It follows that the court erred in admitting evidence of matters outside of the record of the Alaska suit to impeach the decree, and in holding that decree void; and also erred in granting the decree of divorce in this action. The principles announced in the *Peyton* Case are conclusive on these points.

[4] But it does not follow that the respondent was entitled to no relief. The Alaska decree made no disposition of property, and contained no reference to the property rights of the parties. It was confined to a dissolution of the marriage tie. The complaint in this action set up facts which, if established by competent evidence, would entitle the respondent to a division of the property acquired as community property by the appellant prior to his obtaining the Alaska divorce, or, in lieu thereof, some provision for maintenance. That was a part of the relief sought in this action. A dissolution of the community by a decree of divorce, which makes no mention of the property, does not divest the title. The community being terminated, the community property becomes common property. Of necessity, the title vests in the members of the former community as tenants in common. *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103.

[5] The statute of Limitations has no application to this phase of the case. During the coverture, the husband was entitled to the possession of the community property, which he held, in a sense, as trustee for the community. When by the dissolution of the marriage the community property became property held in common, the possession of one was the possession of both. The divorce decree, which made no mention of property, was no assertion of an adverse claim upon the appellant's part. It was no such notice of an adverse holding or claim on his part as would set the statute in mo-

tion as against the respondent. She is still entitled to an equitable accounting.

The trial court awarded to the respondent \$2,500 for maintenance and support; but, inasmuch as the cause was tried upon an erroneous theory, and that award was made as ancillary to a decree of divorce, we cannot say that, had the inquiry been confined to the issue of a division of the property or provision for maintenance, the same result would have been reached.

The judgment is therefore reversed, and the cause remanded for a new trial, with direction to permit the parties to so frame the pleadings as to present and try out this issue, and upon the evidence to make such a division of property or provision for maintenance as the equities of the case may warrant.

FULLERTON, MOUNT, and MORRIS, JJ., concur.

DREW v. BOUFFLEUR.

(Supreme Court of Washington: Aug. 21, 1912.)

1. DEEDS (§ 71*)—EXECUTION—DURESS.

Where, prior to the execution of a deed, complainant took advice of counsel, and was advised by him not to make the settlement of which the deed formed part, she was not entitled to have the same set aside for duress, because she feared foreclosure of a mortgage might cause her to lose her home; and that injury might result therefrom to her daughter, who was then ill, but who was a mature woman with a family of her own, and could have been made to understand the situation without danger to herself.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 183-189; Dec. Dig. § 71.*]

2. COMPROMISE AND SETTLEMENT (§ 18*)—AVOIDANCE—RETURN OF CONSIDERATION.

A party to a settlement cannot avoid the same on the ground of duress, where he does not offer to return the benefits received from the settlement.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 75-82; Dec. Dig. § 18.*]

3. ACKNOWLEDGMENT (§ 62*)—IMPEACHMENT—EVIDENCE.

Where complainant went before a notary to acknowledge a deed, and there was evidence that she actually did acknowledge it, such proof outweighed her mere denial that she acknowledged it and her claim that the officer's certificate to that effect was false.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 345-347; Dec. Dig. § 62.*]

Department 2. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by Hannah M. Drew against H. P. Bouffleur to set aside a deed. Decree for defendant, and complainant appeals. Affirmed.

L. H. Frather, for appellant. John C. Kleber, of Spokane, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

PER CURIAM. The appellant brought this action against the respondent to procure the cancellation, on the ground of want of consideration, duress, and fraud, of a quitclaim deed executed by herself to the respondent. From the record it appears that one Benjamin F. Smith died, leaving a tract of land, one-half of which he devised to the appellant, and one-half to certain other parties. The estate was indebted in a considerable sum, and to pay the same the land was sold by the executor named in the will at public sale. The respondent became the purchaser at the sale, paying for the land the amount of the obligations against the estate, some \$700, taking the title thereto in his own name. The purchase was made pursuant to a written agreement between the appellant and respondent, the precise terms of which are in dispute; the writing itself having been lost while in the possession of the respondent. The respondent's version of the agreement is that he undertook to purchase the land at the executor's sale for a sum sufficient to pay the obligations against the estate, make an advancement to the appellant sufficient to clear a mortgage on her home place, and, after these sums had been repaid to him, to divide the land evenly with the appellant. The appellant, on the other hand, contends that the respondent agreed to pay \$1,000 for a half interest in the land, the money to be used in payment of the debts of the estate and certain liens, consisting of a mortgage and taxes, then on the appellant's home property, and that she was to have, in addition to the money necessary to pay the liens, an undivided half interest in the property, free from incumbrances. The precise terms of the agreement being in dispute, the parties settled their difficulty by a new agreement. The appellant gave to the respondent a quitclaim deed for her interest in the land purchased from the estate, and he in turn procured for her a cancellation of the mortgage against her homestead, and gave her acquittances for certain moneys he had advanced to her in the payment of taxes and for her personal use.

[1, 2] It is this quitclaim deed that the appellant sought to set aside in this action. The duress and fraud alleged is the taking advantage of the necessities of the appellant, thus compelling her to enter into the agreement of settlement. She alleges and testified at the trial that the respondent threatened to foreclose the mortgage on her home, unless she acceded to his terms of settlement; that she had a sick daughter living with her; and that this threat so far disturbed the daughter's peace of mind as to render her condition dangerous, compelling the appellant to comply with the request, in order to save the daughter's life. But the evidence does not justify this claim. It was

shown that she took the advice of counsel just prior to making the settlement, and was advised by him not to enter into it, as her contentions, if they could be proven, would prevent a foreclosure of the mortgage, and she stood in no danger of losing her home by reason thereof. It was shown also that the daughter was a mature woman with a family of her own, capable of being made to understand that no danger lay in a foreclosure suit if the appellant's version of the contract was correct. Moreover, the appellant has accepted the benefits accruing to her from the settlement, no part of which has she offered to return.

[3] The appellant next insists that she did not in fact acknowledge the quitclaim deed, and that the officer's certificate thereon to that effect is false. But this claim is also without merit. She bases her charge of want of acknowledgment on the assertion that she refused to state to the notary taking the same that she executed the deed freely and voluntarily for the uses and purposes therein mentioned. But, aside from the fact that she went before the notary for the purpose of acknowledging it, there is evidence that she actually did acknowledge it, sufficient to outweigh her denial.

The judgment is affirmed.

GREAT NORTHERN RY. CO. v. PUBLIC SERVICE COMMISSION OF WASHINGTON et al.

(Supreme Court of Washington. Aug. 21, 1912.)

RAILROADS (§ 9*) — REGULATION — ORDERS OF PUBLIC SERVICE COMMISSIONERS—REVIEW.

Where a railroad, ordered by the public service commission to construct a spur track to one's warehouse, at his expense, did not appeal therefrom, or apply for suspension thereof, which the superior court is authorized, by Public Service Commission Act (Laws 1911, c. 117) § 87, to grant, in its discretion, pendente lite, but did the construction at the individual's expense, it may not have review of the proceedings, with the result, in case of reversal, of rendering the physical connection worthless, though the order contemplates the future maintenance of the connection, with switching accommodations.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9*]

Department 1. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Writ of review by the Great Northern Railway Company against the Public Service Commission of Washington and another. Writ quashed and action dismissed, and the railway company appeals. Affirmed.

F. V. Brown and F. G. Dorety, for appellant. Merrill, Oswald & Merrill, of Spokane, for respondents.

GOSE, J. This is an appeal from an order quashing a writ of review and dismissing the action. The history of the case is as follows: On July 13, 1911, the respondent Mohler Union Warehouse Company, a corporation, hereafter called the respondent, filed a complaint with the public service commission, alleging that it was operating a grain warehouse at the town of Mohler, in this state, at a point adjacent to the appellant's right of way, and that the appellant refused to run a spur track to its warehouse and to give it shipping facilities, and prayed that citation issue and that a hearing be had. On July 25th, pursuant to notice, a hearing was had before a member of the public service commission. On August 28th the commission filed its findings. On September 9th an order was entered by the commission, requiring the appellant to make the necessary survey and set the stakes for a spur track from its main line to the respondent's warehouse, requiring the respondent to do the necessary grading under the direction of the appellant's engineer, and requiring it to execute a bond in the sum of \$2,000, conditioned that upon the construction of the track it would pay to the appellant the sum of \$1,556, the agreed cost of the improvement. It was further ordered that the appellant, within 10 days after it received notice that the grading had been completed, should proceed to construct the spur track, and that it should complete it within 5 days thereafter. The order further provided that, within 20 days after the completion of the spur track, the respondent should pay to appellant the sum of \$1,556, and that upon such payment the bond should be canceled. By agreement of the parties, a certified check for that amount was accepted, and is still held by the appellant, in lieu of the bond. It is admitted that, within the time limited by the order, the appellant constructed the spur track, connected it with its main track, and proceeded to furnish switching service to the respondent. Thereafter and on October 5th the appellant applied for and was granted a writ of review by the superior court of Spokane county. Upon the facts stated upon the motion of the respondent, the writ was quashed and the action dismissed.

The appellant contends that it was error to dismiss the case, because the order of the court requires the performance of services upon the part of the appellant of a continuing and permanent nature. In support of this view, it cites the following cases: *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Boise City Irr. & Land Co. v. Clark*, 131 Fed. 415, 65 C. C. A. 399; *State v. Moore*, 23 Wash. 276,

62 Pac. 769; *Commonwealth v. Hall*, 8 Pick. (Mass.) 440. The *Southern Pacific Terminal Case* was a suit to enjoin an order of the Interstate Commerce Commission requiring the appellant to desist, on or before a fixed date and for a fixed period, from granting an undue preference to one Young, a shipper of cotton seed products. It was contended that the appeal should be dismissed, because the time fixed in the order had expired, and the case was moot. The motion was denied, on the ground that the order might be the basis of further proceedings, and that the questions involved in the orders were usually continuing. In the *Freight Association Case* some of the defendants had entered into a traffic agreement under the name of "Trans-Missouri Freight Association." The defendants asked that the appeal be dismissed, on the ground that the association had been dissolved by a vote of its members after the entry of the judgment. In denying the motion, the court observed that the object of the appeal was twofold, viz., the dissolution of the association and the restraining of the defendants from continuing in a like combination. It was said that the mere dissolution of the association was not the most important object of the litigation, but that "the judgment of the court is sought upon the question of the legality of the agreement itself, for the carrying out of which the association was formed, and, if such agreement be declared to be illegal, the court is asked, not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future."

In the *Boise City Case* there was a motion to dismiss the appeal, on the ground that the period for which the water rate was fixed had expired. This was denied, on the grounds: (1) Because the rates, once fixed, continue in force until changed as provided by law; and (2) because of the propriety of deciding some questions of law which might serve to guide the municipal body when again called upon to act in the matter. In the *Moore Case* it was observed that the object of the litigation, viz., the certification of the nomination of the relator, could still be carried out. In the *Hall Case* it was held that an involuntary payment of an award of damages in an eminent domain proceeding by a corporation, so that it could enter upon the land and save its franchise, was not a ground for quashing a writ of certiorari.

The public service commission act (Laws, 1911, p. 597, § 87) provides that the superior court, "in its discretion, may restrain or suspend" in whole or in part the operation of the commissioners' order pendente lite. The appellant did not apply for a suspension of the order. It is plain that the discretion here vested in the superior court is not an arbitrary discretion, but a sound judicial

discretion, to be exercised as the justice of the particular case demands. The appellant chose to comply with the order, and to make the physical improvement at the expense of the respondent. If it were now permitted to review the proceedings of the commission and to reverse the order, the physical connection which the respondent has paid for would be rendered valueless. It has not appealed from the order, and no reason is suggested, and none occurs to the court, why it is not bound by it. The argument made, that the order is in its nature a continuing one, is measurably true. There is no doubt that it contemplates both a physical connection between the main line of the appellant's road and the respondent's warehouse and the future maintenance thereof, together with switching accommodations. This, however, cannot overcome the effect of the other acts mentioned. We think, in view of the fact that the spur track has been run out at the expense of the respondent, and that no application was made for an order of superseas, the appellant is precluded from continuing the litigation.

While the case at bar has some features analogous to the questions involved in the Southern Pacific Terminal Case and the Boise City Case, we are of the opinion that the application of the principles there announced would be a flagrant injustice to the respondent.

The judgment is therefore affirmed.

MORRIS, PARKER, CROW, and CHADWICK, JJ., concur.

STATE v. HAMILTON.

(Supreme Court of Washington. Aug. 20, 1912.)

INDICTMENT AND INFORMATION (§ 189*)—CONVICTION OF LESSER OFFENSE.

Under Rem. & Bal. Code, §§ 2413-2415, which distinguish assaults in the first and second degrees from that in the third degree, which is defined to be an assault, or assault and battery, not amounting to assault in the first or second degrees, which involve felonious intent, a conviction of assault in the third degree can be had under an information charging an assault upon a pregnant woman by producing an unnecessary abortion, resulting in her death and that of her unborn child.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.*]

Department 1. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

John A. Hamilton was convicted of assault in the third degree, and he appeals. Affirmed.

Dunphy, Evans & Garrecht, for appellant. Everett J. Smith, of Walla Walla, for the State.

PARKER, J. The plaintiff was charged by information filed in the superior court for Walla Walla county with the crime of manslaughter, as follows: "On the 28th day of August, 1911, at and within the county aforesaid, in and upon one Della Reams, then and there being, the said John A. Hamilton and Alice J. Prather did commit an assault, she, the said Della Reams, being then and there a woman pregnant with a quick child, and upon her, the said Della Reams, did then and there use and employ, and caused to be used and employed, certain instruments and other means, the names, kinds, and descriptions of which are to this informant unknown, with intent then and there to cause the miscarriage of her, the said Della Reams, so pregnant as aforesaid, such miscarriage not being then and there necessary to preserve the life of her, the said Della Reams, and, with the instruments and other means by them, the said John A. Hamilton and Alice J. Prather, so used and employed with the intent aforesaid, did then and there inflict upon her, the said Della Reams, and upon the said quick child of which she was then and there pregnant as aforesaid, divers wounds, punctures, and other mortal injuries, and did then and there and thereby produce the death of her, the said Della Reams, and of the said quick child, and did then and there, and thereby commit the said crime of manslaughter." Upon the trial the jury found the defendant, Hamilton, guilty of assault in the third degree. Thereupon the court adjudged that he pay a fine of \$150 and costs of prosecution. From this judgment, he has appealed.

The principal and only contention made by counsel for appellant, which we deem necessary to notice, is that a conviction cannot be lawfully had for assault in the third degree under this information, because such crime is not included within the crime of manslaughter as therein charged. The question then is reduced to this: Does the language of this information charge the crime of assault in the third degree, as well as the crime of manslaughter? It, of course, cannot be seriously contended, but that such a crime may be included in the crime of manslaughter. Under the new Criminal Code of 1909, there is no statutory definition of the crime of assault, nor of assault and battery, which constitutes the misdemeanor of assault in the third degree. Assaults in the first and second degrees are distinguished from assault in the third degree, in that the former are committed with a felonious intent. Rem. & Bal. Code, §§ 2413, 2414, 2415.

The latter section defines assault in the third degree as follows: "Every person who shall commit an assault or an assault or battery not amounting to assault in either the first or second degrees, shall be guilty of assault in the third degree, and shall be pun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ished as for a gross misdemeanor." Since the meaning of the words "assault" and "assault and battery" are not defined by statute, we must resort to their common-law meaning. Now, the authorities seem to be uniform in holding that in charging assault, or assault and battery, when those words are used only in their common-law meaning, an indictment or information need not set out the particular acts of violence which constituted the assault, or assault and battery. Bishop's Directions and Forms (2d Ed.) § 201; 1 McClain on Criminal Law, § 252.

The argument of counsel for appellant seems to proceed upon the theory that this information is defective as charging assault, or assault and battery, in that it fails to sufficiently charge the facts, other than the mere facts of assault and assault and battery, which, it is argued, are mere conclusions. Assuming that these general facts only are charged, the only decision of this court which may seem to support this view is that in the case of *State v. Heath*, 57 Wash. 246, 106 Pac. 756. But an examination of that decision will show that the court was dealing with the old statute defining assault and assault and battery. Section 2746, Rem. & Bal. Code; Bal. Code, § 7055. That statute, however, was expressly repealed by the new Criminal Code (Laws of 1909, p. 906), when sections 2413, 2414, and 2415 were enacted leaving the words "assault" and "assault and battery" without any statutory definition. Judge Fullerton's dissenting opinion in that case would, no doubt, have been adopted as the views of the majority, had there been no statutory definition of the crime of assault under the old law then under consideration. The authorities collected in his dissenting opinion clearly show that at common law it is only necessary to charge that the defendant did make an assault, etc., without stating the acts of violence committed; and it is only because of the statutory definition of the term under the old statute that it became necessary to charge more. This difference is noticed in 2 Bishop's Directions and Forms, §§ 204 and 205; and in 1 McClain on Criminal Law, § 252. Omitting from this information that portion which has reference to the death of Della Reams, it clearly satisfies all requirements of a charge of assault and assault and battery. We conclude that the information was sufficient in that respect, and that a conviction thereunder for assault in the third degree, as now defined by statute, can be lawfully had. Our decision in *State v. Copeland*, 66 Wash. 243, 119 Pac. 607, is in harmony with this view.

Some contentions are made upon the introduction of evidence; but they rest upon the sufficiency of the information as charging assault and assault and battery, and

therefore do not require further discussion. The judgment is affirmed.

GOSE, CROW, ELLIS, and CHADWICK, JJ., concur.

FISHER v. MARSH et al.

(Supreme Court of Washington. Aug. 21, 1912.)

1. HUSBAND AND WIFE (§ 254*)—COMMUNITY PROPERTY—EXEMPTION.

Where the earnings of a wife belonged to the community, property purchased therewith was not exempt from execution on a judgment against the community, under Rem. & Bal. Code, § 570, providing that the wife's personal earnings shall be exempt from attachment or execution on a liability or judgment against the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 897-899; Dec. Dig. § 254.*]

2. HUSBAND AND WIFE (§ 259*)—SEPARATE EARNINGS—COMMUNITY PROPERTY.

A husband and wife, while living together, agreed that she should run a farm and receive the proceeds thereof as her separate property, while he should operate a threshing machine and receive the proceeds of that business as his separate property. Held that, notwithstanding such agreement, the wife's earnings in the operation of the farm, while living with her husband, were community property as to the community creditors, and liable to execution for their debts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 911; Dec. Dig. § 259.*]

Department 2. Appeal from Superior Court, Whitman County; Thomas Neill, Judge.

Claim and delivery by Margaret Marsh and others against L. C. Fisher. Judgment for plaintiffs, and defendant appeals. Reversed as to Margaret Marsh, and remanded, with directions to enter judgment against her and the sureties on her bond for \$250.

Samuel P. Weaver, of Sprague, for appellant. John L. Melville, of Sprague, and J. M. McCroskey, of Colfax, for respondents.

MOUNT, J. This is an action under the statute for claim and delivery of personal property levied upon by the sheriff under an execution. Plaintiff delivered to the sheriff an affidavit, claiming certain horses levied upon, and stating the value of the horses at \$750. A bond in the sum of \$1,500 was also delivered to the sheriff, conditioned, as required, that the claimants would make good their title to the property, or return the property, or pay the value to the sheriff. On a trial of the case, it appeared that L. C. Fisher, in the year 1911, recovered a judgment against the community, consisting of Margaret Marsh and her husband, Wesley Marsh. This indebtedness was incurred prior to 1901. In that year Mrs. Marsh and her husband entered into an oral agreement, to the effect that Mr. Marsh would operate

a threshing machine and receive the proceeds of such business as his separate property; that Mrs. Marsh would run the farm and receive the proceeds thereof as her separate property. About the same time Mrs. Marsh and her two sons entered into an agreement, by which they were to run the farm and divide the proceeds, one-third to each. Thereafter, with the proceeds of the farm, Mrs. Marsh and her two sons purchased the five horses levied upon. Mr. Marsh, the husband, resided with his family and did chores around the farm to pay for his board. When he did other work, he was paid wages therefor. Mrs. Marsh and her husband have abided by the contract ever since it was made as above stated. There is no claim that Mr. Fisher, the judgment creditor, had any notice of the contract between the judgment debtors. The trial court concluded that the horses levied upon were the separate property of Mrs. Marsh and her two sons, and were not subject to the community debts of Mr. and Mrs. Marsh. A judgment was accordingly entered in favor of the plaintiffs. Mr. Fisher, the judgment creditor, has appealed.

[1] It appears from the record that the trial judge based his conclusion upon the fact that the wife's portion of the proceeds of the farm, as conducted by herself and her two sons, was her personal earnings, and that such earnings, under section 570, Rem. & Bal. Code, "shall be exempt from attachment and execution upon any liability or judgment against the husband." But this property was seized upon a judgment against the community. If the property seized was not the separate property of the wife, but was common property, the statute does not exempt it from execution upon a judgment against the community. In *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176, it was held that the personal earnings of the wife became separate property only when she is living separate from her husband.

[2] It is conceded in this case that Mrs. Marsh and her husband were at all times, and still are, living together. Her personal earnings were therefore community property, unless the agreement, above referred to, made such earnings her separate property. In *Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17, it was held that, under an agreement between the spouses, the personal earnings of the wife were her separate property, and that such earnings were divested of the community character, in so far as subsequent creditors were concerned. That case is not controlling in this case, because here the appellant was a creditor at the time the agreement was made.

In *Sherlock v. Denny*, 28 Wash. 170, 68 Pac. 452, we declined to extend the rule in *Yake v. Pugh* to include a general agreement, to the effect that whatever the wife

earned was her own money. We there said: "But we do not think the rule should be extended further." In *Dobbins v. Dexter Horton & Co., Bankers*, 62 Wash. 423, 113 Pac. 1088, we followed the rule in *Yake v. Pugh*; but we have not held in any case that the spouses may agree that the personal earnings of the wife may be held as her separate property, as against creditors existing at the time of the agreement, and where the parties continue to live together, except the case of *Brookman v. State Ins. Co.*, 18 Wash. 308, 51 Pac. 395, where it was said: "Under our statute there is no question but that Mrs. Hall, although a married woman, had a right to lease a farm and prosecute the business of farming in her separate interests, and her testimony in this case, if the jury believed it to be true, would constitute this business her separate business." But that case was expressly overruled upon that point in *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125, where it was held that property acquired after marriage is community property. We are satisfied that this is the rule under our statute, and that the agreement of the parties that the earnings of each should be separate property did not affect existing creditors. Any other rule would open the way for fraud, and render the statutes relating to community property of no effect. The court therefore erred in concluding that the interest of Mrs. Marsh in the horses was a separate property interest. The evidence in the case clearly shows that the sons of Mrs. Marsh owned a two-thirds interest in the horses. This interest, of course, was not subject to the execution.

The judgment appealed from is therefore reversed as to Mrs. Marsh, and the cause is remanded, with directions to enter a judgment against her and the sureties upon the bond for \$250, being her interest in the horses.

MORRIS, ELLIS, and CROW, JJ., concur.

LA FAYETTE v. DEAN.

(Supreme Court of Washington. Aug. 19, 1912.)

APPEAL AND ERROR (§ 1010*)—FINDINGS—REVIEW.

Findings of the trial court, sustained by the evidence, will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Department 1. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by W. H. La Fayette against David Dean. Judgment for plaintiff, and defendant appeals. Affirmed.

D. W. Henley, of Spokane, for appellant.
H. J. Hilschman, of Spokane, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

CHADWICK, J. This is an action on an account stated, to recover a balance of \$1,161.67, growing out of certain transactions between the plaintiff and the defendant. It appears from the testimony that, on the 28th day of February, 1910, the plaintiff and the defendant entered into a written contract, under the terms of which the defendant took over and agreed to operate a sawmill and logging outfit, which the plaintiff held under a contract of purchase from one Wertz, the owner. The mill was operated by the defendant until on or about April, 1910, and on or about August 1, 1910, the defendant rendered an account to the plaintiff for the above amount, showing the balance due the plaintiff on account of lumber sold from the mill. The case was tried before the court without a jury. The court found, among other things, that operations under the contract were suspended, and the contract abandoned by mutual consent, on or about April 1, 1910, and that on or about August 1, 1910, an account was stated between the plaintiff and the defendant, showing a balance due plaintiff as alleged in the complaint, for which amount, less certain credits, judgment was entered. From this judgment the defendant has appealed.

The findings of the court are amply sustained by the testimony, and, according to our usual practice in such cases, the judgment must be affirmed. It is so ordered.

CROW, GOSE, and PARKER, JJ., concur.

STATE ex rel. SPOKANE, P. & S. RY. CO.
v. RAILROAD COMMISSION OF
WASHINGTON et al.

(Supreme Court of Washington. Aug. 19, 1912.)

1. RAILROADS (§ 9*)—RAILROAD COMMISSION—ORDERS—VALIDITY.

An order of the State Railroad Commission, directing a railroad company to show on all tariffs and folders and tickets to a certain station, the name of the village B., in connection with the name W., applied by the company to that station, is invalid as an unjust interference with the company's right to name its stations, where the town W. has a population of 800 or more, and the name is suggestive of the surrounding country, and where B. is a mere village of about 100 inhabitants only, though the center of W. is a mile and a half from the station; whereas the station is on the platted town site of B.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

2. RAILROADS (§ 9*)—STATE RAILROAD COMMISSION—POWERS—NAMES OF STATIONS.

A railway company has the right to choose names for its stations without interference by the State Railroad Commission, except where a name used materially detracts from the efficiency of public service.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

Department 1. Appeal from Superior Court, Klickitat County; H. E. McKenney, Judge.

The Railroad Commission of Washington made an order requiring the Spokane, Portland & Seattle Railway Company to show certain matter in its tariffs, folders, etc., and the company appeals from a judgment of the superior court affirming that judgment. Reversed.

Carey & Kerr and Charles A. Hart, all of Portland, for appellant. W. V. Tanner, of Olympia, and Stephen V. Carey, of Seattle, for respondent.

PARKER, J. [1] This is an appeal from a decision of the superior court for Klickitat county, affirming an order of the State Railroad Commission, which, so far as it requires our notice here, directs that appellant "show on all tariffs and folders the station of Bingen and that the name be shown, not by a star and footnote, but that it be shown among the list of stations, and that the name of 'Bingen and White Salmon' or 'White Salmon and Bingen' be bracketed and shown as the same station; that when tickets are sold to passengers desiring a ticket to Bingen, the ticket shall bear the name of Bingen thereon in connection with the name of White Salmon."

It is contended by counsel for appellant railway that this order is unreasonable in the light of evidence produced before the Commission, upon which it is based, and, in view of our conclusions upon that question, it will be unnecessary for us to discuss other contentions made by counsel.

The controlling facts as shown by the evidence introduced before the Commission may be summarized as follows: In July, 1906, appellant railway company changed the name of its station on the line of its railway in Klickitat county theretofore called "Bingen" to White Salmon. This change was apparently made in compliance with the wishes of a large majority of the patrons of the railway company having business with it at that station. The station is situated upon the platted town site of Bingen, not far from the business center of that town, where there is a post office of the same name. Bingen is not an incorporated town, but a mere village, and has only about 100 inhabitants. The name has no application, except to the town or village itself. It is not suggestive of any surrounding country or valley, as is that of White Salmon. About a mile and a half from the station is situated the business center of the town of White Salmon, which is an incorporated town of the fourth class, having a post office of the same name and a population of 800 or more. The name White Salmon has a well-recognized application to a somewhat extensive scope of country lying in the valley of the White

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Salmon river, and tributary to the town of White Salmon. This tributary valley and country has a population, together with the town of White Salmon, of from 3,500 to 4,000 people. The country tributary to Bingen is very small, both in extent and population. About 90 per cent. of the business of the railway company at this station is with the people of the town of White Salmon and the White Salmon country; about 60 per cent. of it being with the town of White Salmon; the other 10 per cent. being with the people of Bingen and its tributary territory.

[2] It seems to us that argument is hardly necessary to show the appropriateness of the name of White Salmon for this station, though it may be conceded that Bingen is not an inappropriate name therefor. The closer proximity of the station to the business center of Bingen than to that of White Salmon is the only argument worthy of notice in favor of the name Bingen in preference to White Salmon. When we consider the very short distance of the town of White Salmon from the station, the excess of the business of that town and its tributary territory with the railway company over that of Bingen, and the well-recognized application of the name White Salmon to both the territory and town, the facts shown seem to argue much more in favor of the appropriateness of the name of White Salmon than that of Bingen. Now, it cannot be seriously argued that the railway company has not the right to choose and use names for its stations without interference therewith by the Commission, except it be in cases where a name so chosen and used materially detracts from the efficiency of the service which the railway company is required to furnish to the public. We are quite unable to see how the use of the name White Salmon for this station in any degree detracts from such required service. Indeed, the facts here shown convince us that the use of that name will tend to better rather than lessen the efficiency of the railway company's service to the public. But, even if we were not of this opinion, we think the naming of the station by the railway company could not be interfered with by the Commission, unless there was shown a public necessity demanding a different name or a different designation than that adopted by the railway company. We are quite clear there is no such necessity shown in this case. It may be noted that this is a comparatively new railway line, and the name Bingen was only applied to this station during the construction of the railway and for a short time only after it began to do business as a public service corporation.

We are of the opinion that the order of the Commission, requiring the use of a name for this station other than White Salmon, is unreasonable, and for that reason should

be annulled. The orders of the Commission and superior court are therefore reversed.

CROW, CHADWICK, FULLERTON, and GOSE, JJ., concur.

(39 Wash. 535)

PARSONS v. WASHINGTON CONST. & BLDG. CO. et al.

SAME v. PACIFIC SURETY CO.

(Supreme Court of Washington. Aug. 21, 1912.)

1. PRINCIPAL AND SURETY (§ 129*)—BUILDING CONTRACTOR'S BOND—CONDITIONS—WAIVER.

A contractor being unable to pay materialmen out of estimates certified to him by the architect from time to time, and in order to prevent the filing of liens, it was agreed between plaintiff and the contractor that plaintiff would pay all such claims as should meet the approval of defendant surety company, surety on the contractor's bond. These claims were thereupon O.K'd by the surety company's attorney in fact, who had executed the bond in the name of the company, and whose general authority was not questioned. They were thereupon paid by plaintiff. Held, that such acts constituted a modification of the contract and a waiver of the provisions of the bond, requiring immediate notice of breach to the surety company's president together with notice to the surety before making the last payment on the contract, and for the withholding of certain percentages due to the contractor until final completion of the contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 366-372; Dec. Dig. § 129.*]

2. PRINCIPAL AND SURETY (§ 123*)—CONTRACTOR'S BOND—PENALTY FOR DELAY—WAIVER.

Where a building contractor's bond required immediate notice of default to the surety's president, but the owner did not inform the surety's agent that the contractor did not complete the building within the time named in the contract until some days after he had actually breached the contract in that respect, the surety was not liable for a penalty for delay.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304-311; Dec. Dig. § 123.*]

Department 2. Appeal from Superior Court, Spokane County; W. A. Huneke, Judge.

Action by J. C. Parsons against the Washington Construction & Building Company and another. From a judgment for plaintiff, defendant Pacific Surety Company appeals. Reversed and remanded, with directions to enter judgment for plaintiff for a reduced amount.

Cannon, Ferris & Swan, of Spokane, for appellant. McCarthy & Edge and H. H. Cleland, all of Spokane, for respondent.

FULLERTON, J. On July 25, 1910, the respondent, Parsons, and the defendant Washington Construction & Building Company entered into a contract, by the terms of which the defendant agreed to erect a building for the respondent at the city of Spokane, according to plans and specifica-

tions agreed upon, for the contract price of \$21,079. By the terms of the contract, the building was to be completed on or before November 15, 1910, under a penalty of \$10 per day for each and every day its completion was delayed beyond that time. To secure the faithful performance of the contract, the contractor executed a bond to the respondent, with the appellant Pacific Surety Company as surety, in the sum of \$10,800. The bond contained a number of stipulations in addition to those found in the contract, the performance of which it was intended to secure, among which was a stipulation to the effect that the surety should be immediately notified of any breach of the contract by the contractor, or of any act on his part or that of his agent or employes which might involve a loss for which the surety might be liable, immediately after the occurrence of such act shall come to the knowledge of the owner, which notification "must be given in writing to the president of said surety, at its principal office in San Francisco, California." The bond also contained conditions to the effect that the owner would notify the surety before making the last payment on the contract; and the contract provided that a certain percentage of the amount of the installments due the contractor should be withheld until the final completion of the contract. The surety company, at the time of the execution of the bond, was represented by one H. W. Newton, its attorney in fact, who resided in the city of Spokane.

The contractor defaulted in the performance of his contract, leaving the building in an incomplete condition. The owner notified the surety of the default, and demanded that the surety complete the building itself. On its refusal so to do, the owner partially completed the building himself at a cost exceeding the contract price, and after a delay of a month beyond the time fixed in the contract for its completion. This action was brought to recover the excess cost paid for the construction of the building, alleged to be the sum of \$422.60, the sum of \$300 as demurrage for failure to complete the building by the time agreed upon in the contract, and for omissions in the plans made by the contractor in the sum of \$114.50. The respondent recovered in the court below for the full amount claimed, and the surety company appealed.

[1] The appellant contends, first, that it is not liable upon the bond in any sum, because of breaches of the conditions thereof by the respondent himself; and, second, that if the court adjudges it to be so liable it is not liable in the sum found due by the trial judge. It bases its claim of nonliability on the fact that the respondent did not give notice in writing to the president of the surety company, at its principal office in San Francisco, Cal., of the defaults made by the contractor in the performance of the build-

ing contract; that he did not withhold, when making the installment payments on the contract, the percentage he was permitted to retain under the terms of the contract; and that he did not notify the company before making the last payment to the contractor under the contract. But we think there was a subsequent modification of the contract with respect to the matters here mentioned. It is gathered from the evidence that the contractor was unable to pay the materialmen, who were furnishing materials for the construction of the building, out of the estimates certified to him by the architect from time to time, and that they threatened to file liens upon the uncompleted building, unless they were paid; that to meet these demands it was agreed between the contractor and the respondent that the respondent would pay all such claims as should meet with the approval of the surety company; that the contractor thereupon made out written statements of the amount due the several materialmen, presented them to H. W. Newton, who marked them "Approved" over the name of the surety company, signed by himself as its attorney in fact. The claims were thereupon presented to respondent, who paid to the several materialmen the amounts stated therein to be due them. This form of making payments extended over a considerable period of time, and practically one-third of the contract price of the structure was paid in this manner. It is plain, therefore, that if the attorney in fact approving the bills had authority to represent the surety company in this behalf there was a waiver of the several conditions of the bond thought to have been violated by the respondent.

On this latter question, we think it is fairly shown by the record that the attorney in fact did have such authority. The evidence on which the conclusion rests is somewhat involved, and need not be reproduced here. It is sufficient to say that the agent was the accredited representative of the surety company for the city of Spokane; that he was its attorney in fact; that he executed in name of the company the bond which gave rise to the controversy; and that the surety company has not questioned his general authority, other than by mere denials in its pleadings. On the trial it contented itself with the case made by the respondent.

[2] As to the amount of the recovery found by the courts, we are content with the amount allowed as paid in excess of the contract price, and the amount found necessary to a completion of the building, but we think the court erred in making an award for demurrage. As we read the record, the respondent did not inform the agent at Spokane of the fact that the contractor did not complete the building within the time named in the contract until some days after he

had actually breached the contract in that respect. This we held, in *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280, would relieve the surety company from liability on the demurrage clause in the contract, although not from its liability for other obligations, not connected with this particular clause or affected thereby. *Heffernan v. U. S. Fidelity, etc., Co.*, 37 Wash. 477, 79 Pac. 1095; *Trinity Parish v. Aetna Indemnity Co.*, 37 Wash. 515, 79 Pac. 1097; *Denny v. Spurr*, 38 Wash. 347, 80 Pac. 541.

We have not overlooked the fact that the appellant contends that an item of \$232.45 was paid by the respondent without either the certificate of the supervising architect, or the approval of the surety company's agent. But, while it is true the claim was not indorsed or approved by the agent, we think it clear from the testimony that it had its approval in fact. The essential requirement was that it be approved, not that it be approved in any particular manner.

The judgment is reversed, and the cause remanded, with instructions to enter a judgment in favor of the plaintiff below for the amount demanded in his complaint, less the sum of \$300 sought to be recovered for delay in the completion of the building.

MOUNT, MORRIS, ELLIS, and PARKER, JJ., concur.

HOOD v. GERRICK, et al.

(Supreme Court of Washington. Aug. 21, 1912.)

1. CONTINUANCE (§ 30*)—PLEADING—AMENDMENT.

It was not error to deny a continuance because of permission granted plaintiff to amend his complaint by merely stating in more detail matters stated too generally in the original pleading, but which did not affect the issues on the merits, or require different proof than was necessary to meet the allegations of the original complaint.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 99-112; Dec. Dig. § 30.*]

2. PHYSICIANS AND SURGEONS (§ 13*)—PROFESSIONAL SERVICES—EXTENT OF LIABILITY.

Where a surgeon was hired generally to furnish such medical and surgical treatment for an injured employé as, in the physician's judgment, was necessary to effect a recovery, he was entitled to recover for a second operation performed on the servant's broken leg, if the physician found it necessary to perform such operation in order to secure a proper recovery.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. §§ 18-20; Dec. Dig. § 13.*]

Department 2. Appeal from Superior Court, Whatcom County; E. E. Hardin, Judge.

Action by C. S. Hood against John Gerrick and another, doing business as Gerrick & Gerrick. Judgment for plaintiff, and defendants appeal. Affirmed.

Milo A. Root, of Seattle, for appellants. Neterer & Pemberton, of Bellingham, for respondent.

PER CURIAM. One Larry George, while in the employment of the appellants as foreman superintending the construction of a railroad bridge, met with an accident. Some person in no way connected with the appellants called the respondent to attend the injured man. He responded to the call, gave him medical and surgical aid, procured temporary hospital quarters, and engaged for him the services of a professional nurse. Mr. George's injuries were of a serious nature. His right leg was crushed from the knee down, requiring immediate amputation; his left leg between the knee and the ankle, his right arm between the elbow and the shoulder, his right clavicle, and two of his ribs, were broken; he received an injury to the spine, severe contusions on various parts of the body, and a severe scalp wound. Neither of the appellants were present at the place of the accident at the time it occurred. Some five days thereafter John Gerrick appeared at the place where the injured man was being cared for, and, according to the respondent, made an arrangement for his future care. The respondent testified that he explained to Gerrick the desperate nature of George's injuries, the necessity of keeping a nurse with him at all hours of the day and night, the number of nurses that would be required for that purpose, and the cost of their services; that Gerrick, knowing these facts, arranged with him to continue the care and treatment of the injured man, employ such assistants as he found necessary, and promised that the appellant firm would pay the expense thereof. The respondent continued his treatment until George left the hospital, rendering bills to the appellants for his services, a small part only of which were paid. The respondent sued for the services of himself and the nurses he employed for the entire period of service, those performed before the appearance of John Gerrick, as well as those performed afterwards. The appellants denied liability for any part of the services. The issue was tried by the judge, sitting without a jury, and resulted in a judgment in favor of the respondent for the value of his services subsequent to the time of the purported hiring by John Gerrick, and for the services of the nurses subsequent to that time. This appeal is from the judgment rendered.

[1] During the course of the trial, the court granted the respondent permission to amend his complaint, and refused to continue the cause, on the motion of the defendant, after such leave had been granted. The appellant has assigned error upon both of these rulings; but we find nothing in them that calls for a reversal. The amendment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

itself was not very material. It simply alleged with more detail matters that had been stated too generally, perhaps, in the original pleading. It did not affect in any way the issues on the merits of the claim, and required no different proofs to meet its allegations than were required to meet the allegations of the original complaint. There could be therefore no error in allowing the amendment nor surprise on the part of the defendants warranting a continuance.

The contention is made that the evidence is insufficient to support the judgment as a whole, and it is complained particularly that the recovery is too large. But on both of these questions we think the findings of the trial court are justified. No recovery was allowed for the services of the plaintiff and the nurses prior to the time the agreement was had between John Gerrick and the respondent, and the respondent in his proofs had some difficulty in segregating the value of his services at that precise line; but his evidence shows services performed subsequent to that time of the reasonable value allowed by the court.

[2] It is objected that a charge of \$125, made for a second operation on George's broken leg, was not within the terms of the contract proven; but we think it was. The contract of hire was general; it was to furnish the injured man with such medical and surgical treatment as, in the judgment of the respondent, was necessary for his recovery; and if the defendant found it necessary to perform another operation upon his leg, and the proofs show it was so necessary, he has the same right to perform and recover for that service as he has for any other medical or surgical service rendered him.

The judgment will stand affirmed.

JORGENSEN et ux. v. WINTER.

(Supreme Court of Washington. Aug. 21, 1912.)

1. INSANE PERSONS (§ 29*)—RESTORATION OF CAPACITY—ADVERSARY PROCEEDING—JURISDICTION.

Rem. & Bal. Code, § 1671, provides that whenever the court shall receive information that an insane person has recovered his reason it shall immediately inquire into the facts, and if he finds that the ward is of sound mind, he shall discharge him from care and custody, and the guardian of such ward shall settle his accounts and restore to the ward all things remaining in the hands of the guardian belonging to such ward. *Held*, that a proceeding to determine whether an insane person had been restored to capacity was not an adversary proceeding, and was therefore not invalid, because conducted without notice to the ward.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 42, 140, 150; Dec. Dig. § 29.*]

2. INSANE PERSONS (§ 36*)—GUARDIANSHIP.

The appointment and qualification of a guardian for an insane person conferred on the court general jurisdiction over the ward's es-

tate, which continued until the ward recovered his reason, when the right to manage the estate by a court or guardian ceased.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 54, 55; Dec. Dig. § 36.*]

3. INSANE PERSONS (§ 37*)—GUARDIAN—DISCHARGE—NOTICE TO WARD.

The court, having jurisdiction of an insane person, may accept the resignation of a guardian, or discharge him on his own application, without notice to the ward.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 56; Dec. Dig. § 37.*]

4. INSANE PERSONS (§ 42*)—RESTORATION TO REASON—SETTLEMENT OF GUARDIAN'S ACCOUNT—NOTICE.

The settlement of the accounts of a guardian of an insane person is an adversary proceeding, requiring preliminary notice to the ward.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 64-67; Dec. Dig. § 42.*]

5. JUDGMENT (§ 495*)—COLLATERAL ATTACK—JURISDICTION—PRESUMPTION.

It will be presumed on collateral attack that a court of general jurisdiction has proceeded regularly, and that every step necessary to acquire jurisdiction has been taken, unless the contrary is made to appear, where the subject-matter of the litigation is within the court's jurisdiction.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. § 495.*]

6. JUDGMENT (§ 495*)—COLLATERAL ATTACK—PARTIES—PRESUMPTION.

Where a court of general jurisdiction has jurisdiction of the subject-matter of an action in which judgment is pronounced, jurisdiction of the parties will be presumed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. § 495.*]

7. INSANE PERSONS (§ 61*)—RESTORATION TO CAPACITY—CONVEYANCE OF REAL PROPERTY.

Where, almost immediately after an insane person had been discharged as restored to reason, he was restored to capacity and his guardian discharged, after which he conveyed certain real property to plaintiffs' grantor for \$2,500, the fact that two days later the purchaser sold the property to plaintiffs for \$4,100, did not indicate that the sale by defendant was invalid, or authorize a vacation thereof, on the ground that he had not sufficient capacity to make the same.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 98-99; Dec. Dig. § 61.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by John Jorgenson and wife against J. B. Winter. Judgment for defendant, and plaintiffs appeal. Reversed, with directions.

Hathaway & Alston, of Everett, for appellants. Williamson, Williamson & Freeman, of Tacoma, for respondent.

GOSE, J. This is a suit in ejectment. There was a judgment for the defendant. The plaintiffs have appealed.

The respondent pleaded affirmatively that he was adjudged insane and committed to the asylum in this state in the month of November, 1908; that it had not since been judicially determined that he has recovered his reason; that at the time he conveyed

the property to the appellants' grantor he was, and for several years had been, incurably insane and incompetent to transact his ordinary business; and that the appellants had knowledge of his mental infirmity at the time they purchased the property. The appellants, in their reply, traversed the new matter in the answer, and alleged affirmatively that in February, 1909, in the superior court of Pierce county, an order was entered, appointing a guardian of the respondent's estate, upon the ground that he was insane and incompetent to manage his affairs; that the guardian qualified and took possession of the property of his ward; that on the 24th day of January, 1910, the respondent had recovered his reason; and that the said court then entered an order confirming the guardian's report, discharging the guardian, exonerating his bondsmen, and adjudging that the respondent had fully recovered from his mental affliction. The trial court found all the issues in favor of the respondent.

The facts are as follows: The respondent was committed to the asylum on November 2, 1908. On February 6, 1909, a guardian of his estate was appointed. On January 22, 1910, he was paroled, and at the time of the trial in November, 1911, was still at large. On January 24, 1910, an order was entered in the superior court of Pierce county, discharging the guardian and reciting that the respondent had recovered his reason. On January 26th the respondent gave one Miller written authority to sell the property in controversy for \$2,500, and agreed to pay him a commission of 5 per cent. in case of a sale. On February 2d Miller procured a purchaser at the price stated, and on that day the respondent conveyed the property and received the purchase price. Two days later the purchaser sold and conveyed the property to the appellants for \$4,100. The order appointing the guardian recited that the respondent had property which needed the care and attention of some fit and proper person, and that the respondent was "confined in the hospital for the insane" in this state. None of the orders in the record indicate the degree or character of the respondent's insanity. The report of the guardian alleged that the respondent had been paroled upon the order of the superintendent of the hospital where he was confined, and that there was no necessity for the continuance of the guardianship. There is appended to the report a statement, subscribed by the respondent, to the effect that he had examined the account and vouchers; that he approved them; and that he had received from his guardian all personal property belonging to him. The order of discharge recites that the estate had been fairly and legally administered; that the guardian had turned over to his ward all the personal property belonging to the estate; that the guardian be discharged and his bondsmen exonerat-

ed; and that the respondent had "fully recovered from his mental affliction."

The oral testimony is all to the effect that the respondent was competent to manage his business affairs at all times subsequent to his parole. Miller, the man who sold the property, testified that the respondent lived in Tacoma; that he came to his office at Everett and signed the contract authorizing him to make the sale; that the respondent stated that the house was "run down" and needed repairs; that taxes would soon be due; that there were sewer assessments; that he estimated the total of such expenses, and said that the property was not paying, and that he would rather sell it; and that he further said that he did not feel that the city would grow. A Mr. Olson testified that he had known the respondent for 10 or 12 years; that just before he made the sale he requested witness to sell the property; that witness asked him what price he wanted, and that the respondent said that if he would sell it for \$2,600 he would pay him a commission; and that he appeared all right mentally.

On December 20, 1909, about a month before his parole, the respondent wrote Miller as follows: "Ft. Steilacoom, Wash., Dec. 20, 1909. Mr. F. J. Miller: Your letter at hand. I am well at present and have been in good health. Work in the kitchen department and am quite a heavy weight. I hope to have the pleasure of seeing you soon, only wish I could come to see you on Christmas, but I expect to be at home soon in Tacoma, then I can come and see you, in regard to property, also would be glad to see you very much. I wish you a Merry Christmas and a Happy New Year. Respt. J. B. Winter." On February 11th, nine days after he made the sale, he again wrote Miller, saying: "Tacoma, Washington, Feb. 11, 1910. Mr. F. J. Miller, Hewitt St., Everett, Wn.—Dear Sir: Through the recent land deal made by you in disposing of my property in Everett, I have had lots of trouble, and the deal I made is void according to the law. I had no right to make this sale, as I was not fully released from the hospital for the insane at Steilacoom. This property was sold for about one-half its value and the court will say that I must get this property back or get the real value for it. If I don't get it the court will appoint a guardian for me and do it in that way, and I don't want that done. I am under under the supervision of the court and under the protection of the state, and I will have to get this matter adjusted right. Yours truly, J. B. Winter."

[1, 2] Our statute in reference to the discharge of one who has been adjudged insane (Rem. & Bal. Code, § 1671) is as follows: "Whenever the court shall receive information that such ward has recovered his reason, he shall immediately inquire into the facts, and if he finds that such ward is of sound mind, he shall forthwith discharge

such person from care and custody; and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to such ward." It will be observed that the statute makes no provision for notice to the ward, or to any other person. The respondent, however, contends that the ward must be brought before the court in some manner, before it acquires jurisdiction to hear and determine his mental condition. It is elementary law that adversary rights cannot be determined without affording an opportunity to be heard to the party whose rights are to be affected. But the question arises, Is an adjudication that a person has recovered his reason an adversary proceeding? We think not. The appointment and qualification of the guardian gave the court general jurisdiction over the estate of the ward. The jurisdiction continued until the ward recovered his reason, at which time the right to manage the estate by the court or the guardian ceased. *Meeker v. Mettler*, 50 Wash. 473, 97 Pac. 507. The statute contemplates that the court shall conduct such inquiry as it deems proper; that is, inquire into the facts and determine accordingly.

[3, 4] The cases cited by the respondent do not hold that notice to the ward or to his next of kin is jurisdictional, but only that expediency demands that such notice should be given, or that the ward be brought before the court during the hearing. Moreover, we can see no reason why a court may not accept the resignation of a guardian, or discharge him upon his own application, without notice to the ward. The question of the settlement of the guardian's account is quite a different thing. It is in its very nature an adversary proceeding, and as such requires a preliminary notice. We think that both the ward and the guardian were legally discharged.

[5] We have assumed in the foregoing discussion that the hearing was had in the absence of the ward. The record is silent upon this question. In the *Meeker* case we held that an adjudication that a ward had attained his majority, he being personally present in court, was conclusive upon a collateral attack. The presumption always is that a court of general jurisdiction has proceeded regularly until the contrary is made to appear, where the subject-matter of the litigation is within its jurisdiction. *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *State ex rel. Ins. Co. v. Superior Court*, 14 Wash. 208, 44 Pac. 131. It will also be presumed that every step necessary to acquire jurisdiction has been taken. 11 Cyc. 691, 692.

[6] Where a court of general jurisdiction has jurisdiction of the subject-matter of the action in which the judgment is pronounced, jurisdiction of the parties will be presumed.

Galpin v. Page, 18 Wall. 350, 21 L. Ed. 939. "Every presumption, not inconsistent with the record, is to be indulged in favor of jurisdiction." *Applegate v. Lexington, etc.*, Min. Co., 117 U. S. 255, 6 Sup. Ct. 742, 29 L. Ed. 892.

[7] We conclude that the guardian was legally discharged; that the respondent was under no legal restraint when he executed the deed; and that he was then mentally competent to manage his own business affairs. The fact that the property was sold at an enhanced price a few days later is not an unusual occurrence in real estate transactions. It is common knowledge that the market value of property responds quickly to changing conditions; and that the judgment of men differs widely upon the question of value.

The judgment is reversed, with directions to enter a judgment for the appellants.

PARKER, CROW, and CHADWICK, JJ., concur.

HILL v. PACIFIC STATES LUMBER CO.
(Supreme Court of Washington, Aug. 21, 1912.)

DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff, an employé in defendant's logging camp earning \$3.50 a day, was injured March 15, 1911, by a wire cable striking him on the side of the face and neck. He was severely bruised, and was unconscious for half an hour. He was taken to an emergency hospital, where he remained under treatment for 2 days and 2 nights, when he went to his home, where he remained until March 17th, when he accepted employment as loader in a string mill. He was unfit for this work, however, and was discharged after working 3½ days, after which he was again employed by defendant at his old work, at which he worked for a month, when he was discharged. Up to the time of the trial, December 11, 1911, he suffered from severe pains in the back of his head and neck, and after his discharge had not been able to work steadily, though he suffered no diminution in his rate of wages. His physician testified that there had been a strain of the ligaments of the joints of the vertebrae, and that it would probably be a year or more from the date of the trial before he would recover. Two other physicians testified that he seemed to have a stiff neck; but, aside from his statements and his apparent inability to turn his neck but partially, his condition was normal. Held, that a verdict allowing him \$1,000 was not so excessive as to indicate passion and prejudice.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 1. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by S. J. Hill against the Pacific States Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hayden & Langhorne, for appellant. Governor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, all of Tacoma, for respondent.

CROW, J. Action by S. J. Hill against Pacific States Lumber Company, a corporation, to recover damages for personal injuries. From a verdict and judgment for \$1,000, the defendant has appealed.

Appellant's only contention is that the damages are so excessive as to show the influence of passion and prejudice. Respondent was employed as a hook tender in appellant's lumber camp, earning \$3.50 per day, and on March 15, 1911, was injured by a wire cable striking him on the left side of his face and neck. He contended, and introduced evidence to show, that he was severely bruised and injured about his neck and head; that the striking of the cable made him unconscious for, perhaps, half an hour; that he was taken to appellant's emergency hospital near the camp, where he remained under treatment for two days and two nights; that he then went to his home in Tacoma, where he remained until March 17, 1911, when he accepted employment as a loader in a shingle mill; that he was unfit to do the work, and for that reason was discharged after working 3½ days; that his next employment was with appellant at his old work, where he remained for about one month, when he was again discharged; that during all this time and until the date of the trial, which occurred on December 11, 1911, he continually suffered from severe pains in the back of his head and neck; that after working for appellant he worked for a short time as a second faller of trees; that he has since been employed at trucking in the city of Tacoma, where his work is not steady; that since his injury he received the same wages as before; that his neck is stiff and sore; that his activity is only about 50 per cent. of what it was prior to his injury; and that he is physically unfit for his former employment.

The physician who treated respondent testified that, in his opinion, there had been a strain of the ligaments of the joints, which he explained was a wrenching or stretching of the joints, a tearing of the attachments of the ligaments, and that it would probably be a year or more from the date of the trial before he would recover. Two physicians, who had examined respondent the day before the trial, about nine months after the accident, and were called as witnesses for appellant, testified that respondent complained of and seemed to have a stiff neck; that they could discover no objective symptoms; and that, aside from his statements and the fact that he turned his neck only partially when requested to move it, his condition seemed to be normal. The company physician, who examined and treated respondent immediately after his injury, testified, as a witness for appellant, that respondent was then severely bruised; that he

was suffering much pain, but that no injury had occurred to the vertebrae of his neck.

Upon this evidence the verdict may, perhaps, seem large, as appellant has not lost much time, and still has earning capacity. Yet the evidence is so conflicting that we cannot say the award is sufficiently excessive to show passion or prejudice on the part of the jury. From the evidence of the physicians produced by appellant, it is possible that such a conclusion might be reached; but, if the statements of respondent and his physician be accepted as true, a different result would follow. The jury saw the witnesses, heard them testify, passed upon their credibility, weighed their evidence, and undoubtedly found that respondent has endured continued pain and suffering, and has been injured as he contends. The trial judge, who also saw respondent and the witnesses and heard them testify, has sustained the verdict. While the verdict may seem large, we are unable to conclude from all the evidence that it is sufficiently excessive to disclose passion or prejudice.

The judgment is affirmed.

PARKER, GOSE, and CHADWICK, JJ., concur.

UNION ELEVATOR & WAREHOUSE CO., Inc., v. FARMERS' WAREHOUSE CO., Inc.

(Supreme Court of Washington. Aug. 22, 1912.)

1. WAREHOUSEMEN (§ 25*)—DELIVERY BY WAREHOUSEMAN.

The duty of a warehouseman to turn out wheat stored with him is performed when he delivers it on the cars, or, if the receipt permits, wheat of like kind and quality, in proper condition.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 38-47; Dec. Dig. § 25.*]

2. APPEAL AND ERROR (§ 994*)—REVIEW—CREDIBILITY OF EVIDENCE.

The evidence sustaining the judgment, its credibility will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by the Union Elevator & Warehouse Company, Incorporated, against the Farmers' Warehouse Company, Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

C. H. Spalding and J. M. Simpson, for appellant. Lovell & Davis, of Bitzville, for respondent.

CHADWICK, J. This action was brought by respondent to recover damages, alleged to have been suffered by reason of the fact that appellant loaded out wheat, stored un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep' Indexes

der the usual form of warehouse receipt, that was "wet, moldy, and in a growing condition" when it reached the Tacoma terminal.

[1] Many errors are assigned; but, as we view the case, it being largely a question of fact, we shall not discuss them, further than to say that we find evidence to sustain the judgment. However, inasmuch as appellant earnestly contends that the effect of the judgment is to make it and other warehousemen liable to meet the tests and exactions of terminal weights and grades, we shall extend this opinion to the extent of saying that we do not so interpret the findings of the lower court. The duty of a warehouseman to turn out wheat is performed when he delivers the specific article on the cars, or, if the receipt be in such form, wheat of like kind and quality. If it had been proven that there was an acceptance at the warehouse, or that the wheat was damaged in transit, appellant might have recovered; but there is ample testimony to sustain the court's findings that the wheat was damaged when loaded. This being so, appellant is liable for its breach of contract.

[2] Counsel have invited us to pass upon the weight of the evidence, saying that the only evidence worthy of belief is with appellant. The judgment being sustained by the evidence, we shall not pass upon its credibility.

Judgment affirmed.

CROW, GOSE, PARKER, and MORRIS, JJ., concur.

EDDY v. CUNNINGHAM.

(Supreme Court of Washington. Aug. 20, 1912.)

1. LIBEL AND SLANDER (§ 124*)—INSTRUCTIONS—LARCENY.

In an action for slander in calling plaintiff a thief, it was proper to instruct that it was not enough for defendant to show that plaintiff took defendant's money, but that he must show, by a preponderance of the evidence, that plaintiff took the money fraudulently and with criminal intent, and that if plaintiff took the money under a good-faith claim that he was entitled thereto, and did so openly and avowedly, defendant's claim that he was in truth a thief, failed, where the testimony showed that plaintiff had full charge of defendant's business, receiving all moneys and paying all demands, including his own salary.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-373; Dec. Dig. § 124.*]

2. LIBEL AND SLANDER (§ 123*)—JUSTIFICATION—JURY QUESTION.

In an action for calling plaintiff a "thief," whether defendant justified the charge, *help*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

3. LIBEL AND SLANDER (§ 7*)—ACTIONABLE WORDS—"THIEF."

To speak of one as a "thief" is only prima facie actionable per se, malice being the gravamen of the charge; and where the word is used as a mere term of abuse, or relates to a transaction that was fraudulent, but not criminal, defendant is not bound to strict proof.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17-78; Dec. Dig. § 7.*]

4. LIBEL AND SLANDER (§ 124*)—INSTRUCTIONS—"PIMP."

Under Rem. & Bal. Code, § 2440, which makes it an offense to live with a common prostitute, it was error, in an action for calling defendant a "pimp," to refuse to instruct that the charge was justified if plaintiff lived with prostitutes at the hotel where he was employed by defendant, where there was evidence that women, who stayed several days at a time at the hotel, consorted with him, and that he procured patronage for them.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-373; Dec. Dig. § 124.*]

For other definitions, see Words and Phrases, vol. 6, p. 5379.]

Department 1. Appeal from Superior Court, Franklin County; O. R. Holcomb, Judge.

Action by A. F. Eddy against Charles Cunningham. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. B. Noland, of Pasco, for appellant. Moulton & Henderson, of Kennewick, for respondent.

CHADWICK, J.: Plaintiff brought this action to recover damages for an alleged slander. He had been an employé of the defendant at a hotel in the city of Pasco. A part of the time he acted as auditor and clerk. His position may be described as that of a general factotum for his employer. He enjoyed his full trust and confidence, and seems to have managed the business without suggestion. Finally, defendant, being apprised of certain acts of the plaintiff, discharged him. This was done in the presence of others, and defendant is alleged to have used words that are actionable; that is, "thief" and "pimp." We think no further statement of the case is necessary. Defendant made general denial, and pleaded mitigation, justification, and the truth in the words spoken. From a judgment in favor of plaintiff, defendant has appealed.

[1] It is first contended that the word "thief" should have been withdrawn from the consideration of the jury, for the reason that the plaintiff admitted a state of facts which made him guilty of the crime of embezzlement. This the court refused to do, and upon the particular word instructed as follows: "To prove that plaintiff is a thief, it is not enough for the defendant to show that plaintiff took money that was the property of defendant, but he must go further and show that plaintiff took defendant's money fraudulently and with a criminal intent."

tant to deprive the defendant of it. This must be established by a preponderance of the evidence. If, on the other hand, the plaintiff took the defendant's money under a good-faith claim, made at the time thereof, that he was entitled to or had a right to take it, and did so openly and avowedly, and if you so find, then the claim of the defendant that the plaintiff was in truth a thief has failed." The instruction is criticised because it leaves to the jury the determination of the question whether respondent took appellant's money under a good-faith claim made at the time, and that he was entitled to take it and pay an alleged debt, ignoring the only defense that would avail respondent; that is, a good-faith claim of title to the property or money which was converted by him. This would ordinarily be so; for no man should be heard to plead the right to pay himself a debt out of the money of another, knowing that he has no title thereto. Good faith, under such circumstances, demands a presentment of the claim; but instructions cannot be measured as abstract statements. Their pertinence depends upon the facts of the particular case, and the abstract must be tempered to meet the real issue. The testimony shows that respondent had full charge of appellant's business, receiving all moneys and paying all demands, including his own salary. We think, therefore, in respect to the question raised, that the instruction was drawn with a proper appreciation of the distinguishing features of the case.

[2, 3] Nor do we think that appellant's motions to take the consideration of the word "thief" away from the jury should have been granted. Whether the use of the word was justified, or whether appellant showed, by a preponderance of the evidence, a state of facts warranting an inference of guilt, was for the jury, although we have no hesitation in saying that, were we free to pass upon the question as one of law, the use of the word was amply justified by reference to the attending circumstances. The real question is not whether respondent was guilty of larceny in the sense that a verdict of guilty would be sustained; for appellant does not have to prove respondent guilty beyond a reasonable doubt in order to justify his words. An important issue raised by the pleadings and the evidence is whether, considering the relations of the parties and all attending facts and circumstances, the words were used in a defamatory sense as charging a crime, or merely as words of abuse, justified by the circumstances and the former relations of the parties. This is so because the word "thief" is only *prima facie* actionable *per se*. 25 Cyc. 301. Malice is the gravamen of the charge, and where the word is used as a mere term of abuse or had relation to a transaction that was fraud-

ulent, but not criminal, it has been held that a defendant is not bound to strict proof. *Bridgman v. Armer*, 57 Mo. App. 528; *Roberts v. Ramsey*, 86 Ga. 432, 12 S. E. 644. This latter element is ignored in the instruction, though called for by the pleadings and the evidence, and, in the event of a new trial, might with propriety be noticed by the court.

[4] In submitting the word "pimp" to the jury, the court said: "To charge a man with being a pimp charges him with a commission of an offense or offenses against the laws of the state, and which are punishable. The legal definition of the word 'pimp' is: One who solicits other men to go to houses or places of prostitution for immoral purposes; or who solicits men to associate with prostitutes for immoral purposes; or one who in some way procures for others the means of gratifying their passions; or one who lives wholly or in part upon the earnings of an immoral woman, earned by immoral practices of prostitution." It will be seen that the court has adopted section 2440, Rem. & Bal. Code (omitting the words contained therein "every person who shall live with a common prostitute"), as a comprehensive definition of the term. Appellant requested the court to instruct the jury that, if they found from the testimony that respondent had been living with prostitutes at the hotel, it would be a justification of the charge. We think this instruction should have been given. The word "pimp" is not defined by statute *eo nomine*; and it would seem that one charged with using the term in a defamatory way should not be bound to prove acts or conduct that would necessarily sustain, or even justify, a criminal prosecution under section 2440 of the Code. The words "living with" were rejected by the court, as we understand, because the testimony offered by the appellant showed only an occasional resort to meretricious relations, and not a living together in the sense of habitual association. The evidence of appellant tends to show that it was the practice of certain lewd women to lodge at the hotel; that respondent assigned them, as a rule, to a room convenient to his own, and that one of them at least consorted regularly, and others occasionally, with him while there; that these women were there several days at a time, and frequently; that respondent entered false names of these women upon the hotel register and procured patronage for them. If this testimony is true, plaintiff encouraged the patronage of lewd women, and did himself participate in their lustful practices. Under this state of facts, the law should not be too scrupulous or over-technical in defining the term "pimp." In our judgment there is testimony warranting the court in giving an instruction to the effect that a "living with," under the statute, means a resort to sexual commerce with an

abandoned woman under such circumstances as would show previous arrangement and understanding. The offense lies in the reputed or acknowledged character of the women, rather than in the character or frequency of the act. The law never intended that the innocent meaning of the words "living with," as applied to husband and wife, or to people of chaste character, should be applied to those who habitually, even for a brief season, consort in adulterous intercourse. In such case the words have a meaning of their own, and it is well understood. The new Criminal Code, in its definition of the crimes of adultery and lewdness, seems to recognize this principle, and has dropped from the law the common-law element of "living with," as used in the older and stricter sense. We do not want to be understood as holding that an occasional act of lewdness would sustain the charge, but only that where, as it may have been in this case, the respondent found comfort and companionship from day to day and from time to time in the society of fallen women the jury would, in law, be justified in applying the word "pimp."

Because of these errors, appellant's motion for a new trial should have been sustained. Wherefore the judgment of the lower court is reversed, and the case remanded for further proceedings.

GOSE, CROW, PARKER, and ELLIS, JJ., concur.

STATE ex rel. POWELL v. FASSETT, Com'r of Public Utilities et al.

(Supreme Court of Washington. Aug. 20, 1912.)

1. APPEAL AND ERROR (§ 418*)—APPEAL FROM SEVERAL JUDGMENTS—NOTICE—SUFFICIENCY.

Under Rem. & Bal. Code, § 1719, providing for notice of appeal, only one notice was required on appeal from two judgments in quo warranto, dismissing the proceeding as to separate defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2144; Dec. Dig. § 418.*]

2. MUNICIPAL CORPORATIONS (§ 162*)—OFFICERS AND EMPLOYÉS—SALARIES—MUNICIPAL LIABILITY.

Where relator was discharged as foreman of a municipal water construction department, and his successor had been paid the salary up to the time of the trial, the city was absolved from liability to relator to that date, even if he was wrongfully discharged.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 357-367, 369, 372, 374; Dec. Dig. § 162.*]

3. QUO WARRANTO (§ 24*)—RIGHT TO RELIEF—"OFFICER."

Under Spokane Charter, which established a commission form of government and classified civil service, one entitled to the position of foreman in the water construction department is an "officer," and not a mere subordi-

nate, as affecting his right to maintain quo warranto on wrongful discharge.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 27; Dec. Dig. § 24.*]

4. MUNICIPAL CORPORATIONS (§ 48*)—CIVIL SERVICE—CONSTRUCTION OF CHARTER.

Spokane Charter, § 120, which provides that "all other provisions of this charter shall become effective on the assumption of office of the commissioners first elected thereunder," means all other provisions applicable to the commission form of government established by the charter which were to be executed by the commission thereafter to be elected, and does not nullify the provision in section 53 that all municipal employes in office at the adoption of the charter shall continue in office until removed for cause.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127-133; Dec. Dig. § 48.*]

5. QUO WARRANTO (§ 38*)—PARTIES—CIVIL SERVICE.

The commissioner of public utilities of Spokane is a proper party to a proceeding brought by a municipal employé, wrongfully removed, to oust the successor and compel relator's restoration to office.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 44; Dec. Dig. § 38.*]

6. QUO WARRANTO (§ 60*)—SCOPE OF RELIEF.

A municipal employé, wrongfully removed, can seek ouster of his successor and compel his own restoration to the office in one proceeding.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 71; Dec. Dig. § 60.*]

Department 1. Appeal from Superior Court, Spokane County; W. P. Bell, Judge.

Quo warranto by the State of Washington, on relation of W. S. Powell, against C. M. Fassett, Commissioner of Public Utilities of the City of Spokane, and others. From judgments of dismissal, relator appeals. Reversed and remanded.

E. O. Connor and F. B. Morrill, for appellant. A. M. Craven, Wm. E. Richardson, and Harris Baldwin, all of Spokane, for respondents.

GOSE, J. This is a quo warranto proceeding. The complaint alleges and the record shows that the city of Spokane is a municipal corporation of the first class; that on December 28, 1910, it adopted a new charter; that the defendant Fassett is, and since the 14th day of March, 1911, has been, commissioner of public utilities of the city; that the plaintiff, on the 1st day of July, 1909, was appointed to the position of construction foreman in the water construction department of the city, and continued in that position and performed the duties thereof up to and including the 28th day of January, 1911; at the monthly salary of \$125 per month; that the position was placed in the classified civil service by the civil service commission of the city on the 27th day of April, 1911; that the new charter provides that all employes in office at the time of its

adoption shall retain their position, unless removed for cause; that on the 28th day of January, 1911, the plaintiff received a notice from the superintendent of the water department of the city, to the effect that he was "relieved" from duty; that on January 30th said superintendent issued a notice, to the effect that the defendant Burke had succeeded the plaintiff as general foreman of construction; that Burke has ever since held the position; that the plaintiff was dismissed without notice and without a hearing; and that his name was stricken from the pay roll of the city. The prayer of the complaint is that the defendant Burke be ousted; that Fassett, as commissioner of public utilities, be required to restore the plaintiff to his former position and reinstate his name upon the pay roll of the city; that the plaintiff have judgment against the defendants for his salary since the day of his removal at \$125 per month; "and that said salary be paid to said plaintiff by the city of Spokane and the defendants herein." The defendants, the city and Fassett, as commissioner of the public utilities of the city, filed separate demurrers, setting up the first, fourth, sixth, and seventh grounds of the statute. Rem. & Bal. Code, § 259. The demurrers were sustained, and, the plaintiff declining to plead further, a judgment of dismissal and for costs was entered on the 20th day of February, 1912. The defendant Burke answered, and, after trial, a judgment of dismissal, with prejudice and for costs, was entered in his favor on the 23d day of February following. On March 15th the plaintiff served and filed a single notice of appeal from both judgments. On March 18th he filed an appeal bond with appropriate reference to the two judgments.

[1] The respondents have moved (1) to strike the briefs, on the ground that the errors are not clearly assigned, and (2) to dismiss the appeal and affirm the judgment because of the appellant's failure to serve and file a separate notice of appeal and a separate appeal bond upon each judgment. Upon the first ground, it suffices to say that we think the errors relied upon are sufficiently indicated to warrant their discussion. The motion to dismiss is without merit. There is but one case and one notice of appeal, and one appeal bond suffices, although there are two judgments. Rem. & Bal. Code, § 1719; First National Bank v. Fowler, 51 Wash. 638, 99 Pac. 1034; O'Connor v. Force, 58 Wash. 215, 108 Pac. 454, 109 Pac. 1014; Wetherall v. Wetherall, 56 Wash. 344, 105 Pac. 822. In the Fowler Case four actions were consolidated for trial; but separate findings and decrees were entered in each case. A motion was made to dismiss the appeal, because there was but one notice of appeal and but one appeal bond. In denying the motion, we said that the appellant had a right to treat it as one

action, and that "there was but one subject-matter involved."

[2] We need not consider whether the demurrer of the city was properly sustained, as the evidence submitted at the trial shows that the city had then paid the entire salary to Burke up to that time. This absolved it from liability to the appellant to that date. *Samuels v. Harrington*, 43 Wash. 603, 86 Pac. 1071, 117 Am. St. Rep. 1075.

[3] The respondents Fassett and Burke contend that quo warranto does not lie, because the appellant's position is a subordinate one, and not an office, within the meaning of the charter or the Code. Rem. & Bal. § 1034. The new city charter establishes a commission form of government. Its applicable provisions are as follows:

"Commission, Rules and Powers. The commission, with the approval of the council, shall make such rules and regulations for the proper conduct of its business as it shall find necessary and expedient. The commission, among other things, shall provide for the classification of all employes, except day laborers and the appointive offices mentioned in sections twenty-four (24), twenty-five (25) and thirty-two (32) of this charter; for open competitive and free examination as to fitness; for a period of probation before employment is made permanent; for an eligibility list from which vacancies shall be filled; and for promotion on the basis of merit, experience and record. Employes within the scope of this article who are in office at the time of the adoption of this charter shall retain their positions, unless removed for cause. The council may, by ordinance, confer upon the commission such further rights and duties as may be deemed necessary to enforce and carry out the principles of this article."

"Continuation of Existing Government and Offices. The government and offices existing prior to the adoption of this charter, shall continue until the election and qualification of officers first elected under this charter at the general election in March, 1911. The provisions of this charter with reference to elections, recall of elected officers, direct legislation and charter amendments shall be in force from the date of the adoption of this charter. All other provisions of this charter shall become effective on the assumption of office of the commissioners first elected thereunder."

In adopting the charter, the people of the city made it as plain as written language can make it that the merit system should thereafter obtain. It applies to all employes placed in the classified civil service list, and the manifest intent was to classify such positions as offices, and to have such officers removable for cause only. The charter was in effect when the appellant was relieved from duty without a hearing and, so far as record discloses, without cause. The appel-

lant would probably not be an officer, as defined by the common law, but the clear intent of the charter is to afford him all the protection of an officer. The people who created the charter did not intend to give him the right to be retained in office without affording him an adequate remedy if he should be removed in violation of the plain provisions of that instrument. State ex rel. Young v. Smith, 19 Wash. 644, 54 Pac. 33.

[4] The respondent Burke argues that section 53 of the charter did not become operative until after the assumption of office by the commissioners first elected. It is true that the commission could not provide for a classification of officers until after the election of the commissioners in March, 1911. Section 53, however, expressly continued in office all employes "who are in office" at the time of the adoption of the charter, unless removed for cause. The clause in section 120, to the effect that "all other provisions of this charter shall become effective on the assumption of office by the commissioners first elected thereunder," means all other provisions applicable to a commission form of government which were to be executed by the commission thereafter to be elected, and was not intended to nullify the clause in section 53, which embraces only those who were in office at the time the charter was adopted.

[5,6] The contention of the respondent Fassett that he is not a proper party defendant is untenable. The purpose of the information is twofold: (1) To oust Burke and to require Fassett, as commissioner of public utilities, to restore the appellant to office, and (2) for damages. The first object can only be accomplished by making Fassett, in his official capacity, a party defendant. State ex rel. Hellbron v. Van Brocklin, 8 Wash. 557, 36 Pac. 495. In interpreting our quo warranto statute (Rem. & Bal. Code, § 1034 et seq.), the court said in the Hellbron Case: "This information is, under the Code, a plain statement of the facts (section 681), and therein is just like a complaint upon any other cause of action; that it is to be filed upon the relation of some one is the only even formal difference between this proceeding and an ordinary civil action." A litigant is not required to resort to two actions where one will suffice; nor was the appellant required to anticipate at his peril whether the commissioner of public utilities would restore him to office, if he obtained a judgment against the intruder. The appellant is entitled to a decree directing the commissioner of public utilities to restore him to office, and to reinstate him upon the pay roll of the city, and to a judgment against the respondent Burke for his damages.

Reversed, and remanded for further proceedings in conformity with this opinion.

CROW, PARKER, and ELLIS, JJ., concur.

CHADWICK, J. I concur in the judgment of my Associates, but I believe it is not out of place to say that this case illustrates one of the inconsistencies of modern tendencies in municipal government. I believe in a freer democracy and a rule of civil service, but I find myself unable to harmonize these theories with the theory of centralized power and authority comprehended in the commission form of government. The first principle of the latter plan is to centralize authority and fix responsibility; to distribute the functions of government among a lesser number of men than heretofore, and charge them with full responsibility for their conduct, and to recall them if inefficient or corrupt. Now it needs no argument to demonstrate the fact that officers so situated and subject to such hazards should have full power to dispense with the services of any mere employe. It is manifestly unjust to charge a commissioner with responsibility, and compel him to depend, in the execution of his plans, upon those who may even be hostile to him and to his ideas. State ex rel. McReavy v. Burke, 8 Wash. 412, 36 Pac. 281. Such is the case here. But the same hand that put the principal responsibility upon the commissioner followed it with provisions which tie his hands and shackle his judgment, and when the people in their sovereign capacity adopt both provisions, courts, which are powerless to control legislative policy, should not be called upon to rewrite the charter of a self-governing city. There is a science in law making, and too often, when sentiment is allowed to usurp its place, we find a situation such as is here disclosed.

HAPGOOD et al. v. CITY OF SEATTLE.

(Supreme Court of Washington. Aug. 16, 1912.)

1. MUNICIPAL CORPORATIONS (§ 514*) — STREET IMPROVEMENTS — ASSESSMENT OF DAMAGED PROPERTY — CANCELLATION — EFFECT.

Where, after property originally assessed for a street improvement was found to have been damaged in condemnation proceedings, and therefore not subject to assessment, the assessments were canceled of record by a city ordinance, they were thus rendered nugatory and unenforceable, authorizing a reassessment to obtain the balance of the cost of the improvement, as provided by Rem. & Bal. Code, § 7893 et seq., and Seattle City Charter, art. 8, § 18.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207-1216; Dec. Dig. § 514.*]

2. MUNICIPAL CORPORATIONS (§ 450*) — STREET IMPROVEMENTS — STATUTES.

Rem. & Bal. Code, § 7571, provides that it shall be lawful for any city of the first class to order any improvement; the cost of which is to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be charged to abutting property, when such cost shall not exceed 50 per cent. of the value of the real estate, exclusive of improvements within the proposed improvement district, according to the valuation last placed on it for purposes of general taxation. *Held*, that such section was intended for the benefit of property owners, and that, where the portion of the cost of the improvement assessed against them did not exceed the limits specified, the improvement was authorized, though its entire cost exceeded the limit fixed; the difference being paid otherwise than by such special assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1101; Dec. Dig. § 459.*]

3. MUNICIPAL CORPORATIONS (§ 450*)—IMPROVEMENTS—SPECIAL ASSESSMENTS—"DISTRICT."

Rem. & Bal. Code, § 7571, makes it unlawful for any first-class city to order an improvement, the cost of which is to be charged to abutting property, when such cost exceeds 50 per cent. of the value of the real estate, exclusive of improvements within the proposed improvement district, etc. *Held*, that the "district" referred to in such section was not limited to the real estate within the boundaries of a specified locality which might ultimately be legally assessed to pay the cost of the improvement, but included all the real estate within the physical outer boundaries of the defined district, though some of it was subsequently found not benefited, and therefore not subject to assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2136-2138; vol. 8, pp. 7639-7640.]

4. MUNICIPAL CORPORATIONS (§ 514*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—REASSESSMENT.

Rem. & Bal. Code, § 7893, after authorizing reassessment for public improvements, provides that, whenever for any cause the amount assessed shall not be sufficient to pay the cost of an improvement, it shall be lawful for the city council or other authorized board or body to make a reassessment on all property in the local assessment district, sufficient to pay for the improvement. *Held*, that such section authorizes an additional charge against property once assessed for a street improvement, limited only by the benefit which the property has received from the improvement to be equitably apportioned.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

5. MUNICIPAL CORPORATIONS (§ 514*) — STREET IMPROVEMENTS—REASSESSMENT.

Under Rem. & Bal. Code, § 7894, providing for the reassessment of property for public improvements, in case the original assessment is rendered invalid, either directly or by virtue of any decision of the court, it is not necessary to justify a reassessment that a particular original assessment shall have been adjudged invalid, but it is sufficient that it is so in fact; any decision so showing being sufficient to support a reassessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

6. MUNICIPAL CORPORATIONS (§ 441*) — STREET IMPROVEMENTS—PROPERTY DAMAGED.

A determination in condemnation proceedings that certain property within an assessment district was damaged by an improvement constituted a final determination of the fact in a

subsequent proceeding to confirm a special assessment on an issue as to whether it was subject to assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1053, 1059; Dec. Dig. § 441.*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

The City Council of the City of Seattle having confirmed a supplemental assessment over the objection of G. W. Hapgood and others, they appealed to the superior court, where the action of the City Council was affirmed, from which they again appealed. Affirmed.

Ballinger, Battle, Hulbert & Shorts, Wm. Hickman Moore, Edwin C. Ewing, McClure & McClure, Brady & Rummens, Peters & Powell, Byers & Byers, Wm. Martin, and W. A. Keene, for appellants. James E. Bradford, Wm. B. Allison, Leander T. Turner and Preston & Thorgrimson, all of Seattle, for respondent.

PARKER, J. These are appeals from judgments of the superior court for King county, affirming the action of the city council of Seattle in making and confirming a supplemental assessment against property of appellants for the cost of a local street improvement. The same contentions are made by appellants in each case in this court, so our discussion and conclusions will apply alike to all.

In December, 1905, the city council of Seattle passed Ordinance No. 13,102, providing for the change of grades of Jackson and other streets in the city, providing for the institution of condemnation proceedings to acquire and damage property rights as against the owners of abutting property necessary to the making of such change of grades, and providing for the levying of special assessments by eminent domain commissioners against property benefited by such change of grades to pay the damages awarded in such proceedings, as authorized by the eminent domain law applicable to cities. While this ordinance did not make provision for the construction of the physical improvement, it manifestly contemplated the making of such improvement upon acquiring the right to damage abutting property by the change of the grades. Thereafter, in February, 1906, the city council passed Ordinance No. 13,309, providing for the improvement of Jackson and other streets by the change of the grades thereof as contemplated by the Condemnation Ordinance No. 13,102, creating a local improvement district and providing for the payment of the cost of the improvement by special assessment against the property of the district benefited thereby; such assessment to be levied by the city council in pursuance of statute, charter, and ordinance provisions applicable to local improvement assessments in the city. A contract for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

construction of the improvement having been entered into by the city, an assessment was accordingly levied against the property in the district by the city, which was confirmed by Ordinance No. 17,126, in October, 1907. Thereafter, in August, 1910, the city council passed Ordinance No. 24,827, canceling of record assessments charged against certain of the property within the district, reciting and providing in that ordinance as follows:

"Whereas, under Ordinance No. 13,309 of the city of Seattle, creating local improvement district No. 1213, there was improved Jackson street and certain parts of certain other streets and avenues; and whereas, said ordinance authorizing said improvement required that all property abutting adjacent or proximate to said portion of said streets and avenues, named and described in section 1 thereof, to such distance back from the marginal lines thereof as prescribed by the city charter, should be deemed to be property specially benefited by said improvement, and that the total cost and expense of such improvement should be defrayed by the collection of special assessments against such property; and whereas, certain tracts, pieces and parcels of land within the limits of said district, as created by said ordinance, were by the jury impaneled for the ascertainment of damages in the condemnation proceedings had for the establishment of the regrade elevations in said local improvement district, found to be damaged by reason of said regrade; and * * * whereas, under certain decisions of the Supreme Court of the state of Washington, certain assessments in said local improvement district are null and void, either in whole or in part: Now, therefore, be it ordained by the city of Seattle as follows:

"Section 1. That the assessments levied against the lots, parcels, pieces and tracts of land hereinafter in this section enumerated, for the improvement of Jackson street, and certain parts of certain other streets and avenues, all in the city of Seattle, under Ordinance No. 13,309, creating local improvement district No. 1213, be, and the same hereby are, canceled and annulled, to wit:

[1] It is manifest from the record that the passage of this ordinance was prompted by the result of certain litigation prosecuted by owners of certain property charged by the original assessment with a portion of the cost of the improvement, culminating in the decisions of this court in the cases of Schuchard v. Seattle, 51 Wash. 41, 97 Pac. 1106, and Seattle & P. S. Packing Co. v. Seattle, 51 Wash. 49, 97 Pac. 1093, where it was held that property which is found by the jury in a condemnation proceeding to be damaged is not chargeable by assessment with any of the cost of the improvement contemplated by such condemnation proceeding. Under these decisions, the assessments thus canceled of record by this ordinance were invalid and unenforceable. It is also apparent from the

record that the passage of this ordinance was intended as a preliminary step to the making of a reassessment by "supplemental assessment," as the city called it, under the authority of the reassessment law; and the reassessment provisions of the city charter, which are in substance the same. Rem. & Bal. Code, §§ 7803, and following; section 18, art. 8, City Charter. Thereafter, in December, 1910, the city council passed Ordinance No. 25,840, providing for a supplemental assessment against the benefited property within the district, to make up the deficiency caused by the invalidity of the assessments canceled of record by Ordinance No. 24,827. An assessment roll was made up accordingly, omitting therefrom all charges against property which had been found to be damaged in the condemnation proceeding, and against which the invalid canceled assessments had been levied by the original assessment, and charging the deficiency caused thereby against other property in the district, including the property of these appellants, which had already been assessed by the original assessment. Notice of hearing upon this supplemental assessment was given as the law directs, when these appellants filed their objections thereto, which were by the council overruled and the supplemental assessment roll confirmed in May, 1911, by Ordinance No. 27,259. Appeals were taken therefrom by the objectors to the superior court from that confirmation, and the decision of that court being adverse to them, they have appealed to this court. The original assessment, in so far as it was valid, was not disturbed or changed by the supplemental assessment; but the supplemental assessment was made in addition thereto. This seems to account for the city giving the new assessment that name, rather than the name of "reassessment," as it is called in the law and charter provisions under which it was made. This, however, does not change its legal effect, as we will presently see. Other facts will be noticed as may be found necessary in our discussion of the several contentions of appellants.

[2] It is first contended by counsel for appellants that the supplemental assessment was erroneously made and confirmed, because it resulted in the total of the original and supplemental assessment exceeding 50 per cent. of the assessed value of the real estate, exclusive of improvements, within the improvement district, in violation of the limitation prescribed by section 7571, Rem. & Bal. Code, as follows: "It shall be lawful for any city of the first class to order any improvement, the cost of which is to be charged to abutting property, when said cost shall not exceed fifty per cent. of the valuation of the real estate exclusive of improvements within the proposed improvement district according to the valuation last placed upon it for purposes of general taxation." The city charter permits this limit to be ex-

ceeded under certain conditions; but we are not concerned with them here. The original estimated cost of the improvement was \$450,000; 50 per cent. of the total assessed value of the real estate within the district, as then defined by ordinance No. 13,309, was \$452,000; and the total actual cost of the improvement, exclusive of interest, ultimately proved to be \$439,718; so it is apparent that both the estimated cost of the improvement and the ultimate actual cost of the improvement was less than 50 per cent. of the assessed value of all the real estate within the district. The total amount charged against the property within the district by the original assessment was considerably in excess of 50 per cent. of the assessed value of the real estate in the district. This evidently was the result of the accumulation of interest prior to the making of the assessment. However, the total amount assessed upon the original roll against property in the district which was liable to assessment because of being benefited was \$318,587, and the total amount of the supplemental assessment charged against benefited property in the district was \$61,409, making the total amount of the assessment, both original and supplemental, against property liable to assessment because of being benefited \$379,996, which, it will be noticed, is less than 50 per cent. of the assessed value of all of the real estate in the district, less than the original estimated cost of the improvement, and less than the actual cost of the improvement. The difference between this sum and the actual cost of the improvement was made up partly by the city from its general funds, partly from assessments made upon property which had been damaged, and hence not assessable, by consent of the owners thereof, and partly by payments voluntarily made upon invalid assessments. It is apparent from the statute and charter provisions above quoted, relating to the 50 per cent. limit of assessment, that we are not here concerned simply with the question of how much the total cost of the improvement was; but, so far as the rights of the owners of property in the district are concerned, the question here is: What was the cost of the improvement, in so far as that cost became chargeable as a lien by special assessment against the property within the district? If the city should undertake an improvement of an estimated cost of twice the 50 per cent. limit of assessment upon property of the district, and should provide for payment of one-half or more of the cost of the improvement otherwise than by such special assessment, leaving only such portion of the cost to be assessed against property within the district as would be within the 50 per cent. limit, we think that the owners of such property could not successfully maintain an objection to the assess-

ment because of the cost of the improvement being beyond the 50 per cent. limit; because the cost to them would not exceed that limit; and that, in our opinion, is the measure of the cost of the improvement, so far as their rights are concerned. So in this case we may exclude from consideration all sums having to do with the entire cost of the improvement, except the total amount of the original assessment made upon property legally chargeable therewith and the total amount of the supplemental assessment. If the total from these two sources does not exceed the 50 per cent. limit, we are not able to see by what legal right complaint may be made upon this ground.

[3] The question arises, What is the district for the purpose of determining the total assessed value of the real estate therein? Is it all of the real estate within the physical outer boundaries of the defined district, or is it only real estate within such boundaries, which may ultimately be legally assessed to pay the cost of the improvement? Learned counsel for appellants apparently contend that it is only the latter; and that this view would result in the total of the valid assessments in this case exceeding 50 per cent. of the assessed value of the particular property so assessed. It seems to us that this view, in its final analysis, amounts simply to the contention that no particular lot or tract can be charged by the special assessment with more than 50 per cent. of its assessed value. Now, the district must be created and defined before making the improvement. At that time it is not known to what extent each particular tract in the district will be benefited. It is not known but that some of the tracts may not be benefited at all, while others may be benefited even in excess of their entire assessed value. Manifestly these statute and charter provisions do not constitute a limitation upon the amount which each tract may be charged by special assessment, but, like a general debt limit prescribed by Constitution or statute against a municipality, refer to the total debt which may be incurred, as compared with the total assessed value of the property in the entire district. It is simply a measure of the amount of the entire debt which may be incurred, and is not a measure of how much each particular tract or class of tracts may be charged in raising funds to pay such debt. This is the theory upon which this court decided the case of *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277, where there was involved the language of the city charter of Tacoma, reading as follows: "No improvement shall be made when the estimated cost thereof shall exceed 50 per cent. of the assessed value of the property to be assessed." This language, it will be noticed, comes nearer confining the district to the property that is ultimately actually assessed, and comes nearer to limiting the assessment to 50 per cent. of

the assessed value of each particular tract, than does the language of the statute and other charter provisions here involved. It follows that the limit of the assessable cost of this improvement is fixed by the total assessed valuation of the real estate, exclusive of improvement, within the boundaries of the entire district, even though it be found in the making of the assessment that some of the property within the district cannot be assessed, because it is not benefited, as occurred in this case. Applying this measure, we find that the total of these valid assessments, both original and supplemental, is well within the 50 per cent. limit prescribed by the statute and charter applicable thereto. Of course, the limit of actual benefit to each tract is paramount to all other limitations; but that is another question.

[4] Some contention is made against the charging of the supplemental assessments against the property of these appellants, because their property had already been charged for the improvement upon the original assessment roll. It seems clear, however, from the statute that the only valid objection to such additional charge made by supplemental assessment would be that such charge was not based upon proportional benefits; for, except as restricted by law, section 7893, Rem. & Bal. Code, after authorizing reassessments, provides: "And it is further provided, that whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, that it shall be lawful and the city council or other authorized board or body is hereby directed and authorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement." Subdivision 10, § 18, art. 8, of the City Charter, is in substance the same. Clearly this authorizes such an additional charge, limited only by the benefit which the property has received from the improvement to be equitably apportioned. *State ex rel. Barber Asphalt Paving Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11.

[5] As we understand counsel for appellants, they also make some contention that the invalidity of the assessments which were canceled by the city council has not been sufficiently shown as to warrant a reassessment or supplemental assessment to make up the deficiency caused thereby. It is plain, however, from the record that such assessments were canceled of record by the council, because they were levied upon property which had been found to be damaged by the improvement in the condemnation proceedings. It is true that it does not appear that the litigation leading up to the decisions rendered by this court, above mentioned, wherein it is held that such property could not be assessed, directly involved each and all of the

assessments so canceled. But it is shown, at least *prima facie*, and appellants offered no showing to the contrary, that at least some of those assessments were directly involved in that litigation, and the result of that litigation established indirectly the illegality of all others of those assessments. It is not necessary that each particular assessment be directly adjudged invalid in an action wherein such assessment is called in question. The language of the reassessment law (section 7894, Rem. & Bal. Code) shows that it is sufficient, for the purposes of a reassessment, that the invalidity of the original assessment be established "either directly or by virtue of any decision" of the courts. It is not so much a question of whether or not an assessment has been actually adjudged invalid, but whether or not it is in fact invalid. Any decision that so shows is sufficient to support a reassessment. *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448.

[6] It is further contended that the supplemental assessment was erroneously made and confirmed, because all of the benefited property within the district was not charged with the assessment. This contention seems to be rested upon the assumption that the property which had been found in the condemnation proceeding to be damaged should have been assessed for the improvement, because it was in fact benefited thereby; and evidence was offered in behalf of appellants to so show. While the court received some evidence so indicating, such evidence was apparently ignored by the court. In this it was clearly right, because the fact that such property was not benefited by the improvement was rendered final by the determination in the condemnation proceeding that it was damaged thereby. This is the theory upon which our decisions were rested in *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1100, and *Seattle & P. S. Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093.

It is finally contended that the evidence offered upon the trial shows that the supplemental assessments were not made according to benefits, nor equitably apportioned upon the property charged. We have carefully read the evidence hearing upon this question, and deem it sufficient to say that we find nothing therein that would warrant our interference with the decisions of the council and the trial court upon that subject. There may be some room for difference of opinion as to the apportionment of the assessment and as to the amount of benefits conferred upon the several tracts; but we cannot say that any more serious question is presented by the evidence. This does not call for interference by us. Some other questions are

raised in the brief of counsel for appellants; but whatever our views relative thereto might be they would not call for a reversal of the trial court.

We conclude that the judgment must be affirmed. It is so ordered.

CROW and GOSE, JJ., concur.

INNER-CIRCLE PROPERTY CO. v. CITY OF SEATTLE.

(Supreme Court of Washington. Aug. 16, 1912.)

1. MUNICIPAL CORPORATIONS (§ 462*)—LOCAL IMPROVEMENT ASSESSMENT—ESTIMATE.

Seattle City Charter, art. 8, § 11, provides that, if the board of public works finds the facts set forth in a petition for improvement to be true, they shall cause an estimate of the cost to be made and transmit the same, with the other papers and their recommendations, together with a description of the property which will be specially benefited and a statement of proportionate amount of the cost and expense of such improvement to be borne by such property, to the city council. *Held*, that the estimate required by such provision was not to inform property owners of the extreme possible cost of the improvement; and hence the fact that the actual cost exceeded the original estimate did not affect the power of the council to levy either an original or supplemental assessment to the extent of benefits conferred on the property by the improvement, not exceeding the 50 per cent. limit prescribed by statute and charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1106; Dec. Dig. § 462.*]

2. MUNICIPAL CORPORATIONS (§ 441*)—LOCAL IMPROVEMENTS—PROPERTY SUBJECT TO ASSESSMENT.

Where property was found to be damaged by a street improvement in condemnation proceedings, it was not subject to assessment for benefits.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1058, 1059; Dec. Dig. § 441.*]

3. MUNICIPAL CORPORATIONS (§ 514*)—LOCAL IMPROVEMENTS—REASSESSMENT—APPEAL—BURDEN OF PROOF.

Rem. & Bal. Code, § 7898, provides that the decision of the city council, confirming a reassessment or supplemental assessment, shall be a final determination of the regularity, validity, and correctness of the reassessment, to the amount thereof, levied on each lot or parcel of land; and section 7902 declares for a direct appeal therefrom to the superior court by any property owner deeming himself aggrieved by the decision of the council. *Held* that, on an appeal by an objecting property owner from the decision of the council to the superior court, the burden is on him to show want of authority on the part of the council to make the reassessment, as well as the erroneous charge of the assessment against his property from any other cause, before he can secure a reversal of the council's decision in making and confirming the assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

4. MUNICIPAL CORPORATIONS (§ 514*)—LOCAL IMPROVEMENTS—REASSESSMENT—VALIDITY—PRESUMPTION.

Under Rem. & Bal. Code, § 7898, providing that the decision of the city council con-

firmed a reassessment for a local improvement shall be a final determination of the regularity, validity, and correctness of an assessment, to the amount thereof, levied on each lot or parcel of land, when the council has decided that such assessment is legally necessary, as it does when it makes and confirms the same, its decision is presumed to be legally correct until the contrary is affirmatively shown.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

5. MUNICIPAL CORPORATIONS (§ 514*)—LOCAL IMPROVEMENTS—REASSESSMENT.

Until the making and confirmation of a reassessment for a local improvement, the presumption is in favor of the original assessment as between the property owner and the city; but the making and confirming of a supplemental assessment is in effect a decision and finding by the council against the property owners that the original assessment was sufficient, and also on the question of the necessity of the supplemental assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

6. MUNICIPAL CORPORATIONS (§ 514*)—STREET IMPROVEMENTS—REASSESSMENT.

Where, after an original assessment was made for the cost of a street improvement, it was found that certain of the property assessed was not subject to assessment, because not benefited, resulting in a deficiency, the city council had power, within the limit imposed by law, to levy a reassessment on property previously assessed to make up the deficiency.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

The City of Seattle confirmed a supplemental assessment against property of the Inner-Circle Property Company for a local street improvement, and from an order of the superior court confirming the action of the City Council the property owner appeals. Heard herewith were 12 other appeals involving the claims of other property owners touching the same assessment. Affirmed in part, and reversed in part.

Ballinger, Battle, Hulbert & Shorts, Wm. Hickman Moore, Edwin C. Ewing, Higgins, Hall & Halverstadt, and R. R. George, for appellant. Wright & Kelleher, Wm. Martin, Tucker & Hyland, Geo. D. Ehery, Shank & Smith, Douglas, Lane & Douglas, James E. Bradford, and William B. Allison, all of Seattle, for respondent.

PARKER, J. These appeals are from judgments of the superior court for King county, affirming the action of the city council of Seattle in making and confirming a supplemental assessment against property of appellant for the cost of a local street improvement. Except as to certain contentions made by appellant Metropolitan Building Company, our discussion and conclusions will apply to all alike.

In December, 1905, the city council of Seattle passed Ordinance No. 13,074, pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

viding for widening, extending, and changing the grades of Fourth avenue and other streets in the city, providing for the prosecution of condemnation proceedings to acquire and damage property rights as against the owners of abutting property and property through which certain of the proposed extensions were to be made, and providing for the levying of a special assessment by eminent domain commissioners against property benefited by such extensions and change of grades, to pay the damages awarded by reason thereof, as authorized by the eminent domain law applicable to cities. While this ordinance did not make provision for the construction of the physical improvement, it manifestly contemplated the making of such improvement, upon acquiring the right to take and damage property necessary therefor. Thereafter, in November, 1906, the city council passed Ordinance No. 14,784, providing for the making of the physical improvement of the same streets as contemplated by Ordinance No. 13,074, creating a local improvement district and providing for the payment of cost of the improvement by special assessment against property within the district benefited thereby; such assessment to be levied by the city council in pursuance of the law applicable to local improvement assessments in the city. Thereafter an assessment was accordingly levied and confirmed by the city council in October, 1907, by Ordinance No. 17,186. Thereafter, in December, 1910, the city council passed Ordinance No. 25,829, providing for the levying of a supplemental assessment against the property within the improvement district specially benefited by the improvement which had not been already assessed to the full amount of the benefits received by such property. Among recitals in the preamble of the supplemental assessment ordinance, it is stated that "there is a deficiency in the fund created to pay for the said improvement," though it is not stated therein what caused the deficiency, nor the amount thereof. Thereafter a supplemental assessment roll was made up and notice of hearing thereon given, when appellants filed their objections thereto, which objections were by the council heard and overruled and the supplemental assessment confirmed, in May, 1911. This supplemental assessment was made under the reassessment provisions of the state law and city charter, which are in substance the same. Rem. & Bal. Code, § 7893 and following; City Charter, § 18, art. 8. The objectors having appealed from the decision of the council confirming the supplemental assessment to the superior court, and the judgment of that court being adverse to them, they have appealed to this court. Other facts may be noticed as may be necessary in discussing the several contentions made by appellants.

[1] It is contended in behalf of appellant

that, since the actual cost of the improvement charged by special assessment against the property within the district exceeded the original estimated cost thereof, the supplemental assessment is void, at least to that extent. This contention is rested upon the decision of this court in *Chehalis v. Cory*, 54, Wash. 190, 102 Pac. 1027, 104 Pac. 768, where it was held in effect that under the local assessment statutes applicable to cities of the third class the original estimated cost of the improvement fixed the limit of the total amount chargeable by special assessment against the property within the district benefited thereby. A reading of that decision will show, however, that the conclusions there reached by the court were because of the special provisions of the statute relating to local improvement assessments in cities of the third class (Rem. & Bal. Code, §§ 7705, 7706), requiring such estimate to be made, notice thereof to be given to the property owners, and an opportunity for them to protest against the making of the proposed improvement, before it could be finally ordered by the council, and prohibiting the council from ordering such improvement over the protest of the property owners, except upon certain conditions. No other hearing was afforded the property owners before the council, as to the making of the improvement, nor as to the regularity and correctness of the assessment levied by the council. The only recourse of the property owners under that statute was by an original action in the courts against the assessment, or in resisting the lien of the assessment, when it is sought to be foreclosed in the courts. The holding that the estimate and notice thereof to the property owners was a necessary prerequisite jurisdictional step, and that such estimate could not be exceeded by the assessment, was because the statute in effect made it so. That statute has no application here. Seattle is a city of the first class, wherein local improvement assessments are governed by the provisions of other statutes and the charter of the city. The only requirement for a preliminary estimate of the cost of a local improvement in the city of Seattle, which has come to our notice, is that, found in section 11, art. 8, of the City Charter, as follows: "If the board of public works finds the facts set forth in said petition [for improvement] to be true, they shall cause an estimate of the cost and expense of such improvement to be made and transmit the same, together with all papers and information in their possession touching such improvement, with the estimated cost thereof, and their recommendations thereon, a description of the property which will be specially benefited thereby and a statement of the proportionate amount of the cost and expense of such improvement which shall be borne by such property, to the city council." No notice to the property owners of the

amount of the estimate is required to be given; no provision is made for the council receiving protests from the property owners against the making of the improvement, nor for any hearing before the council upon that question. It is evident from the charter provisions that the estimate is to be furnished to the council simply to enable it to act advisedly in the ordering of the improvement, and especially to the end that it may be informed as to whether or not the cost of the proposed improvement will exceed 50 per cent. of the assessed value of the property within the proposed local improvement district; that being the limit of special assessment prescribed by section 7571, Rem. & Bal. Code, and section 11, art. 8, of the City Charter. The estimate is not made for the purpose of informing the property owners of the extreme possible cost of the improvement; and they are not given, by statute or charter, any hearing upon that question as a preliminary step to the ordering of the improvement, though they are later given ample opportunity to be heard, upon the confirmation of the assessment roll, relative to the question of benefits, as well as all other questions going to the regularity and validity of the assessment. We are of the opinion that the fact that the actual cost of the improvement exceeded the original estimate does not affect the power of the council to levy either an original or supplemental assessment to the extent of the benefits conferred upon the property by the construction of the improvement, not exceeding, of course, the 50 per cent. limit prescribed by the statute and charter.

[3] Counsel for appellant make some contentions which seem to be rested upon the fact that the record made upon the trial in the superior court does not affirmatively show the cause of the deficiency in the funds to pay the cost of the improvement to be such as in law renders their property chargeable by supplemental assessment to make up such deficiency. The cause of the deficiency in this case is not shown by the record before us, except in so far as such cause is shown by the passage of three ordinances canceling certain assessments upon the original assessment roll. One of these ordinances, canceling original assessments amounting to \$12,543.13, contains recitals showing that such cancellations were because of the fact that the assessments so canceled were void, because they were against property which had been found and adjudged to be damaged by the improvement in the condemnation proceedings. This fact would render such assessments void and unenforceable under our decisions in *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, *Seattle & P. S. Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093, and *Hapgood et al. v. Seattle*, 125 Pac. 965, just decided. The other two ordinances canceled original assessments

amounting to \$20,669.42, without reciting any reasons therefor. So there was canceled by these three ordinances \$33,212.54 of the original assessments. As to how the balance of the deficiency represented by the supplemental assessment was caused, the record does not inform us. By the supplemental assessment there was charged against private property within the district \$111,003.52, and against the general fund of the city \$36,903.81. So that the total deficiency was apparently \$147,907.38. So far as the \$12,543.13 of the original assessment, canceled because of being erroneously charged against damaged property, is concerned, our decisions, above cited, settle the question of the invalidity of such assessments, and furnish sufficient basis to authorize the supplemental assessment to that extent at least. So far as the balance of the supplemental assessment is concerned, we have in support thereof only the presumption that the city council had legal cause for making the same—that is, that there was such a deficiency as legally required a supplemental assessment to that amount—from the fact that the council made such assessment.

[9] Touching the effect and conclusiveness of the decision of the city council in confirming a reassessment or supplemental assessment, as the city has called it in this case, section 7898, Rem. & Bal. Code, provides that "their decision and order shall be a final determination of the regularity, validity and correctness of said reassessment, to the amount thereof, levied on each lot or parcel of land." And section 7902 provides for a direct appeal therefrom to the superior court by any property owner deeming himself aggrieved by the decision of the council. This, it seems to us, renders it clear that, upon appeal by objecting property owners from such decision of the council to the superior court, the burden is upon such appellant to show want of authority on the part of the council to make such reassessment, as well as the erroneous charge of the assessment against his property from any other cause, before he would be entitled to a reversal or modification of the council's decision in making and confirming the assessment. It will be noticed that the council's decision is not only declared by the statute to be a final determination of the regularity and correctness of the reassessment, but also of its validity.

[4] Manifestly when the council has decided that such an assessment is legally necessary, as it, of course, does when it makes and confirms such an assessment, its decision, like that of any other tribunal having jurisdiction over the subject in controversy, is presumed to be legally correct until the contrary is affirmatively shown. We conclude, therefore, that, unless there is in this record something affirmatively showing that

there was in fact no deficiency legally calling for the supplemental assessment for the amount levied, we must now presume that the deficiency did legally exist as decided by the council, and that it was such as to support a supplemental assessment for that sum. Counsel for appellant call our attention to and place some reliance upon the decision in *Spokane v. Security Savings Society*, 46 Wash. 150, 89 Pac. 466. There was not involved in that decision any question of the presumption of the regularity and validity of the reassessment. The facts upon which the validity of the original assessment rested were apparently conceded in that case; and the question was discussed by this court as though the facts affecting the validity of the original assessment and, in turn, that of the reassessment were all before the trial court. We have no such condition here. This record does not show that there were any facts before the trial court by which it could determine the validity of the original assessment or the cause of the deficiency, except as to the \$12,543.13 charged to damaged property; and hence we are to presume that it had nothing before it to overcome the presumption of the correctness of the council's decision in making and confirming the supplemental assessment from which the appeal was taken to that court.

[5] Now, the only affirmative fact appearing in this record pointing to the lack of deficiency in the funds to the amount of the supplemental assessment requiring that assessment is the making and confirming of the original assessment. Counsel for appellant seem to rely upon the presumption of the validity of the original assessment as against the presumption of the validity of the later supplemental assessment. Of course, until the making and confirmation upon due notice of the latter, the presumption relied upon by appellants was in favor of the original assessment as between them and the city; but the making and confirming of the supplemental assessment was in effect a finding and decision by the council against the appellants upon that very question, and also upon the question of the necessity of the supplemental assessment. When the city council decided that there was a deficiency, whether by reason of invalid original assessments or from any other cause, as, of course, it did so decide by the making of the supplemental assessment, appellants were by notice given an opportunity to be heard upon all such questions. The council's decision upon such questions by the confirmation of the supplemental assessment was necessarily final, unless appealed from as the statute provides; otherwise the notice and hearing thereon provided by law would serve no purpose. The city was not required to assume the burden of showing

the invalidity of the original assessment, nor any other cause of the deficiency, upon the hearing of the appeal in the superior court. Appellants were there attacking the supplemental assessment, and had the burden of showing that the decision of the council in making and confirming it was erroneous. They could not secure a reversal of the council's decision in making a supplemental assessment by merely producing the record of the original assessment and relying upon such presumptions as were theretofore in its favor; nor was the city required to show upon the trial in the superior court the cause of the deficiency which prompted the making of the reassessment.

[6] Another contention made in behalf of appellants, which seems to us to be rested upon their erroneous view of the presumed regularity of the original assessment, is that the original assessment is a final adjudication upon the amount of the benefits conferred upon appellants' property and of the amount of benefits conferred upon property covered by the canceled assessments; and that therefore no different or greater assessment can be placed upon their property than was placed upon it by the original assessment; and especially that no greater assessment can be placed upon their property because of any deficiency caused by want of reassessment upon property covered by the canceled assessments. Such a view would practically defeat the power of reassessment. It is manifest from the provisions of the reassessment law that the question of benefits upon a reassessment or supplemental assessment is not controlled by the decision upon that question rendered in the making of the original assessment, any more than upon a new trial a decision upon the merits is controlled by a decision upon the merits rendered upon a former trial. In a reassessment proceeding the questions of benefits and apportionment thereof are as much original questions as they are in the original assessment proceeding. Our attention is called to *In re Sixth Avenue West*, 59 Wash. 41, 109 Pac. 1052, Ann. Cas. 1912A, 1047, in support of the contention that assessments which would be chargeable to exempt property but for its exemption cannot be charged to other benefited property. Whatever may be said of that view when dealing with property which is by law entirely exempt from taxation and local assessments under all circumstances, we are to remember that we are not here dealing with such property. It is true that property which in the condemnation proceeding is found to be damaged by the improvement is spoken of as being exempt from the assessment for the improvement; it is not, however, property which is by law exempt from assessment generally. In this case the so-called "exempt" property is not assessable, only be-

cause it is not benefited. Hence it is not a case of making appellants' property bear the burden of such nonassessable property. So long as appellants' property is not assessed by the combined original and supplemental assessments more than it is benefited, and so long as such assessments are not inequitably apportioned, there is no legal cause for objecting to such assessments. Of course, the 50 per cent. limit cannot be exceeded as against all the property within the district; but that question is not here involved.

Some other contentions are made by appellants; but we think they have been sufficiently disposed of in favor of the city by what has been said in the case of Hapgood et al. v. Seattle, just decided, except as to the appeal of the Metropolitan Building Company, which we will now notice. There is levied by this supplemental assessment a charge upon land held by the Metropolitan Building Company under a lease from the state of Washington; the land being a part of the old State University grounds. The record indicates that at the time of the condemnation proceedings this land was held by the Seattle Realty & Building Company under a lease from the state. Just what the nature of that lease was is not shown; but in any event the Seattle Realty & Building Company was awarded compensation in the condemnation proceedings on account of damage to this same land resulting from the change of the grades of the streets, and the improvement of them accordingly. It is contended that this resulted in rendering the land and all interests therein free from liability to special assessment to pay for the improvement, upon the ground that the award of such damages was in effect an adjudication that the land was not benefited by the improvement. In the light of *Schuchard v. Seattle*, *Seattle & P. S. Packing Co. v. Seattle*, and *Hapgood et al. v. Seattle*, above cited, we are constrained to hold that this contention must be upheld. If there could be no original assessment, because of no benefits, as it was in effect adjudicated in the condemnation proceeding, there would, of course, be no benefits to support a supplemental assessment to aid in paying for the same improvement.

We are of the opinion that the judgment of the superior court should be affirmed, except as to the charge made by the supplemental assessment against the land held by the Metropolitan Building Company under its lease from the state; and that, in so far as that charge is concerned, the judgment should be reversed and that portion of the supplemental assessment set aside. It is so ordered.

CROW and GOSE, JJ., concur.

HERRICK et al. v. MILLER et al.
(Supreme Court of Washington. Aug. 14, 1912.)

1. WILLS (§ 781*)—GIFTS—ELECTION.

Generally, when the owner of an estate, in an instrument of donation, either will or deed, uses language with reference to the property of another which, if that property were his own, would amount to an effectual disposition of it to a third person, and by the same instrument gives a portion of his own estate to that same owner whose rights of ownership he had thus assumed to transfer, such owner and donee is put to an election between his claim of title to the property so assumed to be disposed of by the donor and his right as donee under the instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2017; Dec. Dig. § 781.*]

2. WILLS (§ 781*)—GIFTS—ELECTION.

Since testator is presumed to intend to dispose only of property over which he has testamentary power of disposition, before a donee can be put to an election between his independent claim of title to property assumed to be disposed of by testator and his right as donee, the testator's intention to dispose of property over which he had no power of disposition must be evidenced by designating with certainty the specific property he so assumes to devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2017; Dec. Dig. § 781.*]

3. WILLS (§ 782*)—GIFTS—ELECTION.

A will, giving in trust for the widow's benefit all of the testator's land "and all interest therein, community or otherwise, of which" he should die "seised or entitled to," or over which he should "have power of disposition by will," is not so inconsistent with her claim of community interest in the property as to compel her to elect between that interest and the provision made for her by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

4. WILLS (§ 487*)—CONSTRUCTION—EXTRINSIC EVIDENCE.

Extrinsic evidence is not admissible to establish intention of testator to dispose of property over which he had no power of disposition, for the purpose of forcing an election by the donee between an independent interest and the testamentary provision.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.*]

5. WILLS (§ 792*)—ELECTION OF BENEFICIARY—MATERIALITY OF ACTS.

Where a will was not so inconsistent with testator's widow's claim of community interest in property devised in trust for her benefit as to compel her to elect between that interest and the testamentary provision, it is immaterial whether her acts in managing the trust estate amounted to an election, where they did not amount to a conveyance of her community rights to the residuary devisees, and did not mislead the latter to their prejudice, so as to create an estoppel against the widow's claim of community interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2049-2052, 2061-2063; Dec. Dig. § 792.*]

6. FRAUDS, STATUTE OF (§ 68*)—CONVEYANCE OF COMMUNITY INTEREST.

On a contest between testator's widow and his residuary devisees, oral evidence is inadmissible to show that she orally agreed that all the property, including her community interest, should be kept together and permitted to

go to them at her death, since that would amount to an oral conveyance.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. §§ 83, 97-104; Dec. Dig. § 83.*]

7. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR.

On a contest between testator's widow, for whom the will made provision during her widowhood, and his residuary devisees, the residuary devisees are not entitled to complain of a separation of the interests, where they in effect asked that very thing by alternative prayer in their complaint, though the will contemplated management of the property as a whole.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3810; Dec. Dig. § 882.*]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Eleanor Herrick and others against Eva J. Miller and others. From the judgment, plaintiffs appeal. Affirmed.

Tucker & Hyland, for appellants. Bo Sweeney, of Seattle, for respondents.

PARKER, J. The parties to this action are the children and widow of Dr. P. B. M. Miller, deceased, late of Seattle. The purpose of the action is to obtain a construction of his will and a settlement of all of the property rights of the parties under the will. Dr. Miller died on December 8, 1904, leaving the will here involved, which he had made a few months previous. The only provisions of the will which we need notice in our present inquiry are the following:

"III. I bequeath to my son, Hubert Livingston Miller, my gold watch and chain, all my medical library, surgical instruments and general surgical equipment of every nature whatsoever.

"IV. I bequeath all the residue of my personal property and effects of every nature whatever, including my separate personal property and my interest in community personal property wheresoever situated, after the payment of my debts, funeral and testamentary expenses as hereinbefore provided, unto my wife, Eva J. Miller, absolutely.

"V. I give and devise all my real estate of every tenure whatsoever and wheresoever situated; and all interests therein, community and otherwise, of which I shall at my death be seised or entitled to, or of which I shall at my death have power to dispose of by will, unto my wife, Eva J. Miller; and my son, George E. Miller, my executors hereinafter named, and to the survivor of them, and their successors, in trust, to be held by them for the purposes and subject to the provisions hereinafter declared.

"VI. I declare it to be my earnest request and recommendation that, under no circumstances, shall any part of my real property be sold during the life time of my said wife, provided, she shall so long continue my

widow; but that said property shall be rented and leased as may seem best to my executors and trustees and their successors; and I direct that the net income therefrom shall be paid to my said wife during her widowhood and become her absolute property and she shall not be liable to account for any income so paid to or received by her.

"VII. I direct that, after the death or future marriage of my said wife, her successor in the trust and the said George E. Miller or his successor in the trust shall, as soon as practicable thereafter, sell all of my real estate and interests therein hereinbefore devised in trust and convert the same into money, and shall for the purposes aforesaid execute and deliver all such deeds and conveyances as may be necessary to pass the proper title thereto; and I direct that the money so received from such sale or sales, together with the income received from said real property from and after the death or remarriage of my said wife, shall be distributed equally, share and share alike, among my children. " * * "

The will appoints Eva J. Miller and George E. Miller, widow and son of the testator, executrix and executor without bonds, and directs the settlement and management of the estate without the intervention of the court, except to admit the will to probate and file an inventory, as required by law. Accordingly, in January, 1905, the will was admitted to probate, and an inventory filed by the executrix and executor. All of the property left by Dr. Miller was his interest in the community property of himself and wife, Eva J. Miller. That community property consisted of lot 1 and the north 15 feet of lot 4 in block 43, Terry's addition to Seattle, which was appraised at \$35,000; and personal property, consisting of surgical instruments, medical library, office furniture, and household furniture, which was appraised at \$850. The community real property, above described, at the time of the death of Dr. Miller, consisted of a tract of land fronting 75 feet upon the east side of Sixth avenue and 120 feet upon the south side of Marion street, being at the southeast corner of the intersection of that avenue and street in Seattle, together with a hotel building, situated upon the westerly portion of the tract, and also a foundation; situated upon the easterly portion of the tract, upon which they were then contemplating the erection of another building. This property is referred to as the "Ross-shire"; that being the name they gave to the hotel building thereon. The management of this property appears to have been left largely, if not wholly, to Mrs. Miller after the death of Dr. Miller. She had separate funds of her own with which she thereafter erected upon the foundation on the easterly portion of the tract a building at a cost of approximately \$12,000. This building and the other one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

upon the westerly portion of the tract were rented together as a hotel. In May, 1911, in a condemnation proceeding prosecuted by the city of Seattle to acquire the right to damage the Ross-shire property by changing the grade of Sixth avenue, there was awarded to the owners of that property the sum of \$12,000 damages, which was accordingly paid into court by the city. The claim of Mrs. Miller to one-half of this money as belonging to her absolutely, and that only one-half thereof belonged to the trust estate, gave rise to this controversy and resulted in the bringing of this action in June, 1911, by certain of the residuary devisees to settle the property rights of all parties under the will. The substance of the prayer of plaintiff's complaint is that the will be so construed as to give to Mrs. Miller only the net income from the Ross-shire property and the \$12,000 awarded as damages to that property in the condemnation case, reserving the whole thereof to go to the residuary devisees upon the death or remarriage of Mrs. Miller. The theory of this claim of the plaintiffs is that Dr. Miller devised the whole of the Ross-shire property as if it were his separate property; that Mrs. Miller was thereby required to elect between her right to her community interest in that property and her right to the income from the whole thereof under the will; and that she has elected to take under the will and thereby waived her right to assert her community interest. The plaintiffs also prayed in the alternative that, in the event the court should decree that they are not entitled to the construction of the will claimed by them, the respective interests of Mrs. Miller and the residuary devisees be finally determined, and that the community interest of Mrs. Miller, if she be decreed to have any such interest, be set apart to her.

The trial court decreed, in substance, that the plaintiffs were not entitled to the construction of the will claimed by them; that Mrs. Miller was not required to elect between her community interest and her rights under the terms of the will; that she is the absolute owner, by virtue of her community right, of an undivided one-half interest in the Ross-shire property, exclusive of the building she erected thereon with her separate funds; and that she is the owner of that building. The court also partitioned the Ross-shire property, with the aid of commissioners appointed for that purpose, between Mrs. Miller and the trust estate, awarding to her the easterly 70 feet on which her building is situated, and to the trust estate the westerly 50 feet, together with the building thereon. The court also awarded the \$12,000, one-half to Mrs. Miller and one-half to the trust estate, providing, however, that there should be first paid therefrom a mortgage upon the Ross-shire property for \$3,600, which had been given to

raise funds to pay a community debt incurred by Dr. Miller in his lifetime. From this determination of the rights of the parties, the plaintiffs have appealed.

[1] The controlling question in this case is: Was Mrs. Miller required to elect between her community interest in the Ross-shire property and her right to the net income from the whole thereof, which, it is claimed by counsel for appellant, was devised to her by the terms of the will? In other words, is the devise made to her by the will so inconsistent with her claim of community interest in the property that equity will not permit her to assert both claims? Learned counsel for appellants contend that such rights of Mrs. Miller are so inconsistent that she cannot successfully maintain both, but must choose which one she will exercise and abandon the other. This contention is rested upon the general rule that when the owner of an estate, in an instrument of donation, either will or deed, uses language with reference to the property of another which, if that property were his own, would amount to an effectual disposition of it to a third person, and by the same instrument gives a portion of his own estate to that same owner whose rights of ownership he had thus assumed to transfer, such owner and donee is put to an election between his claim of title to the property so assumed to be disposed of by the donor and his right as donee under the instrument.

[2, 3] Before looking to the particular language of the will, let us notice some of the rules of law applicable to the construction of such instruments when a question of election is involved. In 1 Pomeroy's Eq. Jur. (3d Ed.), at section 472, that learned author says: "The first and fundamental rule, of which all the others are little more than corollaries, is: In order to create the necessity for an election, there must appear upon the face of the will itself, or of the other instrument of donation, a clear, unmistakable intention on the part of the testator or other donor to dispose of property which is in fact not his own. This intention to dispose of property which in fact belongs to another, and is not within the donor's power of disposition, must appear from language of the instrument which is unequivocal, which leaves no doubt as to the donor's design; the necessity of an election can never exist from an uncertain or dubious interpretation of the clause of donation. It is the settled rule that no case for an election arises, unless the gift to one beneficiary is irreconcilable with an estate, interest, or right which another donee is called upon to relinquish; if both gifts can, upon any interpretation of which the language is reasonably susceptible, stand together, then an election is unnecessary." A strong presumption necessary to overcome, in order to require an election on the part of the donee under such

circumstances, is that the testator is presumed to intend only to dispose of property over which he has testamentary power of disposition. The authorities hereafter noticed show that this presumption will always prevail, unless the testator's intention is clearly expressed or necessarily implied to the contrary by the terms of the will itself. We think there is no dissent from this rule. We will also find as we proceed that such an intention on the part of the testator must be evidenced by designating with certainty the specific property he so assumes to dispose of, in order to put his donee to an election. The simplest case requiring an election is where a testator assumes to dispose of property of his devisee, and designates the property he so assumes to dispose of by description, such as would be sufficient in an ordinary conveyance. In such a case it is easy to see that the devisee is put to an election, because there is then no uncertainty as to the testator's intention to dispose of property belonging to his devisee. In this case, however, we have no such specific designation of the property of the devisee which, it is claimed, the testator assumed to dispose of as his own, and, besides, we are dealing with property which belonged equally to both the testator and the devisee. Such cases give rise to more difficulty in the determination of a question of election. The Ross-shire property being the community property of Dr. and Mrs. Miller, under our laws he had no power of disposition of that property by conveyance during his lifetime, except by deed joined in by Mrs. Miller (Rem. & Bal. Code, § 5918); nor did he possess any testamentary power of disposition thereof, except as to his community interest therein alone—that being only an undivided one-half interest. Rem. & Bal. Code, § 1342.

If we assume that this is simply a case of two persons owning undivided interests in property, apart from the analogy sometimes sought to be drawn by the courts between dower and community property rights of a wife, we find the following observations of Professor Pomeroy applicable here: "If a testator owning an undivided share uses language of description and donation which may apply to and include the whole property, and by the same will gives benefits to his co-owner, the question arises whether such co-owner is bound to elect between the benefits conferred by the will and his own share of the property. Prima facie a testator is presumed to have intended to bequeath that alone which he owned—that only over which his power of disposal extended. Wherever, therefore, the testator does not give the whole property *specifically*, but employs *general words* of description and donation, such as 'all my lands,' and the like, it is well settled that no case for an election arises, be-

cause there is an interest belonging to the testator to which the disposing language can apply, and the *prima facie* presumption as to his intent will control. On the other hand, if the testator devises the property *specifically* by language indicating a specific gift of the property, an election becomes necessary." 1 Pomeroy's Equity Jurisprudence (3d Ed.) § 489. If we assume that dower and community property rights of a wife are analogous rights, then it would seem that there must be an equally clear expression of an intention on the part of the husband in his will to put her to an election, because a gift to a wife by will, in jurisdictions where dower rights exist, in the absence of statute prescribing a different rule, is presumed to be intended as a provision in addition to her dower right, unless the language of the will clearly expresses or necessarily implies that such gift to her is in lieu of dower. 1 Pomeroy, Eq. Jur. (3d Ed.) § 493. At section 505, referring to the question of election by a wife between community rights and her rights under the will of her husband, the author further observed: "Whenever a husband has made some testamentary provision for his wife, and has also assumed to dispose of more than his own half of the community property, in order that she shall be put to her election, the testamentary provision in her behalf must either be declared in express terms to be given to her in lieu of her own proprietary right and interest in the community property, or else an intention on his part that it shall be in lieu of such proprietary right must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to her share of the community property would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them. An intent of the husband to dispose of his wife's share of the community property by his will, and thus to put her to an election, will not be readily inferred, and will never be inferred where the words of the gift may have their fair and natural import by applying them only to the one half of the community property which he has the power to dispose of by will." Having in mind these rules of construction, what does the language of this will tell us as to the intention of Dr. Miller to dispose of his wife's interest in their community property?

The only language of the will which can possibly be construed as expressing an intention on the part of Dr. Miller to dispose of Mrs. Miller's community interest in the Ross-shire property is the following: "I give and devise all my real estate of every tenure whatsoever and wheresoever situated, and all interest therein, community and otherwise, of which I shall at my death be seised or entitled to; or to which I shall at my death have power to dispose of by

will, unto my wife, Eva J. Miller, and my son, George E. Miller, * * * in trust," etc.; Mrs. Miller being the sole beneficiary of that trust during her life, or until she again marries. No specific property is designated or described in any manner, and the language apparently expressly limits his testamentary disposition to property which he shall at the time of his death "be seised or entitled to," or "have power to dispose of by will." In view of the fact that he is not seised of or entitled to the wife's community property, has no power of disposition thereof during her lifetime, nor any power of testamentary disposition thereof, it seems to us that there is but little room for arguing that this language is even ambiguous as to whose property he assumed to dispose of. Standing alone and applying thereto the rules of construction we have noticed, it seems to us that the language does not express an intention on the part of Dr. Miller to dispose of his wife's community interest. In any event, such an intent is not expressed with such clearness as the law requires in order to put her to an election.

In the case of *In re Gilmore*, 81 Cal. 240, 22 Pac. 655, dealing with the provisions of a will disposing of property in language no more specific than this, the court said:

"It will be observed that the will does not specifically describe any property, but simply gives to the wife 'one half of all my property, both real and personal, of which I shall be possessed at the time of my death.' Conceding that the will is susceptible of two possible constructions—one that the testator intended to devise all property of which he should be possessed at the last moment of life, including the whole of the community property over which he had the power of disposition during life; and the other that he intended to devise only his property then in his possession, over which alone he had the power of testamentary disposition—still, well-settled rules of construction and presumptions of law require the adoption of the latter construction, which accords with the decree of the lower court.

"1. The testator must be presumed to have known the law applicable to the disposition of property by will, and therefore to have known that he had no power to dispose, by will, of his wife's interest in the community property, but only of his own interest therein. *Civ. Code*, §§ 172, 1331, 1402; *Morrison v. Bowman*, 29 Cal. 347; *Estate of Frey*, 52 Cal. 660.

"2. He must also be presumed not to have intended to devise any property over which he had no power of testamentary disposition; and therefore the will should be read as applying only to his property within such power. *King v. Lagrange*, 50 Cal. 332; *Estate of Silvey*, 42 Cal. 212. In the latter case it was said: 'The devise must be read as apply-

ing only to that moiety which was within his testamentary power. A purpose to attempt the disposition, by will, of property which by statute would pass to the wife, as survivor of the matrimonial community upon his death, is not to be readily inferred, especially where, as here, the words employed by the testator may have their fair and natural import by applying them only to that moiety of which he had, by law, the testamentary disposition.'

"The devise in this case is 'of all my property of which I may die possessed,' and not of any specific property. The devise to the wife is not inconsistent with the other devises to the daughter and grandchildren. All the words employed, by the testator may have their fair and natural import by applying them only to that moiety of which he had, by law, the testamentary disposition; and there is nothing in the circumstances under which the will was made substantially tending to rebut the presumptions above stated. It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome those presumptions that the wife can be put to her election, either to take under the will, or to take what she is entitled to by law. *Morrison v. Bowman*, 29 Cal. 347; *Noe v. Splivalo*, 54 Cal. 207; *Estate of Stewart*, 74 Cal. 98 [15 Pac. 445]. But where there is no such manifest intent, the wife may claim and take both what the law gives her in the community property, and also what is given her by the will of her husband in that portion thereof subject to his testamentary disposition. *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Payne v. Payne*, 18 Cal. 301; *Estate of Silvey*, 42 Cal. 210; *King v. Lagrange*, 50 Cal. 331; *Estate of Frey*, 52 Cal. 658."

In the case of *Estate of Wickersham*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437, the court held that a similar provision of a husband's will did not require the wife to elect between her community rights and her rights under the will; and, further, that, notwithstanding she there expressly elected, by a signed, written instrument, under the belief that she was required to elect, the written instrument of election not being intended as a conveyance to the other legatees, such election amounted to nothing as affecting her rights, and that she thereafter could claim both under the will and her half of the community property.

These California cases are of special interest and force in this case, in view of the fact that under the laws of California the husband has the absolute power of disposition of the community property by deed, without the wife joining therein, during his lifetime. We have seen that he has no such power under the laws of the state of Washington. In the earlier California case of *In*

re Stewart, 74 Cal. 96; at page 163, 15 Pac. 445, at page 446, the court was evidently largely influenced by the fact that the husband had power to dispose of the whole of the community property during his lifetime, as indicated by its remarks as follows: "When read together, the provisions of the will are the best expression, short of a direct statement to that effect, that he was dealing with the whole of the community property under the phrase 'all my estate.' Every clause in the will bears a clear and indisputable badge of that intention. He dealt with the property just as he had been accustomed to deal with it through a long, active, and successful business life, just as he had in accumulating and disposing of the property during his lifetime, without consulting his wife, or asking her to join with him in any conveyance. He uses the phrase 'my estate' in the sense that he had been accustomed to use it all his life. It was his estate. He could dispose of it absolutely, without the consent of his wife, during his life; and he thought undoubtedly that he could do so, and that he was doing so, by his will."

The result of that case seems to be not in entire harmony with the later California cases we have above noticed, but it is worthy of note that the case was decided by a majority of one only, three of the judges dissenting. We are of the opinion that Mrs. Miller was not required to elect between her community rights and her right to take under the provisions of the will. This view finds support in *Moss v. Helsley*, 60 Tex. 426; *Pratt v. Douglas*, 38 N. J. Eq. 516; *In re Gwin*, 77 Cal. 313, 19 Pac. 527.

[4] It is contended that the trial court erred in excluding oral evidence offered to show a conversation had between Mrs. Miller, the son, George E. Miller, one of the appellants, and Dr. Miller prior to his death. The purpose of this evidence was to show the intention of Dr. Miller to dispose of all of the community property, including Mrs. Miller's portion, by the terms of his will, and was offered upon the assumption that the language of the will was so ambiguous as to warrant the introduction of such evidence in explanation of its meaning. The authorities seem practically harmonious in holding that, for the purpose of forcing an election, extrinsic evidence is not admissible to establish the intention of the testator to dispose of property over which he has no testamentary power of disposition. This is apparently the rule, even though the language of the will is ambiguous, whatever may be the rule as to the admissibility of evidence to explain its ambiguity in other respects. The strength of the presumption against an intention of a testator to dispose of property which is not his own is so strong that the law will not permit any such intention to be

shown by oral evidence; but such intention must appear from the language of the will alone. In *Miller v. Springer*, 70 Pa. 269, Justice Sharswood, speaking for the court, said: "The will of Rachel Skiles, on its face, raised no case of election. It did not assume to devise the property in question as her own, although her title to it, if she had any, certainly did pass by general words. It is well settled, and accords with the reason and principal of the thing, that if the language of the will admit of being restricted to property belonging to or disposable by the testator the inference will be that he did not intend them to apply to that over which he had no disposing power. A general devise of the testator's real estate has always been held to show an intention to give what strictly belongs to him, and nothing more, even if the testator had no real estate of his own upon which the devise could otherwise operate." 1 Jarman on Wills, 393. Nor can evidence dehor the will be admitted to show that the testator considered the land in question to belong to him, and intended it to pass under the will."

Equally strong expression of the rule is found in *Jones v. Jones*, 8 Gill (Md.) 197, in the language of Justice Frick, as follows: "The intention to raise an election must be clear and manifest from the will itself. That intention must be collected from the face of the instrument; and, without a clear and express manifestation, it cannot be presumed to extend to property which did not otherwise pass under it. If the will is susceptible of a construction that does not require it, then, by reason of its imperfect execution here, it is not a case where the party can be put to his election as to the property in this state."

Probably as clear and comprehensive a statement of the doctrine as can be found is that made by Justice Mitchell, in *Sherman v. Lewis*, 44 Minn. 107, 48 N. W. 318, as follows: "The rule is that a general bequest and devise of the testator's property will be construed as intended to extend only to such property as he could dispose of by will. Also that, even where specific property is disposed of by will, in which the testator had only a partial interest, the courts will, if possible under any reasonable rule of construction, construe the language of the will as intended to apply only to the interest which the testator was able to dispose of; the presumption being that he did not intend it to apply to that over which he had no disposing power. Also that, in order to raise a case for an election, the intention as manifested by the will itself must be clear and decisive. It must be clear, beyond reasonable doubt, that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift. 1

Jarm. Wills (5th Ed.) 452-454; 2 Redf. Wills, 745, 746; Havens v. Sackett, 15 N. Y. 365; Washburn v. Van Steenwyk, 32 Minn. 336, 352, 20 N. W. 324; In re Götzel, 34 Minn. 159, 164, 24 N. W. 920 [57 Am. Rep. 48]. And while parol evidence is admissible, to the same extent as in other cases, in aid of the construction of written instruments—that is, to show the condition of the subject-matter, and the surrounding circumstances, so far as to place the court in the position of the testator—yet the intent of the testator to dispose of that which was not his must appear from the words of the will itself, and cannot be proved by evidence dehors the instrument." *Havens v. Sackett*, 15 N. Y. 365; *Fitzhugh v. Hubbard*, 41 Ark. 64; *Stokes' Estate*, 61 Pa. 136; *Charch v. Charch et al.*, 57 Ohio St. 561, 49 N. E. 408; *Young's Adm'rs v. McKinnie's Adm'rs*, 5 Fla. 542; *McDonald v. Shaw*, 92 Ark. 15, 121 S. W. 935. See note to this case in 28 L. R. A. (N. S.) 657.

Our own decisions in *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502, and *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754, are not in conflict with this view. Those were not election cases. Nor do we think our decision in *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255, holds differently, in view of the circumstances there involved. That was a case of mutual wills, which amounted to a settlement of a contractual nature.

[5] A considerable portion of the argument of learned counsel for appellants deals with the acts of Mrs. Miller in the management of the trust estate which, it is claimed, amounted to an election on her part to claim under the will. Since we have concluded that she was not required to elect by the terms of the will, we regard it as immaterial as to whether or not such acts would have amounted to an election. In *re Gwin*, 77 Cal. 313, 19 Pac. 527; *Estate of Wickersham*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437. Her acts in no event amounted to a conveyance of her community rights to the residuary devisees; nor did her acts mislead or cause the residuary legatees to act to their prejudice, so as to raise an estoppel against Mrs. Miller claiming her community interest.

[6] Counsel for appellants also rely to a considerable extent upon evidence which, they claim, tends to show an agreement and understanding between Mrs. Miller and the residuary devisees, to the effect that she would keep all of the property together and let it all go to them at her death as if she were required to and had elected under the will. It is not only argued that the evidence admitted shows such an agreement, but also that the trial court erroneously excluded other evidence offered to that end. In any event, we have nothing to support such a

contention but oral evidence, either received by the court, or offered and rejected by the court. To say that Mrs. Miller's community property could be lost to her by any such oral understanding would be equal to saying that she could convey her real property in that manner. Manifestly she cannot be divested of her community real property by mere word of mouth alone, however certain such an intention may have been expressed by her in that manner.

[7] So far we have dealt with the language of the will as though it contained nothing but the language of the devise made to the executor and executrix in trust for Mrs. Miller's benefit. There are other provisions in the will, relating to the management of the property devised in trust, as will be noticed by reference to the provisions of the will, above quoted, which may seem to indicate an intention that all of the Ross-shire property should be kept and managed together. Those provisions, however, even if construed as mandatory, go only to the question of the management of the property, and do not affect the question of where the title thereto shall ultimately rest. Manifestly no one is interested in this question except Mrs. Miller and the residuary devisees. It is true that all of the Ross-shire property will not necessarily be managed together, if Mrs. Miller's portion be partitioned to her, though it may be so managed if she and her coexecutor so desire, since she, in any event, is entitled to the entire net income therefrom. But these appellants are not in position to complain of a separation of these interests. They have in effect asked that very thing by the alternative prayer of their complaint. Whether or not Mrs. Miller would have the right to have the property partitioned and her interest set apart, against the objections of the residuary devisees, and thus give her the power to prevent the joint management, which it may be argued the will contemplates, is now of but little consequence, in view of the manner in which the several rights of the parties are sought by appellants to be settled in this action. This is only a question of whether or not partition shall take place now between Mrs. Miller and the trust estate, or shall take place at her death or marriage. Appellants seeking this partition cannot complain that it seems in a measure to defeat the management of the trust estate as contemplated by the will.

Some contention is made upon the claimed necessity of Mrs. Miller accounting for rents and profits of the property during her management of the trust estate. This becomes of no consequence, in view of the fact that, in any event, she is entitled to all of the net income, not only of her own community interest, but also of the trust estate during her life, or until she marries. She has not wast-

ed the property, nor caused its depreciation in value in the least. Manifestly she has nothing to account for.

The partition of the property as made is apparently eminently just and fair, and the fact that it could be and was so partitioned as to give to her her own building, without impairing the rights of the residuary legatees in the least, renders the question of their rights in that building by reason of it having been built upon the common property by her of no consequence. Had the building been placed there by her in such manner that a partition of the property could not have been fairly had by regarding the building as her separate property, Mrs. Miller might have been required to forego her claim of absolute ownership to the building.

We are of the opinion that the learned trial court has properly disposed of the rights of the parties, and that the judgment should be affirmed. It is so ordered.

DUNBAR, C. J., and GOSE and CROW, JJ., concur.

CHADWICK, J. (dissenting). It is said in the majority opinion that, standing alone and applying thereto the rules of construction theretofore noticed, the language of the will does not express an intention on the part of Dr. Miller to dispose of his wife's community interest; or, if so, it is not expressed with such clearness as the law requires, in order to put her to an election. It seems to me that the intent is sufficiently expressed. It is true, as asserted, that the husband cannot, as against the will of his spouse, devise more than his half; but he may so draw his will as to compel an election. There are many things about this will that make his intent sufficiently clear and certain to satisfy the tests of the law. He assumed and undertook to provide that the whole property should be kept intact during the widowhood or pending the death of his wife. It is evident from the whole instrument that he intended that the whole property should eventually go to his children, and that, in lieu of her present interest in one-half of the property, his wife would take the income of the whole. When a testator gives property to one whom he would not be bound to recognize as a beneficiary, and the bequest depends upon a beneficial condition, an election must necessarily follow. Mrs. Miller was entitled to her half of the community property; or, in lieu thereof, she might take the income of the whole. The effect of the majority holding is that she is entitled to her own and the whole income, pending the determination of this litigation. The will states that the property is given in trust to the executors. The trust would be

wholly ineffectual, unless Mrs. Miller permitted her undivided share to rest in the trust and contended herself with the income of the whole property. While the case of *Prince v. Prince*, 64 Wash. 552, 117 Pac. 253, was based upon the principle of law governing mutual wills, yet it seems to me that the same principle would govern here, inasmuch as Mrs. Miller accepted the terms of the will and acted upon it for a sufficient time to bind her to an election.

For these reasons I dissent from the majority opinion.

BROWN v. MILLER.

(Supreme Court of Idaho. July 13, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 333*)—VALIDITY—FRAUD BY THIRD PARTY.

Where the principal owner in a bank, who was vice president and general manager of the bank, was indebted to the bank on unsecured notes in the sum of \$76,000 at the time it became insolvent and went into the hands of a receiver, and while the receiver was in charge thereof such managing agent procured one of the principal depositors in the bank, who held a certificate of deposit for \$61,000, and to whom he had for many years sustained a confidential relation, to surrender up to the receiver such certificate of deposit and give her promissory notes for the difference between the amount of such certificate of deposit and the vice president and managing agent's promissory notes, and such transaction was procured through fraudulent practices and fraudulent representations by the vice president and managing agent of such insolvent institution, and the receiver had no actual knowledge of the fraudulent practices and representations, but had knowledge of the relation such officer had previously sustained to the bank and of his indebtedness thereto, and with this knowledge surrendered up the notes amounting to \$76,000, and received the certificate of deposit from the depositor and her promissory notes for the difference, and received all the stock held by the managing agent in such institution, the receiver, as the representative and trustee of the depositors of such institution and of such insolvent institution, is chargeable with notice of the fraud practiced in procuring such note; and the defense of fraud in the inception thereof is a good defense against the receiver as the payee of such note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 806-811; Dec. Dig. § 383.*]

2. BILLS AND NOTES (§ 343*)—VALIDITY—FRAUD BY THIRD PARTY.

Where fraud has been practiced by a third party in procuring the maker of a note to execute such note in favor of the payee, and, although the payee does not have actual notice of such fraud, if he participates in the transaction and gives a part of the consideration therefor, and receives advantages and benefits

therefrom, the law will put him on notice as to the whole consideration and circumstances under which such note was executed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 853-855, 864, 865; Dec. Dig. § 348.*]

3. BILLS AND NOTES (§ 337*)—RIGHTS ON TRANSFER—HOLDER IN DUE COURSE—NOTICE.

Facts and circumstances as disclosed by the record in this case examined, considered, and held sufficient to put the receiver of an insolvent bank upon notice as to the fraud practiced in the inception and execution of a promissory note, and that such receiver is not a holder in due course, within the meaning and purview of the statute.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856-863; Dec. Dig. § 337.*]

Davis, District Judge, dissenting.

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by Fred Brown, as receiver of the Idaho State Bank, against Annie I. Miller. From a judgment for plaintiff, defendant appeals. Reversed.

R. F. Buller, of Los Angeles, Cal., McFadden & Brodhead, of Halley, and A. A. Fraser, of Boise, for appellant. Sullivan & Sullivan, of Boise, for respondent.

ATLSHIE, J. This action was commenced by the receiver of the Idaho State Bank for the collection of three promissory notes, executed by the appellant, for the aggregate sum of \$30,427.32. The appellant set up the defense that the notes were procured through fraud and misrepresentation, and that the receiver of the bank had notice thereof, or was chargeable with notice of the fraud practiced, and which entered into the execution of the notes. The court found in favor of the receiver of the bank, and the defendant appealed.

On the 31st day of August, 1910, the Idaho State Bank of Halley, Idaho, was closed by the bank commissioner on account of being insolvent and unable to carry on its business in due course. H. N. Coffin was thereupon appointed receiver and duly qualified as such on the 1st day of September. When the bank closed, Leo Cramer, vice president, director, and general manager, was indebted to the bank on his individual and unsecured notes in the sum of \$66,721.70. His wife, Sarah Cramer, was indebted on an individual unsecured note in the sum of \$5,081.11, and John Cramer, a brother of Leo Cramer, was indebted to the bank on his unsecured promissory note in the sum of \$5,081.11, making an aggregate indebtedness of \$76,883.92. When the bank closed, the appellant, Annie I. Miller, had on deposit there-

in, as represented by certificate of deposit, the sum of \$61,966.16. She was at the same time indebted to the bank, as evidenced by her two promissory notes, \$14,906, and the further sum of \$398.42 overdraft; and it appears that an agreement existed between appellant and the bank that these notes and any overdraft which she might make on the bank should be paid and retained out of the cash she had on deposit in the bank, as represented by her certificates of deposit. At the time the bank failed, Leo Cramer was the manager and controlling spirit in the bank, and owned some 311 shares of the capital stock of the bank, and the appellant, Miller, was at that time in Europe. She did not learn of the failure of the bank until she landed in Quebec, and nothing of the details of the failure until she arrived in Shoshone, Idaho. Upon her arrival at Shoshone, and before the departure of a train from Shoshone to Halley, Leo Cramer met her and took her in his automobile to his home in Halley. There he began negotiating with her with a view to having her take up his indebtedness of \$76,000 to the bank, which included his individual note and those of his wife and brother—which, by the way, all seemed to have been his indebtedness—and to have Mrs. Miller turn over in payment for these notes her certificate of deposit in the bank, and to execute her individual note for the balance. He at the same time promised and agreed to give her collateral and securities of various kinds which, he claimed, were far in excess of this indebtedness. Cramer had been Mrs. Miller's banker for many years and her confidential adviser in such matters. About the 26th of September, Cramer went to H. N. Coffin, receiver of the bank, with a pencil memorandum proposing, in substance, an adjustment of his indebtedness to the bank under the foregoing terms and conditions, except, so far as the evidence discloses, he did not advise the receiver of the consideration which he was giving Mrs. Miller for her executing these notes and turning over her certificates of deposit and taking up the Cramer indebtedness. The receiver took this memorandum to his attorneys and had an agreement drawn, of which the following is a copy, and delivered it to Cramer, with direction that Cramer sign it and have Mrs. Miller sign it, which was accordingly done:

"Whereas, the Idaho State Bank of Halley, Idaho, is insolvent and now in the hands of H. N. Coffin, the duly appointed, qualified and acting receiver of said bank;

"Whereas, the undersigned, Leo Cramer, one Sarah Cramer and one John Cramer, are indebted to the Idaho State Bank, which indebtedness is represented by the following notes, to wit:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Note No. 2200, Leo Cramer,	\$18,000,	Int. @ 250 64	\$18,359 54
" " 1938, " "	17,734,	" 287 89	18,021 89
" " 2207, " "	3,500,	" 52 89	3,552 89
" " 2621, " "	27,500,	" 1,367 36	28,867 36
" " 2202, Sarah " "	5,000,	" 81 11	5,081 11
" " 2201, John " "	5,000,	" 81 11	5,081 11

—and the said Leo Cramer desires that said notes be paid and that he be released from any further liability to said bank; and

"Whereas, the undersigned, Annie I. Miller, is now the owner and holder of the following certificates of deposit issued by said bank, to wit:

C. D. No. 216, H. B. Miller Est.,	\$10,000,	Int. \$158 32	\$10,158 32
C. D. No. 262, Annie I. Miller,	21,000,	" 332 64	21,332 64
C. D. No. 468, Annie I. Miller,	30,000,	" 475 20	30,475 20

—and the said Annie I. Miller is desirous of applying the full amount of said certificates of deposit, and interest due thereon, in payment of the foregoing described notes:

"Now, therefore, in consideration of the premises aforesaid, the undersigned, Leo Cramer and Annie I. Miller, hereby agree that the above certificates of deposit and interest, amounting to the sum of \$61,906.16, shall be applied in payment of the notes and interest of Leo Cramer, Sarah Cramer and John Cramer, aforesaid, amounting to \$76,863.92, and the difference of \$14,897.76, due the said Idaho State Bank shall be assumed by said Annie I. Miller, and notes given by her to cover the same as follows: \$12,000, payable one year after date, and \$2,897.76, payable February 1, 1911, and both notes to draw interest at the rate of 8% per annum.

"And it is further understood and agreed that the two notes of Annie I. Miller, now held by the Idaho State Bank, amounting to \$14,900.00 shall be renewed for one year at 8% interest, and the overdrafts, \$292.42, and Annie I. Miller, administratrix, \$101.70, to be taken up by her note for \$394.12, payable one year after date, with interest at the rate of 8% per annum.

"And the said Leo Cramer further agrees to turn over to the Idaho State Bank, without compensation, upon the acceptance of the agreement by said receiver, capital stock of said bank standing in his name on the books of said bank to the amount of three hundred eleven shares, and also certificate of five shares in the name of William Black, and certificate of five shares in the name of J. J. Plumer, making a total of three hundred twenty-one shares.

"In witness whereof, we have hereunto set our hands this 26th day of September, 1910.

"[Signed] Leo Cramer.

"Annie I. Miller.

"Witness: Hugh Cramer.

"The above and foregoing is hereby approved and accepted this 27th day of September, 1910. H. N. Coffin, Receiver."

In pursuance of the terms of this agreement, Mrs. Miller executed the promissory

notes therein provided for. The receiver had never seen Mrs. Miller until she came into the bank to sign up the notes which she executed in pursuance of the terms of the agreement, and at which time she delivered to him the certificates of deposit. He testifies that he did not see her any more or

talk with her until the trial of this case. The Cramer notes, aggregating over \$76,000, were surrendered up to Cramer, and Mrs. Miller's certificates of deposit were surrendered up to the receiver and canceled, and her notes, which represented the difference between the amount of the Cramer indebtedness and her certificates of deposit, and also the amount of her individual indebtedness to the bank, were given to the receiver of the bank, aggregating the sum of \$30,427.32. Cramer delivered to Mrs. Miller some of the securities which he agreed to deliver, and failed wholly to deliver other securities. He furnished her at the time a memorandum, setting forth the list of securities he promised to give her and the values he placed on the property, and also the values which he gave as "selling values at forced sale." The total value placed on the property by Cramer was \$120,100, and the selling value at forced sale he placed at \$61,200. Mrs. Miller did not investigate the values or condition of these securities, but took Cramer's word for it. She did not see or consult with any one else but Cramer. Cramer kept her at his home during all the time these negotiations were on. It turned out, however, that when she did find the true situation the property was practically all incumbered, and that the security given was of very little value. The trial court found that the property was not in fact of the value represented by Cramer, or anything like such value, and that it would not have exceeded at the time "the value of more than a few thousand dollars."

The court also finds that Cramer made false and fraudulent representations to Mrs. Miller, both as to the solvency of the bank and the value of the property he would give her as security, and also with reference to the reorganization of the bank, and that he deceived her and imposed upon her in this transaction; and he also finds that H. N. Coffin, the receiver, had no actual knowledge of the fraud or misrepresentation of Cramer. The only sum ever received by Mrs. Miller under this agreement and transaction was \$1,900, which was realized from certain personal property which Cramer subsequently

sold, and the money was turned over to Mrs. Miller to apply on his indebtedness to her. It seems that at the same time as these transactions Cramer was personally indebted to Mrs. Miller in a sum to exceed \$8,000, which was not included in this transaction, and on which no settlement or adjustment was apparently made. Upon the trial appellant offered to surrender up all the securities and money she had received on the transaction, to be dealt with as the court might, in its judgment, deem just and equitable.

[1, 2] The decision of this case must necessarily turn upon one or both of two legal propositions: First, it is contended that this is a controversy between the maker and payee of promissory notes, and that the action is subject to the defense of any fraud which may have been practiced in procuring the execution of the notes; and, second, it is contended that upon the unmistakable facts disclosed by the record the bank cannot successfully maintain that it is a holder of this note in due course, within the purview and meaning of section 3509 of the Rev. Codes and the decisions of this court construing that section and related sections of the statute. *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525; *Park v. Johnson*, 20 Idaho, 548, 119 Pac. 52; *Shellenberger v. Nourse*, 20 Idaho, 323, 118 Pac. 508; *Winter v. Hutchins*, 20 Idaho, 749, 119 Pac. 883; *Vaughan v. Johnson*, 20 Idaho, 669, 119 Pac. 879; *Park v. Brandt*, 20 Idaho, 660, 119 Pac. 877.

In support of the first proposition, namely, that this is purely an action between the payee and maker of a promissory note, and that any fraud or misrepresentation which was practiced in procuring the execution of the note is chargeable to the payee, even though that fraud was practiced by a third party, counsel cite and place special reliance on *Morton v. Rogers*, 14 Wend. (N. Y.) 576, and *Hackley v. Draper*, 60 N. Y. 88. Counsel for respondent, on the other hand, cite a number of authorities which hold that the payee named in a note, in an action between himself and the maker, may often be treated as a bona fide holder with reference to certain defenses of fraud or misrepresentation, where the fraud was practiced or the misrepresentation was made by a third party, who was not the agent or representative of the payee, and whose fraud or misrepresentation was unknown to the payee at the time of receiving the paper. *Lookout Bank v. Aull*, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934; *Boston, etc., Co. v. Steuer*, 183 Mass. 140, 68 N. E. 646, 97 Am. St. Rep. 426; *Armstrong v. Am. Exc. Bank*, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; 7 Cyc. 925; *Eaton & Gilbert, Commercial Paper*, p. 305. *Martin v. Rogers* and *Hackley v. Draper* clearly support the contention made by counsel for appellant. It is unnecessary, however, for us to consider in this case the ques-

tion as to whether or not a payee will be bound by fraud practiced by a third party in procuring the execution of the note, where the third party is in no way connected with the payee in the transaction, and is wholly a stranger to the transaction, so far as the payee is concerned. The facts of this case remove it from that class of cases and render the authorities on that subject inapplicable to this case. Here some kind of consideration purported to pass from each to all the others. We shall therefore consider the remaining questions together.

H. N. Coffin, who was receiver when this transaction took place, testifies that he had no actual notice of any fraud or misrepresentation practiced by Cramer, and the court so finds. The respondent therefore cannot be bound by any actual notice that has been brought home to him. If he is to be bound at all, it is by constructive notice arising either by operation of law, or from other facts and circumstances of which he had notice. Under the facts as heretofore recited, the receiver would not have been justified in believing or considering that Cramer was acting as the agent of Mrs. Miller. Neither the letter of the law, nor the equity of the case, would permit him to presume that Cramer was representing himself, as he was, in negotiating a transaction whereby his indebtedness to the bank, aggregating \$76,000, was to be paid off and liquidated, and at the same time presume that he was also acting as the agent of the person who was paying off this indebtedness and liquidating his obligation to the insolvent bank. The very statement of the proposition shows that it involves a dual relation which he could not, either in law or good conscience, represent, and the receiver of the insolvent bank could not be protected or justified in assuming that Cramer occupied this dual capacity at one and the same time. This fact is made more prominent when we remember that Cramer had been the controlling spirit, the vice president, director, and managing agent of the bank, from the time of its organization down to the day it closed its doors as an insolvent institution. He was at the same time the largest debtor to the institution; and it can safely be said that, if he himself was solvent and had liquidated his own obligation to the bank prior to closing its doors, it would not have been at that time under the necessity of going into the hands of a receiver. In the light of these conditions, the receiver, who had been appointed by the court to take charge of this insolvent institution, could not accept notes from Mrs. Miller, who was at the same time one of the largest depositors in the bank and one of the very persons whom this receiver was representing as a trustee, in payment of the obligations of this largest debtor, vice president, and managing agent of the institution, without making some investigation and in-

quity as to the cause and consideration for a transaction of such magnitude. He must know why a maker of a note of such a large sum is executing and delivering it to him as the receiver of an insolvent institution.

The receiver of the bank cannot successfully defend the charge of fraud and misrepresentation here, on the ground that the whole transaction took place between Cramer and Mrs. Miller, and that the whole consideration for these notes sued upon in this case passed from Cramer to the maker of the notes. There were other considerations as well, and the receiver of the bank, acting as trustee for the institution, passed a part of the consideration; and when he entered into this deal he became chargeable with notice of the remaining consideration which passed from the third party to the transaction, namely, Cramer. Cramer's chief purpose in this was apparently the liquidation of a \$76,000 unsecured indebtedness to the bank. Incidentally, according to his representation to Mrs. Miller, he claimed that the bank was in fact solvent and able to pay out dollar for dollar; and that by her taking up his obligation it could be reorganized and everybody be paid off in full. On the other hand, the bank was securing in this one transaction the liquidation of \$81,000 of its liability to a depositor; in other words, by reason of this transaction alone it reduced its liabilities to depositors in the sum of \$81,000, and thereby increased the dividends that would be paid to the other depositors to that extent. At the same time it procured \$30,000 worth of notes, executed by Mrs. Miller, which the receiver testified he considered good for their face value. In addition to this, the receiver of the bank was to receive 321 shares of the capital stock of the bank, 360 shares of which belonged to Cramer and 10 to Black and Plumer, as will be seen from the last paragraph of the agreement, hereinbefore set out. This agreement was drawn under the direction of the receiver of the bank. It is true that it was drawn from memoranda furnished by Cramer; but the receiver certainly knew why he was to receive this bank stock, and he must have known that there was a consideration moving from some source for its being turned over to him. He testifies that there had been some talk between him and Cramer with reference to reorganizing the bank.

It seems to us that the receiver in this case was clearly chargeable with at least constructive notice that Cramer was insolvent, as well as the bank of which he was vice president, director, and managing agent. Good faith, at least, put him on his inquiry. The receiver had been in charge of this institution for about 25 days. He had charge of the books of the corporation; he had been in a position to know, at least, the general condition of the institution—who had

been the stockholders, directors, and agents and employes of the institution. He had likewise been in a position to know who were the depositors, and who the debtors of the institution. He was informed that Cramer was one of the principal owners and the controlling spirit in the institution. He also knew that Cramer was one of the largest debtors of the institution, and that this indebtedness was unsecured. *He was chargeable, therefore, with notice that Cramer was either insolvent and unable to pay this debt, or that he was so embarrassed and tied up that he could not pay, or that he had defrauded the institution.* One of these conclusions was inevitable. *These facts were sufficient to put the receiver on his inquiry.*

[3] Two propositions are quite clear to us: First, that the receiver was so identified with this transaction and took such part as the representative of the bank as to put him on inquiry and charge him, as the representative of the insolvent institution, with notice of the fraudulent practices and representations of Cramer, made in securing the execution of the notes, and subject him as a payee to the defense thereof; and, second, that even if the receiver could not be held as a payee in the ordinary course of business, still he would not be a holder in due course, within the meaning of section 3500, Rev. Codes, for the reason that under the provisions of section 3516 the burden of proof was on the receiver to show that he was a holder in due course, and that he had no notice of any facts or circumstances that would put him on inquiry and lead to a discovery of the fraud. Under the provisions of section 3516 of the Rev. Codes and the decisions construing the same (*Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525; *Shellenberger v. Nourse*, 20 Idaho, 323, 118 Pac. 508), whenever it is shown that the title of any person who has negotiated an instrument was defective, the burden is immediately transferred upon the holder to show that he, or some person under whom he claims, acquired title to the instrument as a holder in due course. Now, it is successfully shown, and the trial court has found, that these instruments were procured through fraud. It thereupon became incumbent upon the receiver of the bank, in order to maintain his action on the notes, to show that he procured them in due course, as defined by section 3500. If the receiver in this case was to be held strictly under the rules applicable to the payee of a note, there could be no question but that he would be chargeable at law, whether he knew it in fact or not that fraud had been practiced in procuring these notes, and that the title thereto was defective under section 3512. If, however, he could successfully contend that he was not subject to the law applicable to payee, then he must recover as a "holder in due course," and the burden is on him to show this fact.

The facts and circumstances, as hereinbefore recited, were such as to bring him clearly within the rule heretofore announced by this court (Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525; Shellenberger v. Nourse, 20 Idaho, 323, 118 Pac. 508; Park v. Johnson, 20 Idaho, 548, 119 Pac. 52), and it would be necessary for the court to depart from the rule adhered to in all these cases in order to sustain the judgment in this case. This question has been considered by the court so repeatedly that it is no longer an open question in this state. We are satisfied that the rule announced in these cases is in accordance with the statute and the dictates of justice and sound public policy. To allow the bank to retain Mrs. Miller's certificates of deposit and collect these notes, and the depositors to have such an advantage as this would give them, seems unfair and inequitable, and we cannot approve of so doing.

The judgment in this case should be reversed; and it is so ordered, and the cause is remanded, with direction to take further proceedings in accordance with the views herein expressed. Costs awarded in favor of appellant.

In this case Justice SULLIVAN was disqualified, and Judge DAVIS of the district court was called to sit in his stead, under the provisions of section 6, art. 5, of the Constitution.

STEWART, C. J., concurs.

DAVIS, District Judge (dissenting). I regret that my view of this case makes it necessary for me to dissent from the conclusion reached by the majority of this court.

One of the principal questions for consideration is as to whether or not a payee of a promissory note may become the holder thereof in due course, with a right to enforce payment against the maker, free from any defect. And the authorities definitely furnish an answer in the affirmative. Look-out Bank v. Aull, 98 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934; Jordan v. Jordan, 10 Lea (Tenn.) 124, 43 Am. Rep. 301; Cherry v. Frost, 7 Lea (Tenn.) 1; Passumpsic Bank v. Goss, 31 Vt. 315; Deardorff v. Foresman, 24 Ind. 481; Smith v. Moberley, 10 B. Mon. (Ky.) 269, 52 Am. Dec. 543; Armstrong v. American Exc. Bank, 183 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; Boston, etc., Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 427; Watson v. Russell, 8 Best & S. 84; Nelson v. Cowing, 6 Hill, 386; 7 Cyc. 925, note; Eaton & Gilbert on Commercial Paper, p. 305.

It is finally established by the findings of the district court, fully supported by the evidence, that Mrs. Miller and Cramer made a separate contract previous to the transaction wherein the receiver joined them in making the agreement in which the notes sued on herein were given as part consideration. In

making such previous contract, unknown to the receiver of the bank, Cramer committed a fraud upon Mrs. Miller, and falsely promised to give her certain property and securities as consideration for certain certificates of deposit and notes to be delivered by her, provided such certificates of deposit and notes could be used in a proposed compromise settlement between them and the receiver of the Idaho State Bank. Thereupon Cramer made a proposition to the receiver, which was accepted by him. And in pursuance thereof an agreement was entered into by Mrs. Miller and Cramer and the receiver, which was approved by the judge of the district court. The notes in controversy here, payable to the receiver of the bank, were executed by Mrs. Miller and delivered to the receiver in accordance with the terms of each of such contracts, entirely free from fraud or false representations on his part, or by any one in his behalf. And in my opinion the receiver had no information of such facts or circumstances as would reasonably put him on inquiry, or amounted to bad faith when he accepted such notes.

The status of principal and agent did not exist in any way, since each party acted entirely on his own account in making such contract. In making the compromise settlement with Mrs. Miller, the receiver did not stand in the position of trustee, guardian, or protector of her interests. All that was required of him was that he deal in good faith on a fair, equitable basis, without deception or misrepresentation. And this he did.

The district court found, with reference to the contract signed by the receiver, "that in pursuance to said agreement all parties thereto complied with the terms and conditions thereof." It is clear from the evidence that the receiver faithfully complied in every respect with the terms of the contract entered into by him, and that Cramer also did everything required of him by such contract. Even though the burden is upon the receiver to prove that he acquired title to such notes in due course of business, the evidence clearly establishes, to my mind, that he received such notes in good faith and for a valuable consideration, without notice of any infirmity in the instruments, and that he became a bona fide holder thereof. Every element of the contract with which the receiver was connected was fair and equitable, and was faithfully executed by all parties thereto.

But the judgment of the majority of this court in effect charges the receiver with notice of the terms and conditions of another separate and distinct agreement, privately entered into by Cramer and Mrs. Miller prior to any negotiations with him. And it does not seem just to me that a payee of promissory notes received under such circumstances should be charged with notice of the terms of such a prior and private con-

tract, even though made by parties who later join with such payee in another agreement affecting the same subject matter. To so hold imposes upon such a taker of a promissory note a very serious burden.

For these reasons, it does not appear to me fair or reasonable to charge the receiver with constructive notice of the fraud committed by Cramer, even though the receiver may have been aware of the relations of the parties and the condition of their affairs, as set forth in detail in the majority opinion, and assigned therein as facts that should have put the receiver on notice as to the terms of the understanding between Cramer and Mrs. Miller, wherein the fraud was committed.

In my opinion, the judgment of the district court should be affirmed, and the receiver of the Idaho State Bank should not be charged with constructive notice of the conditions of the purely personal and private contract between Mrs. Miller and Cramer, entirely applicable to themselves and of no concern to such receiver.

SMITH v. SMITH et al.

(Supreme Court of Montana. June 10, 1912.)

1. EXECUTORS AND ADMINISTRATORS (§ 380*) —SALES AND CONVEYANCES—EVIDENCE.

In an action to set aside a sale by an executor of shares of capital stock in a sheep ranch, evidence held to show that the executor and the purchaser, who later became the present plaintiff's guardian, dealt at arm's length, and that the act of the guardian was in good faith, in the exercise of a sound discretion, and with no intention to defraud his ward.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1545, 1553, 1555-1564, 1567; Dec. Dig. § 380.*]

2. GUARDIAN AND WARD (§ 63*)—CUSTODY AND CARE OF WARD'S ESTATE—FRAUDULENT TRANSACTIONS—INSUFFICIENCY OF INTEREST CHARGED.

Though a guardian in his settlement, should have been charged a greater rate of interest, and for a longer period of time, than was actually done, such facts will not, by relation, characterize as fraudulent and void prior transactions, which were in themselves honest and free from actual fraud.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 107; Dec. Dig. § 63.*]

3. GUARDIAN AND WARD (§ 105*)—CUSTODY AND CARE OF ESTATE—PURCHASE OF WARD'S PROPERTY—TECHNICAL FRAUD—EQUITABLE RELIEF.

Where the guardian purchased the shares of stock in a sheep ranch belonging to his ward, in good faith and for its full value, and accounted for and turned over to such ward, on his majority, all of the sum due thereon, equity will not interfere to set the sale aside for technical fraud on the part of the guardian in taking the money turned over to him by the executor on his appointment to pay back the money borrowed to purchase his ward's interest.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 383-389; Dec. Dig. § 105.*]

4. EMBEZZLEMENT (§ 18*)—ELEMENTS.

Under Rev. Codes, § 8656, which provides that "every person acting as * * * guardian * * * who secretes, withholds or otherwise appropriates to his own use * * * any money * * * in his possession or custody, by virtue of his office, employment or appointment, is guilty of larceny," a guardian, who gave ample security to account for all funds coming into his hands, who was personally able to raise the amount thereof, on demand, who sincerely believed that he was acting legally and for the best interest of his ward, and who did in fact account for all moneys paid over to him, was not guilty of larceny, though he technically appropriated the funds intrusted to him to his own use in paying up the indebtedness incurred by him in purchasing his ward's interest in a sheep ranch of which he and the ward's father had been joint owners.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 20; Dec. Dig. § 18.*]

Appeal from District Court, Meagher County; W. R. C. Stewart, Judge.

Action by William J. Smith against Mary M. Smith, as executrix, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. Scallon, of New York City, and T. & Hoolan and Walsh & Nolan, all of Helena, and T. F. Nolan, of Butte, for appellant. L. O. Evans, of Butte, McIntire & McIntire and R. Lee Word, all of Helena, for respondents.

SMITH, J. This is a suit in equity, the purpose of which is, in effect, to set aside a sale of 40,988 $\frac{1}{2}$ shares of the capital stock of the Smith Bros. Sheep Company, made by Napoleon B. Smith, as executor of the last will and testament of William A. Smith, deceased, to John M. Smith in his lifetime, and to obtain an accounting. The plaintiff is a son and one of three heirs at law of William A. Smith, deceased. His two sisters, Annie Maud Kahle, residing in the state of Ohio, and Nellie Mae Moore, a resident of the state of Missouri, are the other heirs at law of their father. A suit, similar to the instant one, was begun in the Circuit Court of the United States for the District of Montana by Nellie Mae Moore; that court entered a decree in favor of the defendants, which was reversed on appeal by the Circuit Court of Appeals for the Ninth Circuit; the latter court ordering a decree in favor of the complainant substantially as prayed for. This cause was tried to the district court of Meagher county, sitting without the aid of a jury. The result was a decree or judgment in favor of the defendants, from which, and an order denying a new trial, the plaintiff has appealed. The action was, by stipulation, submitted to the district court on a printed transcript of the evidence taken in the case of Nellie Mae Moore against the defendants, theretofore heard in the federal court, supplemented by a brief examination of the plaintiff touching the circumstances under

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which he made settlement with his guardian, John M. Smith, on arriving at his majority. As stated in the brief of counsel for the appellant, "the cause is before this court for determination on identically the same evidence on which it was heard in the Circuit Court of Appeals." We therefore take the following statement of facts from the opinion in that case (see *Moore v. Smith*, 182 Fed. 540, 105 C. C. A. 78):

"The record shows that for many years John M. Smith and William A. Smith, who were brothers, were the owners of a large amount of land in the state of Montana, upon which they carried on the sheep, cattle, and horse business. At first they managed the business themselves; but in 1890 they organized a corporation under the laws of Montana, under the name of Smith Bros. Sheep Company, to which corporation they conveyed all of their property. Each of them was married, and to the wife of each was given 5,000 shares of the capital stock of the company, which amounted to 250,000 shares. The remainder of the stock was divided equally between the brothers. The wife of William A. Smith deserted him in 1891, leaving three small children, the oldest a boy, then seven years old, and two younger girls, the older of whom was the complainant in this case, and is the appellant here. These children William A. Smith subsequently sent to live with their aunt, & Mrs. Reynolds, in Ohio, who was a sister of the two brothers. Napoleon B. Smith, who was their nephew, was an attorney at law residing at White Sulphur Springs, Meagher county, Mont., in which county most of the property of the brothers was situated, and in which they both resided. William A. Smith died there on February 13, 1897, and on his deathbed made his will, which was drawn by Napoleon B. Smith, by which will he left all of his estate to his three children and appointed his said nephew executor thereof. "During the course of his examination as a witness, John M. Smith was asked what, if any, request his brother William made of him in his last illness regarding his children, and answered: 'A. The last words that he said to me was: "N. B. Smith is my administrator, and he will attend to the affairs in that way; and I want you to look after the interests of my children." Those were the dying words that he said. Q. And did you say you would? A. I said I would, and I have, faithfully.' At the time of his death, William A. Smith was the owner of 122,950 shares of the stock of the Smith Bros. Sheep Company; John M. Smith then owning a majority of the stock.

"The case shows that John M. Smith was himself then in poor health, as was his wife, and that in consequence he spent much of his time at Pasadena, Cal., where he was at the time of much of the correspondence hereinafter referred to. Some time after the

business was incorporated, one McNaught, who was a brother-in-law of John M. Smith, became manager of the property under the supervision and direction of the latter. The will of William A. Smith was admitted to probate, and Napoleon B. Smith became executor of his estate. After the death of William A. Smith, and because of the age and poor health of John M. Smith, and, perhaps, from other reasons, both John M. Smith and the executor became desirous of selling the whole property. A sale by John M. Smith of his majority of the stock to a stranger might have worked to the injury of the minority interest of the children of the deceased William A. Smith, so that both John M. Smith and the executor of the estate of William A. Smith became desirous that both interests be sold together. Repeated efforts in that behalf failed of accomplishment.

"On the 23d of November, 1897, McNaught asked for an option of purchase, to run until the end of the year, on all of the property, free of debts, except future payments on certain railroad land contracts, on which application J. M. Smith indorsed this: 'My figures is two hundred and twenty thousand 220,000 subject to the approval of Mary Smith (wife of John M. Smith) & N. B. Smith to date from Jan. 1, 1892, time to complete sale about to the 10 of Jan., 1898. J. M. Smith.' The executor of the estate of William A. Smith indorsed thereon the following: 'In case a buyer can be found for the property at the amount above stated I will immediately make application to the district court of Meagher county, Montana, to sell the interest of the estate of W. A. Smith, deceased, in said property at the rate above stated. [Signed] N. B. Smith.'

"The evidence shows that the executor regarded the estimate of John M. Smith as to the value of the property at the time too high, as did others.

"On the 14th of December, 1897, John M. Smith wrote a letter from Martinsdale, Mont., to the executor, which reads in part as follows: 'N. B. Smith—Der Sir & Nefue: * * * Mr. McNaught is back from Helena he could not get a party to take hold of the property, but I think the chance will be better next summer I want to sell out so as to go some place that I can be with my famley & can send Stanley [his son] to school as long as I hold it I can't be sadesfied away from it & I dont want to sell out & leave the childrens interest in it I think the coming year will be the time to let grow of the infire plant you can at the next turn get a permit to sell wills intrest at anney time that we can get fair value for it then we can go ahead with it when the oportunity Shows up I think it will be well to arrange that the text turn of Court. I dont think that we will sell much befoar next July or Auges but I dew want to sell as soon as we can to advantage if I was yong I would

not fair to sell for it is a good property well managed at what I ask for it.

"The record shows that on the 24th day of January, 1898, the judge of the probate court made an order, based upon the application of the executor, authorizing him to sell all of the 122,950 shares of the stock of the company belonging to the estate of William A. Smith, deceased, at private sale and without previous notice, provided that said personal property be sold at a sum not less than seventy-five thousand dollars, and may indorse said stock for the purpose of said sale, and may do all other acts requisite for the purpose of said sale, and may do all other acts and things requisite and necessary to transfer all of the interest of said estate in and to said stock, and the property represented by said stock. That said stock be present at the time of said sale, and that said executor present to this court, at the next term thereof after such sale, an account of sale, verified by his affidavit."

"On the 19th of the following March, John M. Smith wrote a letter from Helena, Mont., to the executor, which is in part as follows: 'Mr. N. B. Smith—Dear Nefue: I wish to get the least price that you can excep for the children stalk [stock] I may have to dew some figuring to sell the Plant & in case I knawed fest how much I could drop and pay all debts it would give me a chance to handel my self what would you give me a opchen on the Stock after the debt is payed I think you said the order was for you to sell for \$75,000 but we think we can dew better then that I think I can get them 80 or 85,000 out it clear for them now can you name enney price that would soat you to give a opchen on so I might have a maregen to mark [work] on think the matter over & let me know. [Signed] J. M. Smith.'

"On March 25, 1898, the executor replied, as follows: 'Office of N. B. Smith, County Attorney, Meagher County. White Sulphur Springs, Mont. March 25, 1898. Dear Uncle: Your letter in regard to the stock of the estate came to hand. I have been thinking over the matter. I think rather than see a sale go by I would be willing to take \$85,000 for the stock. I want to do what is fair by the estate and also by you. I want to see a sale go through in some shape, but at the same time I want to do the best I can for the estate. I would want the \$85,000 alone for the stock, and the party who gets the stock to pay all the debts of the company, and also that the sheep company cancel whatever debts it might have against the Alce or Blackhawk Mining Companies. Yours truly, [Signed] N. B. Smith.'

"On July 2, 1898, John M. Smith wrote to the executor, as follows: 'Smiths' Ranch, July 2, 1898. N. B. Smith—Dear Nefue: I have been figerin Since you laft on this Sheep Sale you know that our Judgment

difers as to the value of the property you being wilen to take less then would sadesfy me & thought that you would rether than miss a sail would take \$80,000 for the pert you represent rether then miss a sail. It was on that bases that I made my offer to Mc. My offer gave me a maregen that would sadesfy me but I dont have a small margen it cuts me down so low that I dont feal sadesfied if I had made my figers with the intent of giving you the benefit of my Judgment I should have plase my figers higher then I did so you can see that your estimate throwed me off in my calculation & will bring be out with less money then is sadesfactory to me & Mary I told her as you was willing to take less then I thought the stock worth & I was willing to take 80,000 that I would have a margin to work on & best my offer acorden now under theas circumstances I think you can afoard to take \$84,000 as your figers estimate 85,000 now if I can have a small margen to work on as I dont know jest what it will take to Squair all debts but I think if I can get yours at 84,000 that I will still have a small margen to work on if this deel goes but I would not be sadesfied to take the offer & devide equal as our Judgment difered as to value I made the offer below what I should have done if I had not has some aserence that you would take 80,000 for the interest now if you think you can take 84,000 I think that will be very close to to it if the sail goes if you cant afoard to take that Mary may not sell her stock & and that will spoll the sale if enny can be made atall. let me know at onse So I cam calculat acorden. Your uncel, John M. Smith. If we dont sell this time we may get that much.'

"December 30, 1898, came without the effecting of any sale, although strenuous efforts in that behalf were made by John M. Smith (to one Miles, among others), as well as by McNaught. On the day last mentioned, Henry Neill made to the executor the cash offer of \$80,000 for the stock belonging to the estate. The next day the executor wrote to John M. Smith this letter: 'Office of N. B. Smith, County Attorney, Meagher County. White Sulphur Springs, Mont., Dec. 31, 1898. Dear Uncle: Neill of Helena was in to see me yesterday in regard to the ranch property. He wanted an option on my interest. I told him I could not give it at this time as I had let you have an option. If you are figuring on Miles making a trade I think you had better look for other parties. Neill thinks he can sell the property. I am very anxious to do something with the property as I feel that the estate is going to lose money by holding it. Heltman and Danzer have a large number of sheep feeding in east and it is the prevailing opinion of those who know that they will lose from 50 cents to a dollar a head on the transaction. Neill said he would make me a cash

offer of \$85,000 for the estate's interest in the property. If you will make me a cash offer of \$85,000 you can have the property. I told Neill I would not make such an offer. McNaught writes me that you now owe the company \$13,839.35, and that the company will have to commence borrowing money. If you do not take the stock it would be your duty to put your note in to the company for the amount so that the company could raise the money on the same to carry on the business. Under our law the only way money can be drawn out of a company by a stockholder is by declaring so much dividend on each share of stock. I do not make the suggestion to hurt your feelings, but you know yourself that such large transaction should not be carried on in such a loose way. Please let me hear from you in the matter. We are all well. I wish you all a happy new year. I got a letter from Barnes at your place. Give all the Montana people my best regards. Your nephew.

"On the 14th of January, 1899, John M. Smith wrote to Mr. George L. Ramsey, cashier of the Union Bank & Trust Company, Helena, Mont., this letter: 'Pasadena, Cal., Jan. 14, 1899. Mr. George L. Ramsey, Helena, Mont.: Would your bank loan ninety thousand dollars to me & take the entire stock of the Smith Bros. Sheep Co. as security. I consider it glit edge I am about to buy the estates intrest I will onley want it untill I can make a sale of the property perheps 4 or 5 months. Wire me your lowest rate of intrst & if I can get it wire at my expense all the compny owes is the \$2,000 that I sent the Note for the othr day. Yeus Truly, J. M. Smith.'

"Two days thereafter, to wit, January 16, 1899, John M. Smith wrote from Pasadena, Cal., to the executor at White Sulphur Springs, Mont., as follows: 'N. B. Smith—Dear Nefue: W. S. Springs. I wired you that I would except your offer for the Stock of the Sheep plant belöning to the children I have not herd from Miles yet if he makes a raise I will pay you the \$90,000 if he fails I will give you the \$85,000 that you aske you of corse would put it in govement bonds if you had it now to make things safe & you be absolutely safe I will give you all of the Sheep Company Stock to hold as security for the payment of the \$85,000 & I will pay the same interst that you would get on Gov bonds & pay you 3 times per year untill I can sell out to advantage then you will be safe & if enny one is loseer it will be me & I am willing to take the changes they never will be a time but what the hole business will bee the best security for that amount but I dont intend to hold it very long at enny time that I can make a good sale I will pay off your \$85,000 I think this the best way for us to close up business I intend never to run less than 40,000 head of sheep on the ranch as long as I have ennything to dew with it by you hold-

ing all the stock as Security no one could com in untill your Note is payed first I never tried to get in debt much enny more as I intend to keep close payed up all land payments & Taxes & keep the Smith Bros Sheep Co Cr as good as has always bin you can get up the papers so you ar safe & at the same time gives me a chance to handel my self to advantage if Miles fails you & Mac can fix things so that I will not have to come untill Apr or May or may you can send the Papers down hear for I and Mary to signe I will pay all revenewe Stamps requires I don't think you will have to pay taxes on the \$85,000 while it is represented by the Smith Bros Sheep Co Stok as I have to pay on all the property if you did have to pay taxes I will agree to pay it for you So it will leave it just the same as gov bonds now I hope you will consider this & after Feb the first proceed to fix up the papers or soaner if you wish I could borrow the money of the Bank at Helena by giving the sae seclorty but I would soaner deel with you & you ar jest as safe as the you had gov bonds let me hear from you at once & oblige. Your uncel John.'

On the same day, to wit, January 16, 1899, the executor wrote from White Sulphur Springs, Mont., to John M. Smith at Pasadena, Cal., the following letter: 'Office of N. B. Smith, County Attorney, Meagher County, White Sulphur Springs, Mont., Jan. 16, 1899. John M. Smith, Pasadena, Cal.—Dear Uncle: Your telegram came to hand in which you said you would take the stock. I want a clear understanding with you, so that there may be no hereafter in the matter. It is understood that I am to get \$85,000 for the stock and the estate is to have that and not owe the Company anything for money advanced for uncle Bill's estate. Mack wrote me the other day about the four hundred dollars you were to pay, but I will make no claim as to that if you take the property at the above figures. You had better pay a portion down and then I will make the return to the court, and if the court approves the sale, of which I have no doubt, I will want the remainder of the money. Please let me hear from you at once in the matter. Yours truly, N. B. Smith.'

"The record shows that on the 20th of January, 1899, the executor wrote to John M. Smith a letter, which in some way disappeared; and is not produced. Before it could have been received at Pasadena, Cal., John M. Smith wrote from that place to the executor this letter: 'Pasadena, Cal., Jan. 22, 1899. N. B. Smith—Dear Nefue: I received yours of the 16 in reply to my telegram. I had written 2 letters that you have no dont received befor: this in which I asked turms but have not herd from either yet it dont look as tho Miles is going to make a deel. I now will ask you the amount you wish me to pay down on the property & what interst you want on the balance I will take the astates Stock at \$85,000 and no claim on the

estate for enny money advanced it at enny time tell me the least you will take as a down payment & what time you will give on the balance & what interst ontill payed & you hold all the property as security I made you a properation in my last but don't know how it will soat you pleas give me yours best turns as soan as you get this and I will arange to meet it on the \$85,000 bases. Yours Truly, Your uncle John. I think the court will aprove of the security & offer for the balence I know your Bondsman would I dont think that it will take me longer then May the first to make some turn So I will get the balance for you.

"On the 21st of January, 1899, Mr. Ramsey, cashier of the Union Bank & Trust Company, of Helena, Mont., wrote this letter to John M. Smith: 'Mr. J. M. Smith, Pasadena, California—Dear Sir: In response to your favor of the 14th, we have wired you to-day that we would make the loan of \$90,000 at 9% interest. We suggested in the telegram, however, that the offer to make would be based upon whether or not you should use the money at once. Unless you could take it right away, we would not, of course, want to carry so large a sum here for any particular length of time, awaiting investment. I really hope you will be able to use it. If you have not telegraphed us at the time this letter reaches you of your conclusion as to whether or not you can use the money, we want to ask you to do so, as the loan is a large one and we might have to loan the funds elsewhere, which we would not do, in anticipation of your possible call for these funds. Yours respectfully, George L. Ramsey, Cashier.'

"That John M. Smith replied by wire to the letter last quoted that he did not want the money is shown by this letter from Ramsey, of date January 23, 1899: 'January 23, 1899. Mr. John M. Smith, Pasadena, Cal.—Dear Sir: We now have your telegram reading, "Do not want money," which is interpreted to mean that you are not in a position to use the money just at the present time. But that you may possibly desire to later. If our surmise is correct, I beg to advise you that we will be glad to figure with you whenever you are ready; but we would not of course want to promise so large an amount of money at any time in the future as it is a considerable sum and we may have to invest it elsewhere. Just at this time we would be very glad to make the loan and it is possible we may be in the same position whenever you get ready. Yours respectfully, George L. Ramsey, Cashier.'

"January 24, 1899, the executor wrote to John M. Smith at Pasadena, Cal., as follows: 'N. B. Smith, County Attorney, Meagher County, White Sulphur Springs, Mont., Jan. 24, 1899. J. M. Smith, Pasadena, California—Dear Uncle: Your letter of the 14th of

Jan. came to hand. I cannot sell the way you indicated. The only way I can sell is for cash down. If you are appointed guardian of the children then I could turn the money over to you. As I told you all the time I have no right to sell on credit. You had better forward me a draft for ten thousand and then I will file the petition, and on the approval of sale by the court the balance can be paid. The offer that I had was a cash down offer. If you but [buy] the stock the company can run on just the same and I can act as one of the trustees as I have some stock in my own name. Give my love to all. Yours, etc.'

"Before the letter last quoted could have been received, John M. Smith wrote from Pasadena to the executor, as follows: 'Pasadena, Cal. Jan. 27. N. B. Smith—Dear Nephew: I received yours of the 20 & I think your plan good I will take steps to get the ten thousand down payment & we will proceed to business at once I will write to the Bank & arrange for the money if you have me appointed guardian for the Children as soon as I sell out I want to "want to," according to original exhibit] invest in Gave bonds all their money and also my one as I don't intend to try to dew enny business after I sell out & I fully intend to let goew this spring I think your suggestion a good one I think I should have the children come out near the schools in first class & the climate is good also good society. Yours Truly, J. M. Smith. Will Wright agree soon.'

"On the same day, to wit, January 27, 1899, John M. Smith wrote from Pasadena, Cal., to Ramsey, this letter: 'Pasadena, Cal. Jan. 27, 99. G. L. Ramsey, Helena, Mont.: I received yours of the 23 in regard to the money I did not want it all at once. I received a letter today from the administrator & now I am in shape to use ten thousand of the money at once. I wish the loan for 6 months with the understanding that I have the privilege of paying it at enny time. I can befour it is dew interest to be at the same for what time I have used the money. You understand I want the money to make a payment on the estate of my brother, the money will be turned over to the administrator N. B. Smith at White Sulphur Springs. If you will you can make out a Note for ten thousand & send it hear to me I will signe & return then I will turn it over to the administrator & close a deal, then I will be the entier oner of the Smith Bros. Sheep Co. Yours respectfully, J. M. Smith.'

"Four days thereafter, to wit, January 31, 1899, John M. Smith wrote to Ramsey, as follows: 'Pasadena, Cal. Jan. 31, 1899. George L. Ramsey, Helena—Sir: I have taken the liberty of drawing a check on your Bank for ten thousand Dollars & 10,000 in favor of N. B. Smith of White Sulphur Springs the administrator of my Brothers

astate I dont think that the money will be caled for onley plasto his cr. I inclose his letter so you can se how we intend to manage so that I don't think we will have to call for enny of the money will leave it as a creddet for when I am apolnted gardeen of the children I will turn it all back to the Bank and pay what intrest has acrued for what time we have the money. hoping this will meat your aprovel I wrote you a letter a few days ago asking you to forward me a Note for \$10,000 for me to signe but I have not received it yet. Hoping you can favor me with my request & oblige, J. M. Smith.'

"On the 2d of February, 1899, Ramsey wrote to John M. Smith, as follows: 'Mr. John M. Smith, Pasadena, California—Dear Sir: We enclose you herewith a blank note for \$10,000, sent agreeable to your favor of the 27th, drawn for six months, with the understanding that you shall have the privilege of taking it up at any time prior to maturity if you like, interest to be charged only for the actual time the money is in use. I also inclose several blank notes, which can be filled up by you at any time the money is needed. With regards, I am, Yours respectfully, George L. Ramsey, Cashier.'

"On February 6, 1899, Ramsey wrote to John M. Smith as follows: 'Mr. J. M. Smith, Pasadena, California—Dear Sir: We now receive your letter of January 1st [31st], and beg to advise that we shall have pleasure in honoring your check for \$10,000 when it shall be presented. We return herewith letter from N. B. Smith. With regards, I am, Yours respectfully, George L. Ramsey, Cashier.'

"On February 6th Ramsey also wrote to N. B. Smith this letter: 'Union Bank & Trust Company of Montana, Helena, Feb. 6, 1899. Mr. N. B. Smith, White Sulphur Springs—Dear Sir: Receiving a letter to-day from Mr. J. M. Smith, advising that he had drawn on us for \$10,000 in your favor, and this letter indicating that he would probably draw further checks, I am lead to suggest that we would be very happy indeed to serve you as a depository, for all or a part of the proceeds of the check, if it is in your plans to leave it on deposit. Yours respectfully, George L. Ramsey, Cashier.'

"On the 8th of February, 1899, John M. Smith wrote to Ramsey, as follows: 'Pasadena, Cal., Feb. 8, 1899. G. L. Ramsey: Yours of the 2 came to hand last night I hear sign & return Note. When I am caled on for the balance I will fill out & send on Notes to cover the balance of the perches. I dont think that one dollar of it will be caled for except as a credet as you saw in my last letter the way N. B. Smith proposes to dew with me. Many thanks for your accomedation. Yours Truly, John M. Smith.'

"On the same day, to wit, February 8, 1899, the executor wrote from White Sul-

phur Springs, Mont., to the Union Bank & Trust Company, as follows: 'White Sulphur Springs, Mont., Feb. 8, 1899. Union Bank & Trust Co., Helena, Mont.—Gentlemen: I don't know yet what disposition I will make of the money that J. M. Smith will place to my credit. I would want a certificate of deposit payable on demand. If my Mr. Smith is appointed guardian this money will be turned back to him. I will make no arrangements about the money at this time as I want to get the estate settled up as soon as possible. Yours truly, N. B. Smith.'

"On February 10, 1899, a certificate of deposit for \$10,000 was issued by the Union Bank & Trust Company and sent to the executor, with a letter of that date, in which the bank said: 'We are this morning placed in possession of your favor of the 8th instant, and having instructions from the First National Bank of White Sulphur Springs to send you certificate of deposit for J. M. Smith's check of \$10,000, we are now having pleasure in handing you same herewith. We note that you do not care to make any arrangements about the money at this time, as it is your desire to get the estate settled as soon as possible.'

"On February 12, 1899, the executor wrote to the Union Bank & Trust Company this letter: 'White Sulphur Springs, Mont., Feb. 12, 1899. Union Bank & Trust Co., Helena, Montana—Gentlemen: Your favor of the 10th enclosing draft for \$100000 [\$10,000] came to hand, I am much obliged to you for your kindness in the matter. I presume I will leave the money with you for the present, as I have no use for it. If my uncle is appointed guardian of the children, then in that case, the money will all be turned back to him as guardian. I think I can wind up the estate within three months. I shall be pleased to meet you when I come to Helena which may be some time in this month. Very respectfully, N. B. Smith.'

"The executor proceeded to make application for the confirmation of the sale of the stock, and engaged, in behalf of John M. Smith, an attorney, named Waterman, to make application for the appointment of John M. Smith as guardian of the children, the return of sale being filed with the court by the executor on the 20th of February, 1899, and three days thereafter, to wit, February 23d, John M. Smith's application for his appointment as guardian of the children was filed by Max Waterman as his attorney. On that same day, to wit, February 23, 1899, the executor wrote to Mrs. Reynolds this letter: 'Office of N. B. Smith, County Attorney, Meagher County. White Sulphur Springs, Mont., Feb. 23, 1899. Dear Aunt: Uncle John intends to apply to be the permanent guardian of the children. I presume you will be notified in the matter. Under our law a child that is fourteen years of age can appoint his own guardian. I think Wil-

He is about that age. If he is that old he can appoint who he wants and the court will confirm the appointment. Under our law a guardian has to be appointed so that the estate can be distributed. The estate will have to go into the hands of a guardian so that it can be invested in bonds. Uncle John's address is 481 Eldorado street, Pasadena, California. He will have to give a bond to the amount of about ninety thousand dollars. I don't think he will make any change in the case of the children, and he can't make any change after the children become 14 years of age for then they can appoint their own guardian. I thought it my duty to mention the fact to you so that you might understand the proceedings and why they were taken. You see I will have the eighty-five thousand dollars and the same must be invested which I could not well do as executor. It was uncle Will's desire that you should look after the children and that desire will be no doubt carried out. I have explained fully because I thought you might worry in the matter. If you have any suggestion to offer would like to hear from you in the matter. Give my love to the children. Yours, etc. N. B. Smith.

"On the 1st day of March, 1899, John M. Smith wrote from Pasadena, Cal., to Mr. Ramsey at Helena, Mont., as follows: 'Pasadena, Cal., March 1, 1899. George L. Ramsey, Helena, Mont.: If enny one deposes \$5,000 to my cr for a option Wire me at once at my expen 481. El Dorado St Pasadena Cal. I cant say jest when I will be cald to turn over the other \$75,000 on the Ranch Deale. the Money will not be drawn out of the Bank but left as a cr to the adminestrater N. B. Smith as soon as I am apolnted gerdean the money will be turnd back to me I pay intrest for what time I have it. Will I have to send my note or can you pay my check by Cr to N. B. Smith for the amout & he leave it in the bank & transfer it back to me? Yous Truely, J. M. Smith.'

"March 10, 1899, the Union Bank & Trust Company wrote to N. B. Smith this letter: 'Union Bank & Trust Company. Helena, March 10, 1899. Mr. N. B. Smith, White Sulphur Springs—Dear Sir: As you are perhaps aware, we had made arrangements with Mr. John M. Smith to advance him the sum necessary to purchase the estate's half interest in the Company. He writes us by letter received to-day, as follows: 'I can't say just when I will be called to turn over the other \$75,000 on the ranch deal.' The amount to be advanced on this transaction is a large one, and we like to figure ahead a little bit, so that we may calculate at all times upon the amounts which we have arranged to advance to our several customers, and I am going to take the liberty of inquiring whether you can tell us at this

time about when the balance will be called for, so that we can figure accordingly. We felt quite a bit complimented at your making us your depository for the payment that has already been made by Mr. Smith, and I assure you we will be happy to serve you in the future as well. Yours respectfully, George L. Ramsey, Cashier.'

"On the 28th of March, 1899, the sale of the stock to John M. Smith was confirmed, and the order of confirmation signed and filed. On the same day, to wit, March 28, 1899, John M. Smith, who was then in California, was appointed guardian of the persons and estates of the minors, the order made and filed, reciting due notice of the application, and directing that letters of guardianship of the persons and estates of said minors be issued to him upon his giving a bond to each of said minors in the penal sum of thirty thousand dollars, and upon his taking and subscribing the oath according to law.

"On the 18th of April, 1899, John M. Smith wrote from Pasadena, Cal., to Mr. Ramsey at Helena, Mont., as follows: 'Pasadena, Cal., Apr., 1899. Mr. G. L. Ramsey, Helena, Mont. I will be in Helena about the 18 of May. I leave hear the 13 then I will be redey, to straten out business sadsactry I hope I will have McNaught send the Stock over to the Bank so it will be thair when I get back I will have N. B. Smith meet me in Helena & then we can fix up every thing sadesactry I drew a check to N. B. Smith for \$75,000 but I don't think he will Send it in ontill I get back. Yous Truely, J. M. Smith.'

"April 24, 1899, the bank replied to John M. Smith by letter, saying: 'We are ready to honor your check for \$75,000 when Mr. N. B. presents the same.' On the 27th of April, 1899, a four months' note for \$75,000 of John M. Smith, bearing 9 per cent. interest, was cashed by the Union Bank & Trust Company, and the proceeds put to his credit, with which the bank paid the \$75,000 check which John M. Smith had given upon it to the executor, and which was by the executor indorsed; such payment being then charged by the Bank & Trust Company to John M. Smith's account. The beforementioned \$10,000 certificate of deposit was at the same time surrendered by the executor, who took from the Bank & Trust Company a certificate of deposit to his order for \$80,000 and deposited \$5,000 of the amounts mentioned to his personal credit, \$2,161.49 of which he paid himself as due him 'on the sale of the property,' and the balance to other persons and for other purposes.

"On the 28th of April, 1899, John M. Smith wrote from Long Beach, Cal., to the executor this letter: 'Long Beach, Cal., Apr. 28, 1899. N. B. Smith—Dear Nefue: I return Pour of attorney [appointing N. B. Smith John M. Smith's attorney in fact] with in-

stictions to indors the stock that I bought of you to the union Bank as colatral security for the payment of the \$10,000 & \$75,000 notes now in the bank. I am booked to leave here the 13 of May for Helena will arrive about the 17 or 18 & want you to meet me in Helena at that time if I should decide to make it later I will wire you to that effect. * * * Yours Truly. Our love to orseal J. M. S.'

"John M. Smith returned to Montana from California on the 18th of May, 1899, and on the 25th of the same month executed his bond as guardian and took the oath of office and filed them with the court. June 1, 1899, the executor filed the final account of his administration of the estate of William A. Smith, and on the 12th of June of the same year a decree, settling the account and distributing the estate, was signed; and on the 14th of June, 1899, placed upon file; the decree providing, among other things: 'That the said executor shall be finally discharged from his duties as such executor upon his filing a receipt for the residue of said personal property duly signed by John M. Smith as guardian of William Smith, Nellie Mae Smith, and Annie Maud Smith, minor children of said deceased, and upon the filing of such receipt his bondsman as such executor shall be discharged.'

"On the same day, to wit, June 14, 1899, the executor paid the entire amount in his hands over to the guardian, John M. Smith, and took his receipt therefor as such guardian; whereupon an order of final discharge of the executor was signed and filed. John M. Smith thereupon went to Helena, Mont., and on the 17th of June, 1899, there used the money of his wards so received by him in discharging his indebtedness to that bank, as far as it would go, giving a new note to the bank for the balance due it from him. John M. Smith was questioned in respect to that matter when upon the stand as a witness in this cause, and gave this testimony: 'Q. Mr. Smith, I believe you said this morning that you had used the money turned over to you by Mr. N. B. Smith when you were appointed guardian to pay your notes at the bank? A. I did. Q. Was the money cash that he turned over to you, or was it certificates of deposit? A. It was a certificate of deposit; it wasn't counted out as cash, but it was a credit certificate of deposit that he turned over to me when I qualified as guardian. He turned it over to me as administrator. I done business with the bank here, and I will refer to them. I cannot remember just about how it was done at the time, but I will refer you to the bank and Geo. L. Ramsey; they are better authority than my memory is, a great deal. Q. I will state, Mr. Smith, for your information, that these two certificates of deposit were produced here by the bank officers. A. The

certificates of deposit were turned over to me as guardian of the children of William Smith by the administrator. Q. And you turned them into the bank in payment of your note? A. I thought I had a right to. Q. But you did? A. I did; I thought I had a right to, because I gave security for the amount. Q. Did you understand when you did that that you were using money of minors for your own purposes? A. I understood I was using it, and that I had a right to; I didn't talk with any one about it. Q. You thought that you had a right to take the money of minors and use it to pay your debts? A. As I had given security for that money, it was the same as though it was in my possession. Q. Do you understand that you, as a guardian, had the right to use guardianship money, the money of minors, to pay your own debts and for your own personal account? A. I may have made a mistake, but I didn't do it with the intention of defrauding anybody; I might have made a mistake. Q. But you knew what you were doing? A. I knew I was paying off my indebtedness. Q. And using the money of minors? A. The money that was given security for. Q. Without asking anybody's permission? A. Without asking anybody's permission. Q. Without consulting anybody? A. I didn't do it with the intention of defrauding anybody; and if I have wronged anybody in any way, I am willing to make it right. Q. Was it your view at that time that you, as guardian, had a right to do such a thing? A. I thought this way: That it was just the same as if I put it in government bonds if I paid the same interest. I acknowledge it may have been wrong; but I didn't do it with the intention of defrauding anybody. I paid off my note, and that is the condition of things just as they were.'

"N. B. Smith, the executor, testified that he did not know until the fall of 1899 what use the guardian had made of his wards' money; that 'in October, or before October,' 1899, the guardian told him. He also testified, in answer to the question, 'Did you report the fact to the judge of the court that the money you had given to John M. Smith, turned over to him as guardian, had been used by him to pay off his own debts?' 'I made no such report whatever.'

"On the 20th of November, 1899, N. B. Smith wrote to Mrs. Reynolds this letter: 'Office of N. B. Smith, County Attorney, Meagher county. White Sulphur Springs, Mont., Nov. 20, 1899. Mrs. D. B. Reynolds, Fayette, Ohio—My Dear Aunt: Enclosed find draft for four charges for looking after and caring for the minor children of uncle Bill, until December 1, 1899. Please sign the enclosed receipt. In regard to uncle John buying the stock will say that he borrowed the money from a bank in Helena to buy the stock. I would not let him have the stock until he had actually paid me the

money. I had the money in my name in the bank until I was finally discharged from my trust. When I made my final account I showed the judge my draft, and my bank account subject to check. I turned over to him the money and took his receipt for the same, and filed the same in court and the same is now a matter of record. The Union Bank & Trust Company furnished his bond and same is perfectly good. He has to pay the bank quite a sum of money for furnishing the same. I think he has to pay about three hundred dollars a year for his bond. The judge and uncle John and I talked over the matter of the use of the money, and the understanding was that he should pay four per cent. for the use of the money until such time as it should be invested in bonds. That is better than we could do with government bonds, and as long as the Union Bank & Trust Company is his surety the same is perfectly safe. Nothing has been said as to the compensation that the court will allow him. I think the compensation would be arrived at in this way; he would be allowed his actual expenses in looking after the children, and a reasonable amount for what time spent in looking after the children and their estate, and the costs connected with the court procedure. In cases of administrators the law fixes the compensation at a certain per cent. based on the value of the estate. I don't think the court would fix his compensation at anything unreasonable. Uncle Bill reposed confidence in me and I think I did the best thing for his children that could have been done in making the sale. Before making the sale I talked with the best business men of the county in relation to the matter, and not one but what told me to close the sale as I had made a great deal. Although I am no longer administrator, yet I shall always look after their interests. * * * Your nephew.

"Both John M. Smith and N. B. Smith gave some testimony tending to show that in 1899 the former had some talk with the judge of the court in which the guardianship matter was pending about his (John M. Smith's) using the money of the minors and paying interest on it at the rate of 4 per cent. per annum.

"In December, 1900, this order was made and entered in the matter of the estate and guardianship of the minors: Probate Minutes, December, 1900, Tuesday, the Eleventh day of December, 1900. 255. Estate and Guardianship of Wm. Smith et al., Minors. Max Waterman, counsel for guardianship, asked to have his name withdrawn as counsel in the case. N. B. Smith asked to have his name entered as counsel instead of the Max Waterman's. John M. Smith, the guardian of said minors, having made application to the court for an order authorizing him to borrow the funds in his hands belonging to said minors amounting to the sum of about \$82,000 at the rate of three per cent.

per annum. The court being fully advised in the premises: It is ordered that said guardian be authorized to borrow said sum of \$82,000 at the rate of 8% per annum, and to so hold the same at said interest until the further order of this court.

"N. B. testified that he did not procure this order to be made, and did not know of it at the time. He admits in his testimony that he thereafter acted as the attorney for the guardian, and prepared the final account of the latter, in which the wards were charged for the money paid by the guardian to the surety company for going on his bond as guardian, and in which, also, the guardian was charged interest on the money of the wards only from December 11, 1900, and at the rate of 8 per cent. per annum, but claims that, as respects the interest, his doing so was an inadvertent mistake.

"In regard to his guardianship attorney, John M. Smith was questioned, and answered, as follows: 'Q. Who was your lawyer in the guardianship matters?' A. Waterman for about a year and a half or two years—I forget about it—but Waterman acted as my attorney. Q. Max Waterman, of White Sulphur Springs? A. Yes; he used to assist me about court matters and get the accounts in and accepted. I didn't know anything about the business myself. Badger made out some first of it, and Waterman acted later on, and after that I had N. B. Smith. He was fairly conversant with everything, and I knew he would do the square business by all the parties concerned, and so I got him after that—after Waterman.

"And there is in the record this letter from John M. Smith to Mr. Ramsey, of date October 15, 1900: 'Martindale, Mont., Oct. 15, 1890 [1900]. Geo. L. Ramsey, Helena: I have sent to the Springs to have N. B. Smith fill out my report as Guardian of Brother William. He is my attorney & keeps my accounts. It will be in in a few days as filed in case. Your truly J. M. Smith.'

"The appellant was but 10 years old when the stock was sold, and became 18 on the 27th of August, 1906. On the 5th of November of the same year, her guardian paid her the amount shown to be due her by his final account, which had been approved by the probate court.

"In the deposition of the complainant, which was introduced on the trial of the cause, she was asked, among other things, what information she had regarding the sale of the stock, when her guardian settled with her in November, 1906, to which interrogatory she answered: 'I knew that the sale had been made, of course; and I knew that Uncle John had been the purchaser. That is all I knew. I knew nothing about the stock company or the incorporation of the company. I received my money, and that was all I knew about it—what he gave me.' Being asked what knowledge she had at that

time regarding the method, validity, and good faith of the sale of the stock, she answered: 'I had no knowledge of its method, its validity, or of its good faith, and knew nothing about their intentions.' In response to the interrogatory: 'What was told you by your uncle, John M. Smith, or your cousin, Napoleon B. Smith, the above-named defendants, about your affairs, and particularly about the sale of said stock?' She answered: 'Nothing was told me by either John M. Smith, or Napoleon B. Smith, concerning the estate in any way, unless I asked it directly; and I never talked to "Poly" about my affairs very much; but I have spoken to Uncle John. He always avoided me, or would talk in an indirect way, and I knew no more when I finished than when I begun. He didn't seem to care about discussing it very much; he didn't want me to think much about it. I once asked him about the difference between his estate and ours, and why he had more than we had, and he said: "Papa owed large sums of money when he died, and they had to be paid off." I also spoke about the 3 per cent. which was paid us on our money, and asked him why he didn't give us more. He said, "It was all he could afford." "Poly" never told me anything at all, except what we had, and, in fact, intimating that we ought to be thankful for what we got.'

"Both John M. Smith and N. B. Smith were questioned in respect to conversations they had with the complainant. John M. Smith gave this testimony: 'Q. Do you remember when the complainant in this suit came out to the ranch at the time of the settlement? A. I don't remember the date, but it was in August, I think. Q. Of what year? A. The 27th of August. Q. Of what year, I said. A. 1906. Q. About how long was she there? A. Well, she wasn't there long. I can't remember; but it wasn't but a few days. Q. What occurred in her matters while she was there? A. N. B. Smith, I think, was down there, and was talking about her loaning money. There was a party wanted to borrow the money. Q. Was there any settlement made with her? A. The settlement wasn't made at the ranch. Q. Where was it made? A. At White Sulphur Springs. Q. Was it made that year? A. Yes, sir. I wasn't present at the settlement. N. B. Smith done the entire business, he and the court, as I recollect it. Q. Do you recall any talk, when N. B. Smith was down at the ranch and the complainant was down at the ranch, about her affairs? A. I cannot recall just what it was; no. They had some talk, but I cannot — Q. Where did they have it? A. In the office. Q. Who was present? A. I don't know as I could say exactly who was present. Q. Was the complainant present? A. The complainant was present. Q. Was N. B. Smith present? A. N. B. Smith and myself. Q. Were you present? A. Yes, sir;

and I think Mr. Flatt, and I think probably my wife was. I don't know whether she was or not. I know at the time she was there it was talked over; but I can't recall the conversation. Q. What was talked over—what was it about generally? A. It was talked about what was best for her to do with the money, as near as I can remember. Q. Was there any talk about the matter of your purchase of the stock of the company? A. I don't remember that that was talked over, but it might have been; I don't remember. Q. Was there any explanation given her of her matters, and how the results and amounts due her were arrived at? A. I think that N. B. Smith gave her full information in regard to it. I think so, as near as I remember; but I cannot recall what it was.'

"N. B. Smith was also questioned in respect to the same matter, and also in respect to a visit of the complainant to Montana in 1904, when she was about 16 years old, as follows: 'Q. Do you recall when the plaintiff came out to Helena in 1904? A. Yes, sir; I recall when she came out here. Q. Where did she stop, if she stayed at all, in White Sulphur Springs? A. Well, she stopped with us a few days. Q. At your home? A. Yes, sir; at our home. Q. With yourself and wife? A. With myself and wife. Q. And during that time, was any explanation given to her of these matters about which you have been testifying? A. Yes, sir. Q. What was done in that regard, you may tell. A. I showed her the final account of myself as trustee or executor, as in my letter I invited her to come out here; that was in 1903. I also showed her the annual account. I said I would be glad to explain the affairs of the estate to her; that I was fixing up the annual account as guardian, and she was there at the time; and when I was at the courthouse I got the final account and the annual account as executor and showed them to her. Q. Where were you when you showed them to her? A. I was there in my office, at the little room at the north; there is two rooms to the office. Q. You said as you had invited her in your letter? A. Yes, sir; in my letter I had invited her. Q. What letter did you refer to, the one of August 13, 1903, that is in evidence here? A. August 13, 1903. Q. In connection with the explanation of the papers in question, did you say anything to her about it, or what did you say? A. Oh, I explained to her about the sale of the property. Q. As you have— Witness (continuing): I explained to her about the sale of the property and the items of the account. Q. Did you tell her the facts about these matters as you have told them here? A. I related the facts to her about the sale and why I sold the property. Q. Well, did you give her information the same as you now tell the matter, or definitely? A. Well, the same information. Probably I didn't go into

it quite as fully; but I explained generally the nature of the transaction and why I sold it, and what I got for it, and showed her the accounts. Q. Do you remember, in 1906, when the complainant came out to Montana? A. Yes, sir. Q. Did you see her at that time? A. Yes, sir. Q. Where? A. I saw her down at the ranch of Smith Bros. Sheep Company. Q. What was she doing down there? A. She had, I think, come back from Germany, if I remember correctly, and was going back. Q. Well, that states where she came from and where she was going to; but I asked you if you knew what she was doing down there on the ranch—what she was there for. A. Well, she was there looking after her estate. I don't remember whether the final account had been put in or not; but we discussed the matter there in our presence there in the office. Q. In the office? Where do you mean? A. The office of Smith Bros. Sheep Company. Q. Who discussed it? A. Well, I discussed it with her and Uncle John. Q. Who was present? A. Mr. Flatt was present. Q. And you discussed what matter? A. Oh, about the sale of the property, and how it had been handled, and how we had tried to manage the property for her.

"In the same connection, a letter written by N. B. Smith to the complainant's younger sister on the 7th of April, 1905, is pertinent: 'N. B. Smith, County Attorney, Meagher County, White Sulphur Springs, Montana, April 7, 1905. Dear Anna: Your favor of the 4th inst. came to hand. Will say presume you have my letter inclosing the \$500. Yes, you will get your money in June. You need be at no expense about attorney's fees. I would like to have you come out and be here when the estate is settled. You can go over all the accounts with me and see where the money has gone. I have taken receipts for everything and have paid out all money by checks. I want you to know everything and then I will feel that I have done my duty. * * * Your cousin, N. B. Smith.'"

John M. Smith, as guardian, settled his final account with the plaintiff on the same basis employed in settlement with Nellie Mae Moore, to wit, 3 per cent. interest on the principal sum held by him from December 11, 1900. The net amount received by the plaintiff was \$23,954.01. The initial amount accounted for was one-third of \$82,170.20, or \$27,390.06. The complaint charges that the sale was "illegal, fraudulent, and collusive," and that "Napoleon B. Smith and John M. Smith colluded and confederated to secure the said property to the said John M. Smith, and to sell the same to him at much less than its real value." The claim that the property was sold at less than its then present value was virtually abandoned by the appellant in this court, and, indeed, such a contention cannot be justified in the evidence. The United States Circuit Court of Appeals decided that "the sale of the

stock of the estate of the deceased Wm. A. Smith and the subsequent misappropriation of the money of the minors by their guardian were parts and parcels of a scheme entered into by and between N. B. and John M. Smith, which was a fraud upon the minors and the probate [district] court." Judge Hunt, who tried the Moore case in the federal District Court, and Judge Stewart, who heard this case in the Meagher county district court, were of the opposite opinion; that is to say, in their judgment there was no fraud, collusion, or conspiracy, and the sale was in all respects legal, regular, and free from fraud.

The additional testimony given by plaintiff in the state court was, in part, as follows: "I became 21 in 1906; had attended school in Missoula, at Shattuck Military School, and at Notre Dame; had had no business experience. The settlement between myself and my uncle was transacted by myself, N. B. Smith, and Mr. Flatt. Mr. Flatt gave me a check at the ranch for a part of the money, and I think N. B. Smith gave me part of it. I saw the expense account and what the money was supposed to have been spent for. I did not question it further than this: That I asked what certain accounts were for, and any account that I happened to pick out and see I would ask what it was. Q. Now, Mr. Smith, what, if anything, did you know at that time in relation to the circumstances and conditions under which your uncle, John M. Smith, became the apparent owner of the stock that had formerly been owned by your father in the Smith Bros. Sheep Company? A. Nothing at all; but one thing I asked my Uncle John while on the ranch—I asked him why it was that our property was sold, and he said that he did not feel that he wanted us children to take a chance, so he bought the property. I knew nothing of the fact that the money that was turned over to him he used to pay off his notes at the bank; knew nothing of his purpose to have himself appointed guardian, so that he might utilize the money to pay off the notes. I knew nothing of the affidavit presented to the court that the purpose was to sell the stock of John M. Smith in conjunction with the stock of the estate, in order that the best price might be realized for it, or that John M. Smith had gotten \$13,000 in two years after father's death, while the executor of father's estate only procured about \$800. Mr. N. B. Smith told Mrs. Reynolds, and she told me, that father's stock had been sold to my uncle." The inventory value of the stock in the Smith Bros. Sheep Company belonging to the estate of Wm. A. Smith, deceased, was \$61,475.

We approach the final determination of the case with the greatest respect for the decision of the learned Judges of the Circuit Court of Appeals. Nevertheless it is our duty to decide it in conformity with the

dictates of our own consciences. In so doing we first consider the situations and characters of the persons accused of having formed a conspiracy to defraud the plaintiff; for, unless such conspiracy existed, the conduct of the parties subsequent to the sale becomes altogether immaterial. The principal actor in the alleged plot is John M. Smith, a man 64 years of age, of comparative wealth, in poor health, who, whatever motive may have actuated his later conduct, appears beyond a doubt to have been sincerely desirous of disposing of his interests in the sheep business and retiring from active participation in industrial pursuits, at the beginning of the negotiations for the sale of the corporate assets. This man, who is now accused of so unnatural a purpose to overreach and defraud his brother's orphan children, had been intimately associated with that brother for many years prior to his death. They lived in a sparsely settled community. John, at least, was illiterate. But by their personal efforts and attention to business they had succeeded in accumulating a considerable fortune. John, on account of the exposure incident to the conduct and management of a large sheep ranch, had contracted a disease which necessitated his spending the winters in California. He died pending this litigation. It is not unnatural to assume, from a contemplation of his life and its environments, that he was provincial in his habits and ideas; that the spirit of thrift and a desire to save characterized his conduct and dictated his actions generally. This is constantly to be borne in mind in passing judgment upon the facts in the case and the successive steps taken looking to a disposition of the property of the parties. It is not unreasonable to assume, from their relationship and association, that some considerable degree of affection existed between the brothers. John was present at the death of William, and the latter's last words were a request that John would look after the interests of his children. The promise was given, and John testified that it had been faithfully kept. It is impossible to read the correspondence of this uneducated man with his nephew, N. B. Smith, and thereafter entertain a doubt that, in the beginning at least, he entertained a sincere regard for the plaintiff and his sisters, was actuated by the highest motives of solicitude for their welfare and a desire to protect and conserve their inheritance. Although he held a controlling interest in the stock of the corporation, he was reluctant to sell his portion alone, for fear the minority interests of the children would suffer if strangers acquired his stock; and in giving an option to McNaught he stipulated that it should be subject to the approval of the executor of his brother's estate.

It must not be forgotten, either, that the corporation was a sort of family affair; and

the record tends to show that no particular surprise was caused by the fact that John M. Smith was in the habit of drawing from its funds such moneys as he had occasion to require. The books of the concern were kept in a very informal and careless manner. In all probability the brothers had that trust and confidence in each other which was engendered and justified among those whose sturdy characters and integrity of purpose alone made it possible for the early settlers to go into the remote regions of the state and, by hard labor and mutual dependence, build homes for themselves and develop the natural resources of the country.

The other alleged conspirator is Napoleon B. Smith, now and for many years a member of the bar of this court in good standing; a man of family, whose character for truth, honesty, and integrity generally is unimpeached, so far as the record discloses.

The property in controversy consisted of stock in the Smith Bros. Sheep Company, of the appraised value of \$61,475, which Judge Armstrong, presiding in the district court of Meagher county at the time, authorized the executor to sell for \$75,000 at private sale, and which actually sold for \$85,000. Several bona fide efforts had been made to effect a sale of the whole plant, without success. Touching the value of the stock held by the executor, he testified that he figured \$75,000 was what it was worth; that he had counseled with Mr. Anderson, Dr. Parberry, Perry Moore, and Len Lewis, representative sheepmen of the county, and they advised him to sell if he could get a fair price, which, in their judgment, would be \$150,000 to \$160,000 for the whole property.

Regarding the methods pursued in the probate proceedings growing out of the administration and guardianship matters shown by the records, it is well to note that White Sulphur Springs, the county seat of Meagher county, was at that time a village of about 450 inhabitants, situated many miles from a railroad. Court was held four times a year, and it is well known to the profession that probate matters were sometimes loosely conducted in those remote country districts; and the people generally regarded the district judge as a repository for all their troubles growing out of the administration of estates, and did not hesitate to seek his counsel and advice wherever they could encounter him, and in the most informal manner.

Coming, now, to the correspondence which is claimed to disclose the conspiracy: As was well said by Judge Ross, who prepared the opinion of the Circuit Court of Appeals: "A sale by John M. Smith of his majority of the stock to a stranger might have worked to the injury of the minority interest of the children of the deceased William A. Smith, so that both John M. Smith and the executor became desirous that both

interests should be sold together." The executor therefore, indorsed upon the option to McNaught "an agreement to immediately make application to the district court to sell the interest of the estate in the property at the rate therein named, in case a buyer could be found. At that time, however, as is also noted in the opinion of the Court of Appeals, the evidence shows that the executor regarded the estimate of John M. Smith as to the value of the property as too high, as did others. Under date of December 14, 1897, John M. Smith informed the executor, by letter (we shall not attempt to reproduce his spelling), that he wanted to sell out, "so as to go some place that I can be with my family and can send Stanley [his son] to school as long as I hold it I can't be satisfied away from it and I don't want to sell out and leave the children's interest in it. I think the coming year will be the time to let go of the entire plant you can at the next term get a permit to sell Wills interest at any time that we can get a fair value for it." He also declared that if he were young he would not care to sell. The executor thereupon, on January 24, 1898, obtained from the district court an order to sell the property for \$75,000, which was \$18,525 more than its appraised valuation. There is no indication in this transaction that the executor had any notion of selling the property for less than it was worth, or, indeed, that he intended to sell it to John M. Smith. On March 19, 1898, John M. Smith asked the executor to name the least price he would accept for the children's stock, saying he understood the latter had authority to sell for \$75,000, but that he thought they could do better than that and get them \$80,000 or \$85,000 clear. Bearing in mind that John M. Smith held his stock at a higher valuation than did the executor that of the children, it is not unreasonable to conclude that he acted in good faith in naming a minimum price, so that the former might have a "margin to work on." On March 25, 1898, the executor expressed a reluctance to "see a sale go by," and indicated a willingness to take \$85,000 for the interest of the estate. He said: "I want to do what is fair by the estate and also by you. I want to see a sale go through in some shape, but at the same time I want to do the best I can for the estate." It does not seem possible that these men would take the trouble to express such sentiments in private correspondence if they were engaged in a conspiracy to defraud their minor relatives. On July 2, 1898, John M. Smith very frankly told the executor that their judgments differed as to the value of the property, and that he would not be satisfied with the same amount received by the estate. He then attempted to induce the executor to take less than \$85,000. In our opinion these negotia-

tions disclose no concert of action or meeting of minds between these two men.

On December 30, 1898, Henry Neill made a cash offer of \$80,000 for the stock of the estate. On the next day the executor informed his uncle, by letter, of this offer. In the course of the letter he said: "I am very anxious to do something with the property as I feel that the estate is going to lose money by holding it. If you will make me a cash offer of \$85,000 you can have the property. I told Neill I would not make such an offer. McNaught writes me that you owe the company \$13,839.35. * * * If you do not take the stock it would be your duty to put your note into the company for the amount. * * * Under our law the only way money can be drawn out of a company by a stockholder is by declaring so much dividend on each share of stock. I do not make the suggestion to hurt your feelings, but you know yourself that such large transaction should not be carried on in such a loose way." It is suggested by the appellant that the expression, "I told Neill I would not make such an offer," discloses some secret understanding between the nephew and uncle at this time. We do not know exactly what was intended by N. B. Smith, but it is fair to presume that if he got his price—what he thought the property of the estate was actually worth—he would naturally prefer a relative to a stranger as a purchaser, provided the former wanted to buy. Or it may be that the only meaning of the words was that the executor told Neill he would not give him an option on the estate's holdings. If Neill had offered more than \$85,000, it might be contended that the executor was willing to sell to his uncle at a lesser price; but there is not any testimony to justify such a conclusion. It will be observed, also, that in the letter the executor respectfully, but firmly, called upon his uncle to pay his indebtedness to the company, which is altogether at variance with the idea that they were conspiring to defraud the children. Note, also, that at this time John M. Smith was endeavoring to obtain an option, so that he might dispose of the whole property to some third person, and also that the price of \$85,000 had been fixed many months prior to the offer of Neill.

What relation did John M. Smith and Napoleon B. Smith bear to the Union Bank & Trust Company and Mr. Ramsey, its president, at this time? Substantially none, so far as the record shows, save that John M. Smith was very friendly with Henry Klein, the vice president of the bank. The first account opened with the bank was on April 11, 1898, by the Smith Bros. Sheep Company depositing \$2,000. John M. Smith's account was opened April 27, 1899, by a deposit of \$75,000. Yet on January 14, 1899, we find John M. Smith openly and frankly inform-

ing Mr. Ramsey in a letter that he was about to buy the estate's interest in the stock of the sheep company, and asking if the bank would loan \$80,000 on the entire stock. This letter also indicates that at that time he had a mind to sell the entire property at the first opportunity, and thought he could make a sale in four or five months. On January 16, 1898, John M. Smith wrote to the executor, saying that he had wired an acceptance of his offer to take \$85,000 for the stock belonging to the estate, stating, also: "If Miles makes a raise I will pay you the \$80,000 that you ask you of course would put it in government bonds if you had it now to make things safe and you be absolutely safe I will give you all of the sheep company stock to hold as security and I will pay the same interest that you would get on government bonds and pay you 3 times per year until I can sell out to advantage then you will be safe and if any one is loser it will be me and I am willing to take the chances there never will be a time but what the whole business will be the best of security for that amount but I don't intend to hold it very long at any time that I can make a good sale I will pay off your \$85,000. I think this the best way for us to close up business you can get up the papers so you are safe and at the same time give me a chance to handle myself to advantage if Miles fails if you did have to pay taxes I will agree to pay it for you so it will leave it just the same as government bonds I could borrow the money of the bank at Helena by giving the same security but I would sooner deal with you and you are just as safe as though you had government bonds." To this letter N. B. Smith replied on January 16th: "I want a clear understanding with you, so that there may be no hereafter in the matter. It is understood that I am to get \$85,000 for the stock and the estate is to have that and not owe the company anything. * * * You had better pay a portion down." On January 22d John M. Smith inquired, by letter, how much the executor wanted him to pay down, and what interest he would want on the balance. He also said that, in his judgment, it would not take longer than May 1st to make "some turn so I will get the balance for you." On January 21st John M. Smith was informed by Mr. Ramsey that he could borrow \$90,000 at 9 per cent. interest. On January 24th the executor wrote to his uncle in part as follows: "I cannot sell the way you indicated. The only way I can sell is for cash down. If you are appointed guardian of the children then I could turn the money over to you. As I told you all the time I have no right to sell on credit." But on January 20th the executor wrote the so-called "lost letter," which is thought by the appellant to have mapped out a fraudulent scheme to defraud him and his sisters. It really makes

very little difference who first proposed the plan. There does not appear to have been anything secret about it. John M. Smith sent the "lost" letter to Ramsey, who read and returned it. On January 27th John M. Smith wrote to the executor: "I think your plan good. I will take steps to get the ten thousand down payment and we will proceed to business at once. I will write to the bank and arrange for the money if you have me appointed guardian for the children as soon as I sell out I want to invest in government bonds all their money and also my own as I don't intend to try to do any business after I sell out and I fully intend to let go this spring I think your suggestion a good one I think I should have the children come out here the schools is first class and the climate is good also good society."

[1] It would serve no useful purpose to again quote any substantial portion of the correspondence. It is very clear to us (1) that neither John M. Smith nor Napoleon B. Smith ever had any intention or design to defraud the children, or to gain any advantage over them. Indeed, in our opinion, all of their correspondence and actions indicate a most praiseworthy solicitude for their material welfare. (2) The property was sold for its full market value, and the children suffered no detriment whatsoever on account of the sale. We believe that both John M. Smith and Napoleon B. Smith acted with the utmost good faith in the premises; that they exercised sound judgment as to the affairs of the children, and constantly had in mind the fact that they were dealing with a trust estate, and ought not to jeopardize it by taking any chances of its being diminished or lost while in their care. With this in mind, it naturally occurred to them that an investment in government bonds was, perhaps, the safest that could be made. At least, they appear to have had such an ultimate investment constantly in mind. (3) We think it equally clear that neither of these parties, at any time pending negotiations for the sale, or at the time of the sale, had any idea that John M. Smith should buy the property as a speculation, or as a permanent investment. We cannot read their correspondence or contemplate their actions and hold the opinion that either of them ever entertained any other notion than that John M. Smith, after becoming sole owner, should dispose of the entire plant at the earliest opportunity, and, if possible, within a very few months after the sale. We think the correspondence shows, also, that they were dealing with each other at arm's length; and we find no evidence that N. B. Smith was dominated by his uncle, or influenced by him to do any act inimical to the interests of the children. It is very easy to select a fragment of one letter here, and another there, and by patching them together draw a partisan conclusion, altogether variant

from the intentions and sentiments of the writers. We do not think that any of the main deductions of fact drawn by the appellant are justified in the evidence. We are also of opinion that John M. Smith's frank and repeated assertion that, in his judgment, the property was of greater value than that at which the executor estimated it in itself shows good faith on his part. (4) Neither have we any doubt that John M. Smith was honestly of the opinion that, considering the large undertaking he would be required to give, and which he eventually did give, for the faithful performance of his duties as guardian, together with his individual responsibility, and the further fact that the entire property would be speedily disposed of and the proceeds invested in government bonds it was a perfectly legitimate transaction to employ the guardianship funds temporarily to take up the indebtedness to the Union Bank & Trust Company, and thus avoid the payment of so large a rate of interest as 9 per cent. per annum on the sum of over \$80,000. He testified that he thought he had a right to turn in the certificates in payment of his notes, because he had given security; that he understood he was using money that was turned over to him as guardian, but thought he had a right to do so, as he had given security, because "it was the same as though it was in my possession." He very frankly stated that he might have made a mistake, but that he did not do so with intent to defraud any one, and if he had wronged anybody he was willing to make it right. He said he thought it was just the same as if he put it in government bonds, if he paid the interest. We cannot believe that this old man was engaged in a fraudulent conspiracy to defraud his brother's orphan children. Moreover, the facts show that they have not been defrauded. Their property was sold to the only purchaser who could be found who was willing to give as much as \$85,000, the full value therefor; and that sum, after deducting expenses of administration, has been fully paid to them.

[2] It may be that upon settlement of the guardian's accounts he should have been required to pay a greater rate of interest, and for a longer period of time, than was actually required of him, but that question is not before us: and, even if it should be answered in the affirmative, the fact cannot, by relation, characterize as fraudulent and void prior transactions, which were in themselves honest and free from actual fraud.

[8] But it is contended that the plan adopted by John M. Smith of using guardianship funds to take up his personal indebtedness to the bank was fraudulent and void as a matter of law. In this connection it may be well to note that, aside from the question of the rate of interest that should have been exacted from John M. Smith as guardian,

the equities of the case are all with the respondents. The appellant is attempting, in a court of equity, to overturn and set aside a purchase of property sold in good faith, for its full value, every dollar of which has been accounted for, because, as he claims, his guardian used his money for a short time, in order to effect the purchase. In fact, this consideration is of no moment whatsoever, so far as the result to the appellant is concerned. Not any of his property was embezzled or withheld. All of it was duly and regularly accounted for when he became of age, and turned over to him. During the latter years of his minority, he took no chances of the sheep industry being affected by adverse legislation; he was fully protected from loss. If John M. Smith had continued to pay interest on the amounts temporarily borrowed from the bank, and had allowed the guardianship funds to lie idle, or if he had sold out the entire holdings of the sheep company, as contemplated, the result to the appellant would have been exactly the same as that brought about by the course of procedure actually adopted. If the appellant had been defrauded in fact, or if he had lost anything by reason of the methods pursued by his guardian, he would be in an altogether different situation; but such is not the case.

[4] It is claimed by the learned counsel for the appellant that in the circumstances disclosed by the record John M. Smith was guilty of larceny, under the provisions of section 8656, Revised Codes, which are as follows: "Every person acting as * * * guardian * * * who secretes, withholds or otherwise appropriates to his own use * * * any money * * * in his possession or custody, by virtue of his office, employment or appointment, is guilty of larceny." This section has no bearing upon the case disclosed by the record. Smith did not secrete or withhold the money of his wards. They were in no wise aggrieved by his method of procedure. Even if we assume that he was not justified in using the funds as he did, and that he thereby technically appropriated them to his own use, yet we must look to the ultimate result of his actions, in order to correctly judge of the effect thereof upon the instant controversy. It is impossible for us to believe that a guardian, who had given ample security to account for all funds coming into his hands, who was personally able to raise the amount thereof on demand, who sincerely believed that he was acting legally and for the best interests of his wards, and who did, in fact, fully account for all moneys paid over to him, should or could be adjudged guilty of a heinous crime in a subsequent suit by one who has not lost or suffered by his conduct.

The particular infirmity in the case of the plaintiff is that he is attempting to avoid the sale for a purely technical reason—

a reason based in facts arising after the sale was complete, and which had no effect whatsoever upon the sale itself. It is claimed that this may be done, because the whole course of action was fraudulent and therefore void; that the subsequent use of his money, pursuant to a prior design to so employ it, vitiated the sale theretofore made. But his premises are defective. Not any fraud in fact was contemplated or practiced in any part of the proceedings; at most a mistake was made by the guardian as to his right to so use the money; and a technical violation of duty on his part may not now be employed to overturn a transaction otherwise regular and legal, by which no one had suffered any injury.

Two very elaborate and able briefs have been submitted by counsel for the appellant. Numerous decided cases are therein cited, all of which we have examined with painstaking care, but not any of which, in our judgment, deal with the exact question here involved. It is contended that equity must frown upon such a proceeding as that disclosed by this record, because it has a tendency to "despoil the weak wards of chancery, even though in the individual case it may have been entered upon with the most praiseworthy motives, and a fair and even liberal consideration for the property was paid." But we conceive that a court of equity, while constantly bearing in mind the beneficent fundamental principles of its jurisprudence, should carefully and conscientiously examine and decide each case upon the particular facts therein disclosed, with a view to doing substantial justice by the immediate litigants, lest, in applying a hard and fast rule to all cases alike, injustice may be done to the parties then claiming the attention of the court. We find no occasion to unduly lengthen this opinion by a review of the cases cited.

In addition to the basic question heretofore considered, several technical points of law are advanced in behalf of the appellant and elaborately argued. Some of them are incidentally disposed of by what has already been said; the others have no merit, in our judgment. The facts of the case are against the appellant.

The judgment and order are affirmed.
Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,
concur.

MANSUR et al. v. CITY OF POLSON et al.
(Supreme Court of Montana. June 17, 1912.)

1. MUNICIPAL CORPORATIONS (§ 407*)—STREET IMPROVEMENTS—ASSESSMENTS—PROCEEDINGS.

Proceedings for the levy of assessments on abutting property for street improvements are purely statutory; the only limitation on the power of the Legislature being that the proper-

ty owner must be afforded an opportunity to be heard, so that his property will not be taken without due process of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1003, 1004; Dec. Dig. § 407.*]

2. MUNICIPAL CORPORATIONS (§ 294*)—STREET IMPROVEMENTS—RESOLUTION—NOTICE—REVIEW.

The contents of a resolution for a street improvement, to be paid for by assessments on abutting property, in so far as they relate to notice of what improvements are contemplated are for the Legislature to dictate; and, so long as a reasonably comprehensive notice is provided for, the courts have no power to declare it insufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 776-788, 791; Dec. Dig. § 294.*]

3. MUNICIPAL CORPORATIONS (§ 450*)—STREET IMPROVEMENTS—RESOLUTION—DESCRIPTION OF WORK—STATUTES.

Rev. Codes, § 3397, provides that whenever it is desired to create a special improvement district for certain municipal improvements the council, by resolution, shall designate the number of such district, describe the boundaries thereof, state the character of the improvement or improvements to be made, and a proximate estimate of the cost, and the time when the council will hear objections. *Held*, that such section does not require a detailed description of the work to be done, or any description, as such, but only a designation of the character of the improvement; and hence a resolution, specifying generally the character of the work contemplated, was sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*]

4. MUNICIPAL CORPORATIONS (§ 340*)—STREET IMPROVEMENTS—RESOLUTION—ALTERATION.

That a city council directed that the graveling of certain streets, the improvement of which was provided for by resolution, be left out of the specifications, and that the notice to contractors inviting bids omitted any reference to graveling, was not a fatal defect, as a violation of the resolution providing for such graveling as a part of the improvement, in the absence of proof that the omission to gravel was a substantial and material change from the original plan as evidenced by the resolution.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 868; Dec. Dig. § 340.*]

5. EVIDENCE (§ 7*)—JUDICIAL NOTICE.

The Supreme Court could not take judicial notice that the omission of graveling of certain streets, for the improvement of which a resolution provided, was a substantial or material change in the original plan.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 6; Dec. Dig. § 7.*]

6. MUNICIPAL CORPORATIONS (§ 456*)—STREET IMPROVEMENTS—ESTIMATION—LEVY—STATUTES.

Rev. Codes, § 3890, provides that whenever the council desires to make improvements and extend the payment for the same over a period of three years it shall enact, by ordinance, that the entire expense of all improvements within each special improvement district, including the cost of street and alley intersections, shall be paid by the entire district; each lot or parcel of land to be assessed for that part of the whole cost which its area bears to the entire district, exclusive of streets, alleys, and public places. *Held*, that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

an improvement, including both front and side streets, and a resolution that each lot or parcel of land within the district should be assessed for that part of the whole cost which its area bore to the entire district, exclusive of streets, alleys, and public place, were not objectionable, because inside lot owners were equally assessed according to area with corner lot owners, though not receiving a proportionate benefit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1094-1099; Dec. Dig. § 456.*]

Brantly, C. J., dissenting.

Suit by C. M. Mansur and others against the City of Polson and others. From an order dissolving temporary restraining order, plaintiffs appeal. Affirmed.

J. B. Densmore and Foot & Foot, all of Kalispell, for appellants. D. F. Smith, of Kalispell, and Walsh & Nolan, of Helena, for respondents.

SMITH, J. This suit was brought to obtain a decree declaring a resolution of the council of the defendant city of Polson, creating a special improvement district, null and void, and to enjoin the defendants from entering into a contract or accepting any bid for the construction of the improvements contemplated by the resolution. The appeal is from an order of the district court, dissolving a temporary restraining order. This court enjoined the defendants from proceeding, pending the appeal.

1. The first contention of the appellants is that the resolution failed to sufficiently state the character of the improvements to be made.

Section 4 of the resolution reads as follows: "That the character of the improvements to be made in said district are hereby described as follows: The construction of concrete sidewalks and curbs on the east side of Kootenai avenue and the east and west sides of Third street within the boundaries of said district. Also the east side of block 4 and along the north side of A street from Kootenai avenue east to the center line of lot 2, block 3, the north side and the south sides of B, C and D streets from Third avenue to the alley between Third street and Fourth street along the west half of the south side of block 19, and the east half of the south side of block 20 and along the north and south sides of B street from Third street west to the alley line in block 11. The construction of a concrete crosswalk on the east side of Kootenai avenue at A street, four concrete crosswalks at the intersection of B street and Third street, four concrete crosswalks at the intersection of C street and Third street, and four concrete crosswalks at the intersection of D street and Third street, and one concrete crosswalk on the north side of E street across Third street. Also the grading, surfacing and graveling of the roadway of

Third street and Kootenai avenue and all of B, C and D streets between Third street and the alley between Third street and Fourth street and all of A street within the boundaries of 'said district.'

Section 8397, Revised Codes, invoked by the appellants, among other things provides that whenever it is desired to create a special improvement district for the purpose of grading, paving, curbing, macadamizing, planting trees, constructing grass plots, and sowing grass seed thereon, constructing sidewalks, sewers, and gutters, in any street, avenue, or alley, the council shall, by resolution, designate the number of such district, describe the boundaries thereof, and state therein the character of the improvement or improvements which are to be made, an approximate estimate of the cost thereof, and the time when the council will hear objections to its final adoption.

In the case of *Levy v. City of Chicago*, 113 Ill. 650, the court said: "The statutes require the city council, when an improvement is to be made by special assessment, to pass an ordinance specifying the nature, character, locality, and description of such improvements." It was accordingly held that an ordinance which did not meet the requirements of the statute was void. This case has been followed in *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *City of Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212; *City of Chicago*, 161 Ill. 199, 43 N. E. 715; *Cass v. People*, 166 Ill. 128, 46 N. E. 729; *People v. Hurford*, 167 Ill. 226, 47 N. E. 368; *Sanger v. City of Chicago*, 169 Ill. 286, 49 N. E. 309; *City of Geneseo v. Brown*, 250 Ill. 165, 95 N. E. 172.

In *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927, the court held that under a statute requiring a city council, before ordering work on a street improvement, to pass a resolution of intention to do so "describing the work," a resolution to improve a street by grading, curbing, and for the construction of "suitable drains and inlets at all intersecting street crossings to carry the surface water of intersecting streets and of Market street into the main branch sewer running along said Market street," was fatally defective, because it failed to specify the number of drains and inlets, or the size of the drains, or the materials of which they were to be constructed, or the kind and character of the inlets. To the same general effect are the cases of *Grant v. Barber*, 185 Cal. 188, 67 Pac. 127, and *Lambert v. Cummings*, 2 Cal. App. 642, 84 Pac. 266.

[1] These proceedings are purely statutory. The only limitation upon the power of the Legislature is that the property of the citizen shall not be taken without due process of law. An opportunity to be heard must be afforded. See *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] The contents of the resolution, in so far as they relate to notice of what improvements are contemplated, are for the Legislature to dictate; and, so long as a reasonably comprehensive notice is provided for, the courts have no power to declare it insufficient.

[3] Our statute does not require a detailed description of the work to be done, or any description, as such. We have no requirement that the "nature, locality or description of such improvements" shall be set forth in the resolution. All that is demanded is that the council shall designate the "character of the improvement." The Legislatures of sister states have seen fit to require a more detailed description of the contemplated improvement, and the courts of those states have very properly held that the council must comply with the statutory command. The fact that our lawmakers did not see fit to declare that the resolution must contain a description of the work, as is the case in Illinois and California, is good evidence that the general character of the work is all that is necessary to be given in the resolution. We think the resolution adopted by the city council of Polson was sufficient in this regard.

[4] 2. The minutes of the city council show this entry under date of March 11, 1912: "Upon motion duly made, seconded and carried, the graveling of the streets will be left out of the specifications." The complaint alleges that this action was taken without notice to the plaintiffs, and the change was a material one. The notice to contractors, inviting bids for the work, omits any reference to graveling the streets. It is contended on behalf of the appellants that the resolution of the council was a contract, and its action in resolving not to gravel the streets was a violation thereof, which rendered it void.

[5] On general principles, the resolution being the sole authority for the construction of a public improvement to be paid for by special assessment, the municipal authorities have no right to change the nature, locality, or character of the improvement as set forth in the resolution. Where the improvement about to be constructed is materially and substantially different from that authorized by the resolution, and the cost of the same is materially increased, the courts will interfere. But a substantial compliance of the work done with that provided for in the resolution is all that is necessary. Hamilton on Law of Special Assessments, §§ 391, 392. It is alleged that the omission to gravel will be a substantial and material change from the original plan as evidenced by the resolution. There is not anything in the record, however, to prove the allegation. The change may be altogether immaterial, for aught we know. It may be that the condition of the streets in question is such that but little, if any,

graveling was contemplated in the first instance, and that the council afterwards considered the matter of graveling of so little consequence that it resolved to omit it altogether. It was for the appellants to prove the materiality of the change in the resolution, and this they failed to do. This court cannot take judicial notice of it. It is altogether possible, also, that the council may provide for graveling in separate specifications.

[6] 3. Among other provisions, the resolution contained the following: "That to defray the cost of said improvements an assessment shall be levied against all the assessable property within said district, and each lot or parcel of land within said district shall be assessed for that part of the whole cost which its area bears to the entire district exclusive of streets, alleys and public places."

It is finally urged upon us that the proceedings of the council were void, for the reason, in effect, that the owner of an inside lot will be obliged to bear the same proportion of expense for improvements on side streets adjacent to a corner lot of the same area as would the owner of the corner lot; and it is said that the benefits to the inside lot owner are disproportionate to those received by owners of other lots in the district. Section 3396, Revised Codes, provides that whenever the council desires to make improvements and extend the payments for the same over a period of three years; it shall enact, by ordinance, that the entire expense of all improvements within each special improvement district, including cost of street and alley intersections, shall be paid by the entire district; each lot or parcel of land within such district to be assessed for that part of the whole cost which its area bears to the area of the entire district, exclusive of streets, alleys, and public places. It will thus be seen that the plan of assessment pursued by the city council of Polson was strictly in accord with the statute. The learned counsel who argued the cause for the appellants states in his brief that it is not insisted that the plan provided by the Code is wrong, "but that the city council has in this case included the side streets, thus forcing the inside lot owner to pay for the additional improvement to the already more valuable corner lots; that it has applied a scheme of improvement which the law did not contemplate, and which is therefore void." It is undoubtedly true that hardship to individuals is sometimes involved in applying the hard and fast rule of the statute to particular cases. It is likewise true that some scheme of assessment must necessarily be enforced to pay for special improvements. The Legislature, in its wisdom, has adopted the "superficial area" rule. This court in *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203, declared that this rule amounts to

a legislative declaration that all property in a proposed district is presumptively equally benefited by the improvement. That case settled the law in this state as to the legality of the rule; and, although the lots there in question were somewhat differently located with reference to the proposed improvement than are those of the appellants, nevertheless the law permits the respondent city council to proceed exactly as it did. We find nothing in principle to distinguish this case from that of *McMillan v. City of Butte*, supra.

The order is affirmed, and the restraining order heretofore issued by this court is dissolved.

Affirmed.

HOLLOWAY, J., concurs.

BRANTLY, C. J. I do not concur in the result reached by my associates in this case.

1. It is true that the proceedings are statutory, and that the only limitation imposed upon the power of the Legislature is that the property of the citizen shall not be taken without due process of law; that is, after notice and an opportunity to be heard. The requirement as to notice, if it means anything, means that the lot owner must have such notice of what the city council intends to do, as will enable him within the very brief time allowed for that purpose, to make up his mind whether he will submit to the imposition which is about to be laid upon him in order to effect the kind of improvement contemplated, or will appear and object. The statute requires the resolution to state the "character of the improvement or improvements which are to be made, an approximate estimate of the cost thereof, and the time when the city council will hear objections to its final adoption." The term "character" is perhaps the most general that could have been employed. Even so, it must be assigned such a meaning as will effectuate the purpose had in view, viz., that the improvement be so described by a statement of the dimensions, materials, etc., that the lot owner may determine whether he will acquiesce, and thus consent, or appear at the appointed time and seek to arrest further proceedings. He ought not to be compelled to suffer the inconvenience incident to leaving his business to seek, and make inquiry of, members of the council or of the officer or officers who will have charge of the contemplated improvement. It is entirely possible that in a given case such inquiry would be futile, because definite information could not be obtained from any one of these officers. Indeed, this was the case here; for the record shows that the city engineer did not submit an estimate of the cost of the improvements or prepare plans and specifications until after the time for making objec-

tions had passed by. Such estimate as had theretofore been made, had been made by the street committee.

The statutes of the different states differ widely as to the character of the information the notice must contain; but even in those jurisdictions in which the most general terms are employed the courts have declared that the contemplated improvement must be so described in the notice or resolution, as the case may be, that the lot owner may gather from it such information as to dimensions, quality, and materials, as will enable him to make a definite objection if he chooses to do so. *Kirksville v. Coleman*, 108 Mo. App. 215, 77 S. W. 120; *Ladd v. Spencer*, 23 Or. 193, 31 Pac. 474; *Schwiesau v. Mahon*, 128 Cal. 114, 60 Pac. 683.

2. The record shows that after the final adoption of the resolution the council eliminated from the specifications the graveling of the streets, thus changing the character of the improvement. In my opinion, this was prima facie a substantial departure from the plan and extent of the improvements proposed in the resolution, and the burden was upon the defendants to show the contrary, if such was the fact. As I read the record, the result was to omit this part of the improvement altogether, and not to leave it to be included in separate specifications.

For these reasons, I think the resolution insufficient to give the council jurisdiction, and that the plaintiffs are entitled to relief.

(32 Or. 479)

GRAF v. WILSON et al.

(Supreme Court of Oregon. Aug. 6, 1912.)

1. GARNISHMENT (§ 13*)—PROPERTY SUBJECT — DEFENDANT'S RIGHTS — CONDITIONS PRECEDENT—EFFECT.

Where a defendant has property or funds in the possession or under the control of, or owing from, a county, and cannot himself institute an action therefor without previous notice or demand, such property, if otherwise subject to garnishment, is not exempted by his failure as to notice or demand.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 21-24; Dec. Dig. § 13.*]

2. GARNISHMENT (§ 105*)—GROUNDS—NATURE OF CREDITOR'S RIGHT.

The general rule is that a creditor has no greater rights against a garnishee than the defendant had before the writ was served.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 216; Dec. Dig. § 105.*]

3. GARNISHMENT (§ 13*)—PROPERTY SUBJECT —EXISTENCE OF RIGHT OF ACTION BY DEFENDANT.

The usual, though not the decisive, test as to whether garnishment will lie, is whether the defendant is able to maintain an action or suit against the garnishee.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 24-24; Dec. Dig. § 13.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Ab. Dig. Key-No. Series & Rep.'s Index.

4. GARNISHMENT (§ 1*)—NATURE OF REMEDY.

Garnishment is purely a statutory proceeding.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. GARNISHMENT (§ 42*)—PROPERTY SUBJECT—CONTINGENT LIABILITY—APPROVAL BY PRINCIPAL DEBTOR.

L. O. L. § 234, subd. 1, provides that, where the garnishee's certificate shows a debt to the judgment debtor then due, the sheriff, on failure of payment on demand, shall levy on property of the garnishee, but that if such debt is not then due he shall sell it according to the certificate, as other property; section 258 provides that any wages or credits in the possession of any county and owed to any person shall be subject to garnishment; and section 3049, relating to Multnomah county, prescribes that no order for the payment of any demand shall be valid in the hands of the original payee or an assignee unless the demand for which it was issued has been first audited and approved by the county auditor. Defendant on June 30th received a time check for labor performed for the county which was assigned on July 8d and presented by the assignee for allowance on July 11th, pending a writ of garnishment served on the county June 30th. *Held* that, in view of the provision as to the sale of debts not due, the debtor's claim against the county at the time of the service of the writ was, not contingent, and hence was subject to garnishment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 83-88; Dec. Dig. § 42.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by E. A. Gray against J. C. Wilson, in which Multnomah County was garnished. From a judgment against it as garnishee Multnomah County appeals. Affirmed.

This is an appeal by Multnomah county from a judgment against it as garnishee. In December, 1909, the plaintiff recovered a judgment against the defendant, J. C. Wilson, in the justice's court, for \$175 and costs, and filed a transcript thereof in the circuit court for Multnomah county. Execution on the judgment was issued out of the circuit court June 25, 1911. On June 30, 1911, a writ of garnishment was served on Multnomah county, by delivering the same to the county clerk. The clerk made a return on the writ as follows: "Nothing now in my hands as county clerk nor was there anything on June 30, 1911." Thereafter plaintiff filed an affidavit, and secured an order of the circuit court requiring the county clerk to appear and be examined under oath, concerning property in the possession of the said garnishee, belonging to defendant Wilson. Allegations and interrogatories were served upon the county by plaintiff, to which the garnishee answered. Issue was joined by the reply. Upon the examination, plaintiff and garnishee agreed upon the facts involved, as follows: "That during the month of June, the defendant, Wilson, worked for the county of Multnomah about 21.75 days

at \$5 per day, earning for said month the sum of \$109.38; that upon the 30th day of June, 1911, one of the road supervisors for said county issued to said defendant a time check for said amount; that on the 3d day of July, 1911, the defendant, Wilson, for a valuable consideration, assigned said time check to the firm of Aldrich & Linnett, which said firm thereafter and, before the 11th of July, 1911, presented said time check to the county auditor of Multnomah county for audit and allowance; that at the time the writ of garnishment was served upon the county clerk, said claim had not been presented to the county auditor for audit and allowance." Upon these facts, the circuit court concluded that the plaintiff was entitled to a judgment against the county of Multnomah for \$109.38.

M. H. Clark and R. E. Dennison, both of Portland (Geo. J. Cameron, Dist. Atty., of Portland, on the brief), for appellant. Sidney Telser, of Portland (Oliver M. Hickey, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It is contended on behalf of the county that the fund was not subject to garnishment, because Wilson's claim was contingent until presented for auditing and allowance. The contention of the plaintiff is that the claim is not contingent, and that the fact that the claim was not presented to the county at the time of, or before, the issuance of the writ, does not affect its character, nor make it contingent, and that therefore it was subject to garnishment.

This one question is involved in the case, namely: Was the debt due from the county subject to garnishment? The sections of the statute applicable thereto are as follows: Section 234, subd. 1, L. O. L., provides that: "If it appear from the certificate of the garnishee that he is owing a debt to the judgment debtor, which is then due, if such debt is not paid by such garnishee to the sheriff on demand, he shall levy on the property of the garnishee for the amount thereof, in all respects as if the execution was against the property of the garnishee; but if such debt is not then due, the sheriff shall sell the same according to the certificate, as other property." The original garnishment law relating to public officers was passed in 1862 (section 259, B. & C. Comp.), and provided that a public officer should not be liable to answer as garnishee. This section was repealed in 1906. See Laws of 1903, p. 199. In 1909, the Legislature of this state enacted section 258, L. O. L., which is as follows: "Any salary, wages, credits, or other personal property in the possession or under the control of the state of Oregon or of any county, city, incorporated town, school district or other political subdivision therein or thereof, or any board, institution, commission, or off-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

son of the same, belonging or owed to any person, firm or corporation whatsoever, shall be subject to attachment, garnishment and execution in the same manner and with the same effect as property in the possession of individuals is now subject to attachment, garnishment and execution; provided, however, that process in such proceedings may be served on the officer by or through whom such salary, wages, credits, or other property is paid or delivered in the ordinary course of business, or on the officer whose duty it is to audit or to issue a warrant for such salary, wages, money, or other personal property; and provided further, that no clerk or officer of any court shall be required to answer as garnishee as to any moneys or property in his possession in the custody of the law."

It is claimed by counsel for the county that the claim of Wilson, the principal debtor in the execution, was contingent by reason of section 8049, L. O. L., which concerns Multnomah county, and prescribes that any demand, except the salary of the county auditor, to be paid out of the treasury, shall be audited and approved by the county auditor, and an order made by the county court or board of commissioners, before the same shall be paid. "No order or warrant for the payment of any demand shall be valid, either in the hands of the original payee or holder, or any transferee or assignee thereof, unless the demand for which the same was issued shall have been first duly audited and approved by the county auditor, as in this act provided."

The principle is announced in *Ware v. Gowen*, 65 Me. 534, and in *Miller v. Scoville*, 35 Ill. App. 385, that when labor contracted for is performed, and there remains only to fix its amount and value, the fact, that by the contract the payment is to be made on an estimate and certificate of the third person, does not constitute a contingency within the meaning of the statute. Clause 4, § 55, c. 86, of the Revised Statutes of Maine, provides that no trustee shall be charged: "By reason of any money or other thing due from him to the principal defendant, unless at the time of the service of the writ upon him, it is due absolutely and not on any contingency." Section 61 of the same chapter provides that "any money or other thing due absolutely to the principal defendant, may be attached before it has become payable; but the trustee shall not be compelled to pay or deliver it before the time appointed therefor by the contract." It was held that the phrase "due absolutely and not on a contingency" was applicable to the past earnings of a party, payable in the future on the estimate and certificate of a third person. See, also, *Cutter v. Perkins*, 47 Me. 557.

In *Holbrook v. Waters*, 19 Pick. (Mass.) 354, it was held that the interest of a hus-

band in a legacy according to his wife during the coverture was subject to be attached in the hands of the executor, at the suit of a creditor of the husband, before a decree of distribution.

In *Webster v. Wagon Co. v. Peterson*, 27 W. Va. 314, at page 334, the court, in commenting on the views expressed by Mr. Waples, in his work on Attachment and Garnishment, c. 6, close of section 4, p. 218, said: "There may be deduced from these and other cases other reasons than those assigned by Waples, why, when a defendant has property or funds in the hands of another, though it may be under such circumstances that he cannot institute a suit for it without previous notice or demand, such property or funds will never be exempt from garnishment, merely because the defendant has not given such notice or made such demand." There are circumstances under which the garnishee will be liable, though the defendant could not immediately recover of him: (1) Under some statutes, when a debt is not yet due; (2) when notice on the part of the defendant is a prerequisite to recovery.

[1] Where the defendant has property or funds in the possession or under the control of, or owing from, a county, under such circumstances that he cannot institute an action therefor without previous notice or demand, such property or funds, if otherwise liable to be subjected to garnishment, cannot be exempt for want of such preliminary action on the part of the defendant; for, if so, he might foil the thrust of the creditor by purposely avoiding the giving of the notice or the making of the demand.

[2] The general rule is that the creditor has no greater rights against the garnishee than the defendant had before the writ was served; that he steps into the shoes of the defendant and prosecutes for him in order that the credit or property of the latter may be subjected to the payment of such judgment as may be obtained against him. Here is a reasonable exception to the rule, so manifestly just that the opposite course, as is clearly seen, would defeat the ends of justice. Waples on Attachment & Garnishment, pp. 217, 218; *Rood on Garnishment*, § 46; *Keene v. Smith*, 44 Or. 525, 527, 75 Pac. 1065.

[3] It is not a decisive test, though a usual one, that the principal defendant be able to maintain an action or suit against the garnishee, in order for garnishment to lie. *Whitney v. Munroe*, 19 Me. 42, 44, 36 Am. Dec. 732; *Ham v. Peery*, 39 Ill. App. 341, 342, 343; *Bank of Montreal v. Clark*, 108 Ill. App. 163, 168.

[4] Throughout the United States, garnishment is purely a statutory proceeding, and its operation is controlled by statutory authority. *Drake on Attachment* (7th Ed.) § 451.

[5] Referring again to our statute, it will be observed from section 224, L. O. L., that, "if such debt be not then due," it should be sold as other property; therefore in such case no judgment is taken against the garnishee. The requirement that the claim of Wilson against Multnomah county should first be presented and audited, would, at the most, only require the plaintiff, after the claim was sold, upon execution to present it for auditing and allowance. According to the stipulation of the parties as to the facts, Wilson had performed the labor and was entitled to the amount of wages named. Nothing further remained for him to do to make the liability of the county complete, except the presentation of the claim for auditing and allowance. This requisite, according to the rules above mentioned, would not exempt the debt from garnishment. Especially should this rule be invoked under our statute which plainly provides that wages owing to any person from any county shall be subject to garnishment and execution. Any other rule would render the legislative decree nugatory or of little avail. It would be useless for plaintiff to wait until the claim was presented or paid. If he must, the ends of justice would often be defeated. Wilson's claim against the county at the time of the service of the writ was not contingent within the meaning of the rule. Counsel for defendant cite and rely upon Case v. Noyes, 16 Or. 329, 332, 19 Pac. 104. It should be remembered that section 258, L. O. L., which changed the law in respect to garnishment, was not in force when that opinion was rendered. It is urged that it would be an inconvenience to the public to subject such claims due from a county to the process of garnishment; but that is a legislative question. It is a simple matter

for county officers, when such proceedings are taken, to defer payment to the judgment debtor and make certificate of the facts in response to the garnishment. This is required of persons, and the statute subjects counties to the same provisions.

It follows that the judgment of the lower court should be affirmed, and it is so ordered.

(87 Kan. 794)

In re WASHINGTON.

(Supreme Court of Kansas. June 4, 1912.)

In the matter of the disbarment of W. B. Washington. On application for reinstatement. Reinstatement ordered.

M. B. Nicholson and Lee Monroe, for respondent.

PER CURIAM. The court having heretofore ordered that within a certain period of time the respondent herein could, upon compliance with certain conditions placed by the court upon the making of the same, present a motion for reinstatement as an attorney and counselor at law at the bar of this state, and it appearing to the court that the respondent herein, W. B. Washington, has complied with the order and judgment of this court in this disbarment proceeding, and that he now appears before said court, by M. B. Nicholson and Lee Monroe, his attorneys, with proper showing and recommendations for reinstatement, and the court being fully advised in the premises, does now order that upon his appearing personally before the court and taking and subscribing to the oath prescribed by law, and from thenceforth, said W. B. Washington, respondent herein, be reinstated as a member of the bar of this state in good standing as an attorney and counselor at law, with permission to practice law before any and all courts in the state, the judgment of disbarment heretofore rendered notwithstanding.

The oath was taken and the roll signed June 17, 1912.

GRANT v. LILIENTHAL.

(Supreme Court of Washington. Aug. 30, 1912.)

CONTRACTS (§ 322*)—CONSTRUCTION CONTRACTS—PERFORMANCE—EVIDENCE.

In an action for compensation under a subcontract to grade a street, evidence held to sustain findings that plaintiff completed all the work called for by his contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534, 1542, 1754, 1772, 1768, 1801, 1802, 1804—1808, 1815, 1816; Dec. Dig. § 322.*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by A. E. Grant against H. L. Lilienthal. Judgment for plaintiff, and defendant appeals. Affirmed.

Burcham & Blair, for appellant. Oullen & Lee, of Spokane, for respondent.

MORRIS, J. Action to recover balance claimed to be due under a subcontract to do certain work connected with the grading of a street. Appellant obtained a contract from the city of Spokane to grade, curb, and lay sidewalks along what is known as Syringa road. He sublet a part of this contract to respondent, and the difference between them is as to what work was included in this subcontract. The court below found in favor of respondent and sustained his contention.

The contract between the parties hereto reads: "All of the grading necessary for the grading of Syringa road from the center line of Highland boulevard to the center line of Overbluff." The prices for the work to be done are also given as: "solid rock excavation, one dollar per cubic yard; loose rock excavation, fifty-five cents per cubic yard; earth excavation, thirty cents per cubic yard; excavating for curbs, eight cents per lineal foot." Contending that he had completed his contract, respondent ceased work, and, not obtaining what he claims to be due him, he brought this action. Appellant contends that, subsequent to respondent leaving the work, he was compelled, under his contract with the city, to do the following work at a cost of \$535.28, which work was properly included within respondent's contract and should have been done by him: Filling up the portion of the parking strip between the sidewalk and the curb; filling in back of sidewalk; raking off the larger stones; crowning the street. Here we have a plain question of fact as to whether or not respondent completed all the work called for by his contract. Some of the witnesses, competent to determine the meaning of the technical expressions used in the contract and the amount and character of work called for, say he did; others, equally competent, so far as we can observe from the record, say he did not. We are inclined, after reading the evidence, to agree with the lower court that its weight and preponderance are with respondent.

125 P.—61

The assistant city engineer in charge of the work testified that he set stakes, with blue chalk marks on them, to indicate to the grading contractor the final line of the grade. The evidence shows that respondent graded up to the blue chalk marks. Other evidence is to the effect that these blue chalk marks, placed on stakes driven at each side and in the center of the roadway, indicated to the contractor the finish line of his work, and when the grade is as indicated by the blue chalk marks it is finished. This testimony is ample to sustain the findings, and they will be sustained.

Judgment affirmed.

FULLERTON, PARKER, CHADWICK, and GOSE, JJ., concur.

NYE v. MANLEY.

(Supreme Court of Washington. Aug. 21, 1912.)

1. APPEAL AND ERROR (§ 966*)—CONTINUANCE (§ 7*)—REVIEW—DISCRETION.

The granting of a continuance rests within the trial court's sound discretion, exercise of which will be disturbed only for abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966; Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7.*]

2. CONTINUANCE (§ 19*)—ABSENCE OF DEFENDANT.

In an action on notes, it was not an abuse of discretion to refuse a continuance beyond October 9th, requested by defendant's counsel on account of defendant's absence in Alaska, where, on June 24th, the case was set for trial September 28th, and various continuances were granted, and where defendant failed to advise his attorney as to his whereabouts, so that he could be reached by letter or telegram within a reasonable time.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 41, 43—48; Dec. Dig. § 19.*]

3. NEW TRIAL (§ 95*)—GROUNDS—MERITORIOUS DEFENSE.

Existence of a meritorious defense or cause of action is no ground for new trial after judgment has been taken in the absence of a party, if he has failed to use reasonable diligence to present the same at the former trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 190—194; Dec. Dig. § 95.*]

Department 2. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Roy V. Nye against F. G. Manley. Judgment for plaintiff, and defendant appeals. Affirmed.

Kerr & McCord, for appellant. Hughes, McMicken, Dovel & Ramsey and J. B. Joujon-Roche, all of Seattle, for respondent.

ELLIS, J. This action was brought to recover the amount alleged to be due upon two promissory notes executed and delivered by the defendant to the plaintiff, and also to recover the amount alleged to be due to plaintiff upon a certain written contract between plaintiff and defendant.

The answer set up in defense lack of consideration, fraud, duress, coercion, intimidation, and other unlawful means, alleged to have been used by the plaintiff to induce the execution and delivery of the notes and contract.

On June 24, 1911, the case was set for trial on September 26, 1911, before Hon. J. T. Ronald, one of the judges of the superior court for King county. At the time the case was set for trial, the defendant was in Alaska, and had not returned to Seattle on the date set for trial. Upon application of his attorney, the cause was continued to October 5th, and on that day again continued to October 6th, when, on application supported by affidavits of his attorney, the cause was further continued to October 9, 1911. At that time, the defendant still being absent, application for a further continuance was made. This was resisted by the plaintiff, and was denied by the court. The defendant thereupon applied for a change of judges, alleging disqualification on the part of Judge Ronald to try the cause on the ground of prejudice against the defendant and his attorney. The change was granted, and in the afternoon of the same day the case came on for hearing before Hon. H. A. P. Myers. The application was renewed upon the same grounds stated in the affidavits presented on the former application and an additional statement of counsel. Further continuance was denied. The cause was tried to a jury, the defendant introduced no evidence, and the court directed a verdict for plaintiff. The defendant moved for a new trial. The motion was overruled, and judgment was entered upon the verdict. The defendant has appealed.

[1, 2] Appellant's first contention is that the trial court abused its discretion in declining to grant a continuance when the case was finally called for trial.

The first affidavit for continuance made by the appellant's attorney stated, in substance, that in May or June, 1911, he was employed by the defendant as his attorney; that he entered into negotiations with the plaintiff looking to a settlement of the case; that the plaintiff offered to accept a specific sum in settlement, provided the money was paid immediately, to which the defendant agreed, but there was unavoidable delay in making the payment; that the defendant was then at Iditarod, Alaska, and it was difficult to communicate with him; that the affiant shortly thereafter went East and returned some time in July, and in August he was advised that the authority to settle and arrange for payment of money in settlement had been delayed through no fault of the defendant; that it developed that settlement could not be made; that the affiant immediately attempted to communicate with the defendant, but was unable to reach him by letter or by wire; that the affiant was informed by the defendant's brother-in-law that the de-

fendant would reach Seattle between the 5th and 15th of October, 1911; that, so far as affiant was advised, the appellant did not know of the setting of the case for trial; and that he was the most important witness for the defense.

In a second affidavit the attorney stated that during the latter part of August, 1911, he was for the first time advised that the case had been set for trial; that he immediately advised respondent's then attorneys, Wardall & Wardall, that it would be impossible for appellant to try the case at that time, and he would be compelled to move for a continuance; that he asked respondent's attorneys to ascertain whether their client would then accept in settlement the sum which he had agreed to accept in June, and, if not, whether the case could be continued to the latter part of October; that affiant was advised a day or two later that the respondent would not accept the offered settlement, and that respondent's attorneys stated that they would telegraph respondent and ascertain whether he would agree to the continuance; that affiant received no further information till a short time before the case was set for hearing. The affidavit then again set forth the importance of appellant's presence at the trial, and stated that the affiant did not then know his address in Alaska, or where he could be reached by letter or telegram, but had been advised by the appellant when he left Seattle in May that he would return in October, 1911, and affiant had then told him he thought the case would not be reached for trial till the latter part of October.

The respondent, in his affidavit contesting the continuance, among other things, stated: "I had some negotiation with Mr. E. S. McCord, one of the attorneys for the defendant, looking to a settlement of said cause. The said E. S. McCord was advised by me that I would accept a certain sum in settlement of said cause, provided said sum was paid not later than June 3d. Said sum was not paid at that time, and I then abandoned my negotiations; and the said E. S. McCord well knew upon that date that all negotiations looking to a settlement were terminated. The next day, and on June 4, 1911, I accepted the position of Assistant United States Attorney for the First Division of Alaska, and shortly afterward proceeded to Ketchikan, Alaska, where I am now stationed in the discharge of my duties as such officer. Shortly after accepting said position, I arranged for a leave of absence to enable me to come to Seattle to attend to the trial of said cause, and to prepare for the same, upon the date said cause was set, as aforesaid; and I secured from the Department at Washington, D. C., and my superior officer a leave of absence, which entitles me to remain at Seattle for the trial of said cause for about 10 days beginning

September 21st, and no longer, as I am at present advised. I further state that since the said 3d day of June, 1911, there have been no negotiations for settlement, and no negotiations at all between the said defendant, or any one on his behalf, and myself, or any one upon my behalf, and during all of said time the said defendant, or his representatives, have been advised that all negotiations were abandoned, and that said cause was to be tried upon the day it has been set, or as soon thereafter as it could be reached. I further state, as a matter within my own knowledge, that there is and has been during all the time since June 3, 1911, telegraphic and mail communication between the city of Seattle and Iditarod, Alaska; that during all of said time the said defendant, F. G. Manley, has been at or within 10 miles of Iditarod, Alaska, at which point he might have been communicated with at any time."

One of the respondent's attorneys also made an affidavit as follows: "That he is one of the attorneys for the plaintiff in the above-entitled action; that on the 8th day of August, 1911, Mr. McCord, of counsel for the defendant, called affiant up by telephone and offered eight thousand dollars (\$8,000.00) cash to settle the case, and also stated that Manley at that time would not attend trial; that on the said 8th day of August, 1911, affiant communicated with plaintiff, for the purpose of ascertaining whether the plaintiff would accept said offer; that plaintiff and affiant exchanged telegraphic messages with each other as to offer of settlement; that plaintiff notified affiant that he would not accept the said offer, and that plaintiff expected the cause to be tried upon the day named as the day of trial, and upon receiving said information from plaintiff affiant, on the 9th day of August, 1911, quoted plaintiff's telegraphic reply refusing the said offer to Mr. McCord, and then and there notified him to telegraph, if necessary, to Manley, in order to get him out here in time for trial on, to wit, September 26th, informing him that the cause had already been delayed too long, and that Mr. Nye would be here on the date set for trial; that Mr. McCord thereupon replied that he would make every effort to get Mr. Manley here for trial; but feared that said Manley would be unable to reach here before the 1st of October."

It is the settled law of this state that the granting of a continuance is a matter resting within the sound discretion of the trial court, and that its refusal to grant a continuance will not be reviewed, except for abuse of that discretion. *Juch v. Hanna*, 11 Wash. 676, 40 Pac. 841; *Warehime v. Schweitzer*, 51 Wash. 899, 98 Pac. 747.

"A stronger case for a continuance on account of the absence of a witness must be made, if that witness is a party to the action, than would be required were he a third

person, unless the case presents some peculiar feature from which some material injustice to the party's rights would result in case of trial without postponement. It is the duty of a party to be present at the trial of his own cause, and his absence will, as a general rule, be considered as his own peril. Especially is it proper to refuse a request for a continuance where it is not known where the party is, or the cause of his absence, where the evidence proposed to be given could not affect the result of the trial, or where he has been guilty of gross negligence." 9 Cyc. pp. 118, 114.

Under all of the facts and circumstances appearing in the affidavits presented in behalf of both parties, we cannot say that there was an abuse of discretion in the refusal of a continuance when the case finally came on for trial. While the affidavits of the appellant's attorney may be held sufficient to exonerate the attorney from blame, they are not sufficient to excuse the appellant himself. The case was an important one, involving a large sum of money. In his own interest, he should have kept his attorney continually and particularly advised of his whereabouts, so that he could be reached by letter or by telegram within a reasonable time. The circumstantial affidavit of the respondent stated that during all the time from June 3, 1911, till the trial there was telegraphic and mail communication between Seattle and Iditarod, Alaska; that during all of that time the appellant was at or within 10 miles of the latter place. This is not controverted. From the affidavit of the respondent's attorney, it appeared that on August 9, 1911, counsel for the appellant was advised that the plaintiff had refused the offer of settlement for \$8,000. The cause was not finally tried until October 9th. Had the appellant observed reasonable diligence in his own interest and kept in touch with his attorney, he could have been advised of the date of trial in time to attend. It is true that in many respects the affidavits presented in behalf of the parties, respectively, were contradictory; but those of the respondent and his attorney were the more circumstantial and exact. Moreover, the appellant must have known that the case had not been settled by reason of the fact that he was not advised of the payment of the money. From a careful consideration of the whole record, we cannot say that the trial court was not justified in refusing the continuance.

[3] It is next urged that a new trial should have been granted. It is manifest that, if there was no abuse of discretion in refusing the continuance, there was none in refusing a new trial. The affidavits in support of the motion for new trial, in addition to the things set out in the affidavits for the continuance, merely detailed the evidence which the appellant and his witnesses claim would have

been adduced, had the continuance been granted. It is argued that they show a meritorious defense. Under the circumstances, this is not sufficient ground for a new trial. It is not the law that by showing a meritorious defense or cause of action, which, by the exercise of reasonable diligence, might have been presented at the trial, the failure to exercise that diligence and present the evidence at the trial may be overcome. Such a situation certainly presents no stronger reason for a new trial than the claim of newly discovered evidence, which the trial court has found could have been discovered and produced at the trial by the exercise of reasonable diligence.

The judgment is affirmed.

FULLERTON, MORRIS, and MOUNT, JJ.,
concur.

**FINLEY v. WESTERN EMPIRE INS. CO.
OF WASHINGTON.**

(Supreme Court of Washington. Aug. 23,
1912.)

1. INSURANCE (§ 136*)—ACCEPTANCE OF POLICY.

Plaintiff, to whom a policy was issued by defendant to take the place of one of another company, which it desired canceled, is not shown to have refused to accept it, but rather to have accepted it and held it subject to his legal rights, where, on being consulted by defendant after a fire as to whether he intended to make a claim against it, he, after stating what he would have done if consulted before it was issued, stated that he intended to hang onto all the policies.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.*]

2. INSURANCE (§ 141*)—ESTOPPEL TO ASSERT NONACCEPTANCE.

A company, having issued and delivered a policy, and known of the destruction of the property when the loss was adjusted, and accepted proof of loss and participated in an adjustment which proceeded on the theory of it and other policies being valid, and issued its check for its share, admitted liability, and so was estopped to assert that there had been, without its knowledge a refusal to accept the policy, so that it was not in force.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 75, 253-262; Dec. Dig. § 141.*]

3. INSURANCE (§ 229*) — CANCELLATION — WAIVER OF NOTICE—CONTRACT FOR NEW INSURANCE.

The requirement in a fire policy of five days' notice of cancellation, being for the benefit of insured, is waived when, within that time, on notice of desire to cancel, insured's agents, authorized to keep the insurance up to the amount then on the property, contract for other insurance to take its place; and the old policy then ceases to be in force—the agreement to take the new policy being in legal effect an acceptance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.*]

Department 1. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by J. D. Finley against the Western Empire Insurance Company of Washington.

Judgment for plaintiff; defendant appeals. Affirmed.

Charles P. Lund, for appellant. W. W. Zent and D. W. Henley, of Spokane, for respondent.

CHADWICK, J. On August 20, 1910, plaintiff held three policies of insurance covering a certain stock of lumber. These policies were written by the New Brunswick, Glenn Falls, and Fireman's Fund Insurance Companies; each policy being for the sum of \$2,500. The New Brunswick Company, being desirous of canceling its policy, notified its local agents at Spokane to notify the assured of its intention. Instead of acting under the terms of the policy, which called for a five-day notice, the agents, Rogers & Rogers, who seem to have been factors in behalf of the insured, as well as the company, immediately set about to secure another contract, in lieu of the one the New Brunswick Company desired canceled. This they secured from the defendant, the Western Empire Insurance Company of Washington, on August 20th. The policy was dated August 22, 1910, but was not actually issued and delivered to plaintiff until the 23d. The property was destroyed by fire on the 21st of August. After the fire, a surrender of the New Brunswick policy was demanded. Plaintiff refused to surrender it, but held both. The loss was thereafter adjusted by an independent adjuster, and the loss apportioned between the four companies. Defendant drew its check for the amount awarded by the adjuster—\$1,233.70—and sent it to plaintiff, but stopped payment thereon prior to its presentment at the bank. Upon plaintiff's motion, the case was withdrawn from the jury, and the court adjudged, as a matter of law, that plaintiff was entitled to recover.

This appeal is prosecuted in reliance upon the assertion that the policy of the appellant was not delivered or accepted by the insured prior to the fire; and therefore there can be no liability. Appellant had no notice of the purpose of Rogers & Rogers to cancel the New Brunswick policy and substitute therefor appellant's policy until after the fire. There were no conditions or limitations attending the contract. It was made in the usual way, and the policy issued in due course, and was made by an attached slip to date from August 20, 1910.

[1, 2] The record hardly justifies the assumption that respondent did not accept the policy of appellant. It shows rather that he accepted it and held it subject to his legal rights in the matter, which, so far as the New Brunswick Company is concerned, were adjudicated in *Finley v. New Brunswick Fire Ins. Co.* (C. C.) 193 Fed. 195. Appellant's agent called on Mr. Finley after the fire, to ascertain whether he intended to make a claim against appellant. He states the sub-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stance of the conversation to be "that if he had been consulted in the matter he would have allowed the New Brunswick policy to have been canceled, on the ground that he had shipped out a sufficient amount of lumber to have reduced its value, so that the \$5,000 would practically cover it, but that he had not been consulted, and had no knowledge of the issuance of the Western Empire policy, nor any knowledge of a requested cancellation of the New Brunswick; but, being that the adjuster had been on the ground, and had adjusted the loss, and had taken into consideration the fact of there being \$10,000 insurance, that he proposed to hang onto all of the policies, as he did not propose to fall between the two stools—that is, between the New Brunswick and the Western Empire." This falls far short of showing a refusal to accept; and, when taken in connection with subsequent events, we think appellant was clearly bound to meet its engagement. It issued its policy, dating its liability from August 20th; it had delivered the policy and knew of the destruction of the property at the time the loss was adjusted; it accepted proof of loss and participated in an adjustment which proceeded upon the theory that there were four valid policies; it accepted an award that relieved it of one-fourth of its liability, and issued its check therefor. These facts are an admission of liability, and clearly estop appellant from maintaining its allegation that "it was without notice or knowledge of the fact that said plaintiff had refused to accept said policy, and that the same was not in force at the time of the loss." 19 Cyc. 803.

[8]. The case of *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65, while seemingly in point, is to be distinguished from the case at bar. That case turned on the fact that dealings between insurance agents with reference to placing a risk, and the writing of a policy to take the place of one which the company desired canceled, were ineffectual to terminate the contract until notice had been given to the assured. Before that was done, the property was destroyed by fire, and it was correctly held that, the liability of the cancelling company being fixed by the destruction of the property, there was no liability on the part of the defendant. Or, as stated, "after the liability of the company has become absolute, notice of their previous election to terminate the risk was of no effect." If notice had been given, and the substituted policy been tendered and accepted, the judgment of the court would, no doubt, have been for the defendant. Here Rogers & Rogers, acting as agents for respondent, secured the new policy in order to effect a substitution, so as to keep the property insured up to \$7,500, which, considering the whole record, we think they were authorized to do. Their act was the act of, and their knowledge was the

knowledge of, the respondent; and the time limit on the notice of cancellation, being for the benefit of the assured, was waived when they contracted for other insurance. The New Brunswick policy had no binding force after August 20th, for the reason that the agreement to take appellant's policy was in legal effect an acceptance of it. In *Ferguson v. Northern Assurance Co.*, 28 S. D. 346, 128 N. W. 125, there was no oral contract for the policy sued on; nor did the assured have notice of the policy. The contract, lacking the element of acceptance, was incomplete, and the court held that a recovery could not be sustained. Other cases are cited by appellant; but they do not militate against the judgment of the trial court.

Affirmed.

GOSE, PARKER, and FULLERTON, JJ., concur.

MORRIS, J. I concur for the reason that this action was brought upon the check. I find no valid defense in appellant to such an action under the circumstances under which it was given. I express no opinion as to appellant's liability had the check not been given and the action brought on the policy.

SEATTLE MATTRESS & UPHOLSTERY CO. v. CITY OF SEATTLE.

ERICKSON et al. v. SAME.

(Supreme Court of Washington. Aug. 22, 1912.)

1. MUNICIPAL CORPORATIONS (§ 465*)—STREET IMPROVEMENTS—ASSESSMENTS.

Seattle Ordinance No. 4165, which authorizes collection from the owner of any subdivision of a lot or tract such portion of a local improvement assessment as is chargeable to the subdivision, applies to a segregation of a tract by subdivision, and not to a segregation of interests, as a leasehold from a fee.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1108; Dec. Dig. § 465.*]

2. MUNICIPAL CORPORATIONS (§ 484*)—STREET IMPROVEMENTS — ASSESSMENTS — PRESUMPTIONS.

In the absence of evidence to the contrary, a finding by a city council that property, not assessed for a street improvement, was not benefited by the improvement will be upheld as presumptively correct.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1137-1139; Dec. Dig. § 484.*]

3. MUNICIPAL CORPORATIONS (§ 487*)—STREET IMPROVEMENTS — ASSESSMENTS — LEASEHOLDS.

A lessee of tidelands cannot complain of an assessment against the fee for a street improvement, if the part apportioned against his interest is equitable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1146; Dec. Dig. § 487.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. MUNICIPAL CORPORATIONS (§ 485*)—STREET IMPROVEMENTS — ASSESSMENTS — APPORTIONMENT.

It was not inequitable to apportion a street improvement assessment against tidelands, two-thirds against the leasehold interests and one-third against the fee, where the lease had about 21 years to run, with a preference right of renewal, and where the lessees enjoy the whole present benefit.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1108; Dec. Dig. § 465.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Street improvement proceeding by the City of Seattle. From a judgment of the superior court modifying an assessment as confirmed by the city council, the Seattle Mattress & Upholstery Company and Oliver T. Erickson and another appeal. Affirmed.

Murphy & Wall, for appellants. James E. Bradford and Howard A. Hanson, both of Seattle, for respondent.

ELLIS, J. This is an appeal from a judgment of the superior court for King county, modifying an assessment, as confirmed by the city council of Seattle, upon certain leasehold interests in the west 120 feet of lots 2, 3, 4, and 5 of block 279, Seattle tidelands. The ordinance, pursuant to which the assessment was levied, provided for the improvement of Fourth Avenue South between Seattle boulevard and Holgate street, together with certain other streets by filling the same. The appellants objected to the assessments, and were accorded a hearing before the city council. Their objections were overruled, and the assessments were confirmed by ordinance. The two appeals were taken from this action of the council to the superior court. The appeals were consolidated for trial. The appellants are owners of leasehold interests in the tideland; the fee being in the state. The assessment roll as originally made and confirmed by the council cast the entire burden of the assessment against these tidelands upon the leasehold interests. Among the objections urged before the city council and made the basis of the appeal to the superior court was the following: "That the tax sought to be assessed against the leasehold interest of your objector in said property is as great as the tax levied upon lots and parcels of land upon the same street, wherein the fee-simple title to the same is in private individuals, and where there is no outstanding leasehold interest or other title."

The appellants urged before the city council a segregation and apportionment of the assessments between the fee and the leasehold interests. The council refused to make the apportionment. On the appeal, after a full hearing, the superior court sustained this objection, and by decree modified the assess-

ments by apportioning one-third to the fee and two-thirds to the leasehold interests, and directed the city council to correct and modify the assessment roll accordingly. From that decision, the appeal to this court was prosecuted.

The appellants contend (1) that the assessments are invalid; (2) that the court had no power to segregate or apportion the assessment between the fee and the leasehold interests; (3) that if the court had such power it has not justly exercised it in this case. We will consider these in their order.

[1] 1. It is urged that the assessments were invalid, because not made in accordance with a city ordinance No. 4165, which authorizes the city treasurer to collect from the owner of any subdivision of any lot or tract upon which an assessment has been or shall be made such portion of the assessment as the city engineer shall certify to be chargeable to such subdivision, in accordance with the provisions of the charter and ordinances in force when the original assessment was made. This ordinance was manifestly not intended as a part of the original proceeding in making the assessment roll, but to provide an easy and convenient mode of segregation for collection of the assessment, where title to a part of a lot or parcel against which the assessment was originally levied as a whole has changed ownership. It was never intended to apply to a segregation of interests, as a leasehold from the fee, but to a segregation of the tract or parcel by subdivision.

[2] It is also urged that the assessment is void, because not made in accordance with the ordinance providing for it, nor in accordance with the city charter. The ordinance provided that the assessment district should have bounds as prescribed by the city charter. The city charter provides that, unless otherwise provided by the ordinance creating it, the assessment district shall extend to the middle of the adjoining blocks. Block 279 of the Seattle tidelands is 660 feet square. The line of the district therefor extended 330 feet back from Fourth Avenue South, which runs along the west side of the block. The lots here in question are 330 feet deep, and extend back to the east line of the district. Only the west 120 feet of these lots was assessed, though all of the west 270 feet was included in the appellants' leaseholds. The remainder of these lots, comprising the east 60 feet, is owned by and included in the right of way of the Oregon & Washington Railway Company and of the Great Northern Railway Company. This 60-foot strip is within the half block from Fourth Avenue South. The appellants contend that the failure to place any of the assessment for the improvement upon this 60-foot strip invalidated the whole assess-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment. There is no complaint because the assessment was not spread over the entire leaseholds, but only that the railroad land was not assessed. The objection before the council was "that some of the parcels of land specially benefited by said improvement, and within said improved district, have not been assessed." The city council, in failing to assess this strip and in overruling this objection and confirming the assessment roll, must have done so upon the ground that, in its judgment, this strip received no benefit from the improvement. Manifestly, if it was not specially benefited, it could not be assessed, whether lying within or without the district. Neither before the council, nor on the appeal to the superior court, was any evidence offered by the appellants showing or tending to show that this strip was specially benefited, either actually as railroad property, or potentially by increasing its value as real estate for any use. While there are many authorities to the contrary, we think that both the better reasons and the more persuasive authorities sustain the view that, in the absence of such evidence, the courts must indulge every presumption in favor of the regularity and propriety of the action of the assessing officer or body. This is a general rule, applicable to all official action. To have any standing here, the appellants should have shown affirmatively that the omitted property was benefited. In the absence of such showing, we must presume that it received no benefit, and was therefore properly omitted.

"Every reasonable presumption is made in favor of the regularity and propriety of the action of public officers. Accordingly, a property owner, who complains of the omission of land from a local assessment, must show affirmatively that such land was benefited by such improvement, and that the omission thereof was improper. The mere fact that certain land was omitted from the assessment is not sufficient to invalidate the assessment, unless the complainant further shows that such property should have been included. The fact that after an assessment has been levied the city confesses in court that certain property is not benefited thereby, and the court accordingly sets aside such assessment as to such property, does not, in the absence of fraud or of a showing that the omitted property was in fact benefited, invalidate the assessment as to the remaining property. The mere fact that contiguous property is not assessed does not invalidate the assessment, in the absence of a showing that such property is benefited, where the assessment is to be levied on property benefited, and there has been no determination that contiguous property has been benefited." 1 Page & Jones, Taxation by Assessment, § 643.

"But counsel seem to regard the mere fact

that the evidence shows the existence of a street railway, which is not specially assessed, as alone sufficient to impeach the commissioners' report. But we are aware of no rule of law which makes the existence of real estate contiguous to an improvement conclusive evidence that it is specially benefited by the improvement. How could the jury apportion special benefits to the street railway company pursuant to section 31 (section 147), supra, without evidence of the extent of such benefits? There is no evidence in the record that this street railway is benefited by this improvement. Appellant might, possibly, have reduced its assessment by proving that the street railway was specially benefited, and the extent of its benefits. But there can be no presumption in that respect in the absence of evidence." Chicago, R. I. & P. Ry. Co. v. Chicago, 139 Ill. 573-580, 28 N. E. 1108, 1110; Culver v. Chicago, 171 Ill. 399, 49 N. E. 573; Rich v. Chicago, 152 Ill. 18, 38 N. E. 255; Holdom v. Chicago, 169 Ill. 109, 48 N. E. 164; Warren v. Street Commissioners, 187 Mass. 290, 72 N. E. 1022; Beals v. James, 173 Mass. 591, 54 N. E. 245; State v. Duryea, 45 N. J. Law, 258; City of Kansas v. Baird, 98 Mo. 215-220, 11 S. W. 243, 562; Kansas City v. Bacon, 157 Mo. 450-473, 57 S. W. 1045.

[3] 2. In support of the second contention, namely, that the court had no power to apportion the assessment between the leasehold interests and the fee, the appellants argue that they have not had the benefit of the judgment of the city council as to how much of the assessment the fee and how much the leasehold interests should bear, and that the court should have remanded the roll, with direction to the council to determine these amounts. But this matter had already been before the council. Upon the hearing of appellants' objections, that body had said that the leasehold interests should bear the whole assessment. The statute governing appeals in such cases (Laws 1901, p. 242) declares that "the judgment of the court shall confirm, correct, modify or annul the assessment in so far as the same affects the property of the appellant." The jurisdiction of the superior court to reduce the assessment upon the leaseholds was invoked by the appellants themselves. The assessment was modified at their instance. Assuming that the owner of the fee could successfully contest the assessment as to the fee, because it was originated by the court, instead of the council, we fail to see wherein that assessment is a matter of any concern to these appellants. If the assessments on their leasehold interests have been reduced to equitable amounts in proportion to the benefits, it is a matter of no moment to the appellants whether the assessment on the fee be valid or not, or whether it is ever paid or not. Whatever may be said as

to the part of the assessment placed upon the fee, there can be no pretense that the court has originated or created an assessment as against the leaseholds. It has merely modified and reduced an assessment already made, so far as the leaseholds are concerned.

The case of *Coast Land Co. v. Seattle*, 52 Wash. 380, 100 Pac. 858, cited by appellants, has no bearing upon the case here presented. There the whole charge was assessed against the fee. The action was brought to enjoin a sale of the leasehold to pay the assessment against the fee. The argument was made that the leasehold alone was benefited, and hence it alone should respond to the assessment. The court said: "Inasmuch as the assessment was not made against its [the land company] interest, but is made upon the entire property, it was not called upon or given an opportunity to contest whether its interest in the property was the sole interest benefited; and it must be given this opportunity before the charge is irrevocably fixed against its interest." However pertinent this language might be as applied to the assessment against the fee in the present case, it is obviously not pertinent as to these appellants. They had their hearing on this very question before the council, and on their appeal to the superior court their assessment was reduced. The appellants had no interest in the assessment of the fee, but only in a reduction of the assessment on their leaseholds. The owner of the fee is not complaining.

[4] Finally it is urged that, if the assessments are valid, and if the court had power to reduce the assessments charged against the leaseholds, the court did not make a sufficient reduction. The leases involved are 30-year leases, and had about 21 years to run when the assessments were made. The question was one of special benefits to be determined on evidence. In the nature of the case, it was not a matter which could be determined with mathematical certainty or exactness. There were almost as many opinions as to the relative benefit to the leaseholds and to the fee resulting from the improvement as there were witnesses. The court heard evidence as to the situation of the property both before and after the improvement. It reduced the assessment upon the leaseholds by one-third. It is argued that, the fill being a permanent improvement, the fee will receive the greater benefit. That, of course, is in a sense true; but the leases provide that the lessees have the preference right of renewal, and it is plain that the leaseholds receive the whole of the present benefit. It seems reasonable that the present market value of the leasehold is relatively much more increased by the improvement than is the present market value of the fee. Upon a consideration of the whole evidence,

we cannot say that it warranted a greater reduction than that made by the court.

Finding nothing in the record to justify a reversal, we affirm the judgment.

MOUNT, MORRIS, and FULLEERTON, JJ., concur.

(60 Wash. 689)

STATE v. BAKER.

(Supreme Court of Washington. Aug. 21, 1912.)

1. INDICTMENT AND INFORMATION (§ 110*)—LANGUAGE OF STATUTE.

An information, charging defendant with attempt to do the precise things recited in Rem. & Bal. Code, § 2418, as constituting robbery, is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. CRIMINAL LAW (§ 1172*)—INSTRUCTIONS—ERROR CURED BY VERDICT.

Error in the concluding clause of the charge, that the information charges the crime of attempted robbery, which includes in it, also, the lesser offense of grand larceny, even if there could have been a misunderstanding, was cured by the verdict, finding attempted robbery.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8128, 3154-3157, 3159, 3163, 3169; Dec. Dig. § 1172.*]

3. CRIMINAL LAW (§§ 368, 424*)—EVIDENCE—ACTS OF ONE OF SEVERAL OFFENDERS.

Where B. and W. attempted to rob P., and, noticing an approaching officer, started to run away, and W. was immediately captured and left with P., while the officer pursued B., with whom he soon returned, W.'s offer of money to P. to be permitted to go, and attempt to escape, while B. was absent, pursued by the officer, were sufficiently closely connected with the crime as to be admissible against B. as part of the *res gestæ*, or, if not, were admissible against her because of the concert of action between her and W. in the commission of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 808, 812, 814, 815, 821, 1002-1010; Dec. Dig. §§ 368, 424.*]

4. CRIMINAL LAW (§ 650*)—EVIDENCE—ILLUSTRATING.

Permitting witness to illustrate on the person of another how he was assaulted is proper, though the illustration can be preserved in the record only by description.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1457; Dec. Dig. § 650.*]

Department 2. Appeal from Superior Court, Spokane County; John D. Hinkle, Judge.

Irene Baker was convicted of attempt to commit robbery, and appeals. Affirmed.

Nuzum, Clark & Nuzum and Geo. H. Armistage, for appellant. John L. Wiley, Robert L. McWilliams, and C. C. Dill, all of Spokane, for the State.

FULLEERTON, J. The appellant was informed against by the prosecuting attorney of Spokane for the crime of attempt to commit robbery; the information, omitting the

formal parts, reading as follows: "Comes now the prosecuting attorney of Spokane county and charges the said defendants as follows: That they, Irene Baker and Bessie White, said defendants, and each of them, on or about the 5th day of December, 1911, in the county of Spokane and state of Washington, then and there being, did then and there unlawfully, feloniously, willfully, and with force and violence, attempt to take from the person and immediate presence of one John Pharo, and against his will, certain personal property, to wit, a pocketbook and ten dollars in money, bills and currency of the value of ten dollars; said pocketbook and money then and there being in the possession of and belonging to said John Pharo."

The appellant interposed a demurrer to the information, based on the ground that it does not state facts sufficient to constitute a crime. The demurrer was overruled by the court; whereupon the appellant entered a plea of not guilty to the information, and on the issue thus joined a trial was had before a jury, which resulted in a verdict of guilty as charged in the information. The appellant was thereupon adjudged guilty by the court and sentenced to a term of years in the penitentiary. This appeal is from the judgment and sentence.

[1] The appellant first contends that the information does not state facts sufficient to constitute a crime. It is said that, to constitute an attempt to commit a crime, there must appear to have been more than a mere design or intention to commit it, and hence the physical acts done towards the commission of the offense must be set forth in the indictment or information charging the offense, so that the court may know whether the law has been violated, and that the accused may know to what he must make answer. Cases are cited from other jurisdictions which hold with this contention, and seemingly hold that informations and indictments in the form of the one in question does not sufficiently comply with the rule. *Hogan v. State*, 50 Fla. 86, 39 South. 464, 7 Ann. Cas. 130, and note 140.

But, without reviewing these cases specially, we think that, under the liberal rules of criminal pleading enjoined by our statute, the information is sufficient. Robbery is defined by the statute (Rem. & Bal. Code, § 2418) as follows: "Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. If used merely as a means of escape,

it does not constitute robbery. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear. Every person who shall commit robbery shall be punished by imprisonment in the state penitentiary for not less than five years." An attempt is defined (Id. 2284): "An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime."

A comparison of the charge contained in the information with the language of the statute will show that the information follows the language of the statute and charges the defendant with attempting to do the precise things which are recited in the statute as constituting the crime. This is a sufficient charge under the general rules governing criminal pleadings; and convictions for the crime of robbery itself have been sustained by this court, where the overt act constituting the crime was charged in language the same as or similar to that used by the pleader in the present instance. *State v. Johnson*, 19 Wash. 410, 53 Pac. 667; *State v. Smith*, 40 Wash. 615, 82 Pac. 918, 5 Ann. Cas. 686; *State v. Brache*, 63 Wash. 396, 115 Pac. 853.

If it be a sufficient charge of the overt act constituting the offense, when charging the crime of robbery itself, to say that the defendant "did then and there unlawfully, feloniously, and willfully, and with force and violence, take from the person of" another certain described personal property, the personal property of that other, it ought to be a sufficient charge of the overt act, when charging an attempt to commit the crime of robbery, to charge the overt act in similar language. We think it is, and that the information in the present case is not faulty in the respect to which complaint is made. *State v. Womack*, 4 Wash. 19, 29 Pac. 939; *State v. Wright*, 9 Wash. 96, 37 Pac. 313; *State v. Levan*, 23 Wash. 547, 63 Pac. 202; *State v. Davis*, 43 Wash. 116, 86 Pac. 201; 1 Bishop, Cr. Pro. § 611.

[2] In the opening statement of his charge to the jury, the trial judge used this language, namely: "The information in this case charges the defendants, Irene Baker and Bessie White, with the crime of attempted robbery, which includes in it, also, the lesser offense of grand larceny." It is objected that the concluding clause of the statement is error, because it is manifest that the charge of grand larceny cannot be included in a charge of attempted robbery, whatever the fact may be as to its being included within a charge of robbery itself. The statement is doubtless subject to the criticism the appellant puts upon it; but we cannot think it reversible error nevertheless. The statement was clearly an inadvertence on the part of the trial judge, and the jury

could not have understood it otherwise. At any rate, no finding was made by them based on the instruction, and no prejudice resulted to the appellant therefrom. The error therefore did not enter into the verdict, but, on the contrary, was cured thereby.

[3] The attempted robbery occurred on one of the streets of the city of Spokane. As the prosecuting witness was going from the downtown district to his home, he met the women named in the information, who spoke to him, saying something he did not understand. He stopped, apparently to ascertain what was wanted, and was immediately assaulted by them, and a purse containing \$10 in money was taken by one of them from his hip pocket. In the tussle that followed, the purse was dropped by the person taking it, and was picked up by the prosecuting witness. Just then the assailants discovered a policeman approaching, and started to run away. The appellant's companion was caught immediately by the policeman and given to the prosecuting witness to detain, while the policeman captured the appellant. Immediately after the policeman started his pursuit, the woman the witness was detaining made certain proposals and committed certain acts, which the witness detailed as follows: "Q. What happened next with you and Bessie? A. I held the woman by the collar. Q. Did you have any conversation? Mr. Armitage: I object as the defendant was not present. (Objection overruled. Exception.) Q. What did she say? A. She told me to let her go, and she would give me a dollar. Q. What did you say? A. I said, 'You won't get loose from me.' Q. Then what happened? A. I was looking around to see what became of the other one, and she had meantime pulled out her hat pins and trying to make for my face. Mr. Armitage: Objected to as incompetent and immaterial. The transaction did not occur in the presence of the defendant, and I object. (Overruled. Exception.) Q. What did you do? A. I let her go. Q. And what happened? A. She turned to run, and I grabbed her hair. Mr. Armitage: This is all over my objection. The Court: Yes. Q. What next? A. I grabbed her by the hair; but the hair and hat came off. Q. Where did she go? A. I stayed in front of the house and waited for Bradley. Q. Did you see Bradley again? A. Bradley came afterwards with the other woman. Q. With Irene Baker? A. Yes."

It is thought that it was not competent to show these acts and statements on the trial of the appellant, because occurring out of her presence. But we think them matters proper to be shown the jury. They seem to be sufficiently closely connected with the crime committed as to be part of the 'res gestæ' and admissible for that reason; but, if it were otherwise, it was admissible on the authority of the case of *State v. Wil-*

Hams, 82 Wash. 286, 113 Pac. 780, and the cases therein cited, as it clearly appears there was concert of action between the defendants in the commission of the crime charged.

[4] While the prosecuting witness was testifying concerning the manner in which he was assaulted by the women, he was permitted by the court to illustrate on the person of the examiner the position of the woman's arms with relation to his person when his pocketbook was taken from his pocket. This was objected to on the part of the defendant, on the ground that it was a "theatrical exhibition," and consequently improper. But, if the record correctly describes the occurrence, there was nothing in it that was in any way censurable. The illustration was simply in aid of the witness' description of the manner of the attempted robbery, and was proper under all circumstances. It is true the illustration as made cannot be preserved in the record other than by description; but this is not a sufficient reason for excluding it as evidence. As every practitioner knows, there is much that is proper to go before the jury as evidence, or as explaining the evidence, that cannot be preserved in the record. It has been frequently held, for example, that the jury may properly be permitted to view the scene of a crime; that they may view the subject of the crime where identity is in question; that a witness may be permitted to illustrate, by rapping on a table or by motion of his hands, the rapidity with which gunshots were fired; that a witness may properly be permitted to illustrate with his own voice the tone in which certain words were spoken by another; that noises, claimed to have been made for the purpose of alarm, may be repeated before the jury, in order that the jury may determine whether they were in fact made, although it is at once evident that in none of these instances can the particular thing given in evidence be preserved in the record, other than in some more or less general way by description. There was therefore no error in the ruling made with reference to the illustration in question.

We conclude that no reversible error was committed at the trial, and that the judgment should stand affirmed. It is so ordered.

MOUNT, CROW, ELLIS, and MORRIS, JJ., concur.

OLD REPUBLIC MINING CO., Limited, v. FERRY COUNTY et al.

(Supreme Court of Washington. Aug. 21, 1912.)

1. TAXATION (§ 421*) -- SALE OF LAND -- DESCRIPTION OF PROPERTY -- MINING CLAIMS.

As against collateral attack upon a sale of mining claims for delinquent taxes, the claims were sufficiently described in the assessment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rolls and the foreclosure proceedings as the "Republic Lode" and the "Cecelia Lode," each description being followed by a statement of the number of acres contained therein, in the absence of a showing that the claims could not be found and located from the description given.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720-727, 729-735; Dec. Dig. § 421.*]

2. TAXATION (§ 810*) — DELINQUENT TAX SALES—SUIT TO VACATE—PRESUMPTIONS.

Since, in a suit to set aside a delinquent tax sale of mining claims, the proceedings are presumed to have been regular, in the absence of a contrary showing, the fact that in the certificate of delinquency the "total amount" of the assessment is given in one lump sum does not warrant a presumption of irregularity invalidating the sale, on the theory that the property was assessed in solido; whereas the law requires each separate parcel to be assessed separately.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1805-1808; Dec. Dig. § 810.*]

3. TAXATION (§ 642*) — FORECLOSURE PROCEEDINGS — PUBLICATION — SUMMONS — SUFFICIENCY.

Under Rem. & Bal. Code, § 9253, which requires the summons in tax foreclosure proceedings to command defendant "to appear within sixty days after the date of the first publication, to wit, within sixty days after the _____ day of _____," etc., a summons requiring appearance "within sixty days after" a specified day is substantially sufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1805-1807; Dec. Dig. § 642.*]

4. TAXATION (§ 684*) — FORECLOSURE PROCEEDINGS—NOTICE OF SALE—PROOF.

Since, on collateral attack, tax foreclosure proceedings are presumed to have been regular, and since Rem. & Bal. Code, § 9267, provides that a tax deed shall be prima facie evidence that the sale was conducted as required by law, it is not necessary that the record of such proceedings show that the statutory notice of the time and the place of sale was given.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1869-1874; Dec. Dig. § 684.*]

5. TAXATION (§ 809*) — FORECLOSURE PROCEEDINGS—SUIT TO VACATE—TENDER—WAIVER.

In a suit to vacate a tax foreclosure sale, allegation that defendant county has announced that any tender of taxes, interest, etc., would be refused does not show a waiver of the requirement, under Rem. & Bal. Code, § 955, that one suing to recover property sold for taxes must first pay or tender all taxes, interest, etc.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1885, 1890-1894; Dec. Dig. § 809.*]

Department 2. Appeal from Superior Court, Ferry County; Ernest Beck, Judge.

Action by the Old Republic Mining Company, Limited, against Ferry County and another. From a judgment for defendants, plaintiff appeals. Affirmed.

John Salisbury and E. C. Macdonald, both of Spokane, for appellant. John W. Matthews, of Pullman, for respondents.

FULLERTON, J. This action was brought for the purpose of setting aside a sale of certain mining claims made by the county

of Ferry in a general foreclosure proceeding instituted to enforce the payment of delinquent taxes. A general demurrer was interposed and sustained to the complaint, and on the election of the plaintiff to stand thereon judgment to the effect that it take nothing by its action and for costs was entered against it. This appeal followed.

In support of its appeal, the appellant makes four principal contentions, namely: (1) That the sale is invalid for want of a sufficient description of the property sold; (2) that the property was assessed in solido, whereas the law requires that each separate parcel be assessed separately; (3) that the summons in the foreclosure proceedings failed to comply with the requirements of the statutes, and was therefore void; and (4) that it does not appear from the record that the county treasurer gave the statutory notice of the time and place of the foreclosure sale.

[1] With reference to the description, it appears that in the assessment rolls and the foreclosure proceedings the claims were described as the "Republic Lode" and the "Cecelia Lode"; each description being followed by a statement of the number of acres contained therein. The names used were the names given the claims in the government patents, except that the Cecelia Lode was called therein the "Cecelia Fraction." But we think, nevertheless, the description sufficient to identify the properties. It must be remembered that the appellant is attacking the judgment of foreclosure collaterally, and all intendments are in favor of the regularity of the judgment. Therefore, in the absence of a showing that these claims could not be found and located from the description given, the court will presume that they can be so found and located, and this is all that is required of a description of property in a deed of conveyance. *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250; *Newman v. Buzard*, 24 Wash. 225, 64 Pac. 139.

[2] Whether there is any foundation for the claim on which the second objection is based, the record does not disclose, as the manner in which the property was assessed in this respect is not shown. In the certificate of delinquency, the "total amount" of the assessment is given in one lump sum, and it may be that under certain circumstances we would presume that the valuation on the assessment roll was in similar form; but we will not so presume, where the effect of the presumption is to invalidate the assessment. As we have stated, the presumption is in favor of the regularity of the proceedings, and they will be presumed valid, unless the contrary clearly appears on the face of the record.

[3] The service of the summons upon the appellant in the tax foreclosure proceedings was made by publication. The summons, as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

published, was directed to the appellant, and summoned and required it "to appear within sixty (60) days after the eleventh day of August, A. D. 1906, and defend the above-entitled action, or pay the amount due upon the certificate," etc. The statute (Rem. & Bal. Code, § 9253) provides that, where service of the summons in a tax foreclosure proceeding is made by publication, the summons shall contain "a direction to the owner, summoning him to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication, and defend the action or pay the amount due." The form given to which the published summons must substantially comply is as follows: "In the Superior Court of the State of Washington for the County of _____, Plaintiff, v. _____

_____, Defendant. No. _____. The State of Washington to the Said (naming the defendant or defendants to be served by publication): You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to wit, within sixty days after the _____ day of _____, 1_____, and defend the above-entitled action in the above-entitled court, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff, _____, at his (or their) office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of court. (Insert here a brief statement of the object of the action.) _____, Plaintiff's Attorneys. P. O. Address, _____, County, _____, Washington."

It is objected to the published summons in the instant case that it does not maintain a direction to the defendant, "summoning him to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication." In other words, it is contended that the summons, in order to be valid, must follow the form prescribed by the statute, and summon the defendant "to appear within sixty days after the date of the first publication, to wit, within sixty days after the _____ day of _____, * * * and defend the above-entitled action. * * *" A similar objection was made to the summons in the case of *Stubbs v. Continental Timber Co.*, 49 Wash. 431, 95 Pac. 1011, answering which we said: "The published summons, it will be noticed, while sufficiently regular in other respects, omits the words 'after the date of the first publication of this summons, to wit,' which precede the actual date given as prescribed in the form, and it is this omission that is thought to render the summons void. We are of the opinion, however, that the omission is not fatal to the judgment. No doubt it was the purpose of the framers of the statute to provide a

summons so definitely worded that the defendant summoned would know with certainty the time within which no default could be entered against him; but the wording of the statute makes it clear that they did not intend to prescribe a particular form of words with which the idea should be expressed to the exclusion of all others. The requirement is that the summons shall be substantially in the form given, not that it shall be a literal transcript of that form. The summons published is as definite as the prescribed form in fixing the time within which the defendant must appear. It summons the defendant to appear within 60 days from a given date, and this is all that form given does or can do. In point of definiteness, it adds nothing to the summons to insert, preceding the date, the words, 'after the date of the first publication of this summons, to wit.' These words but describe an event which may or may not have happened on the date given. To ascertain that fact, the defendant must resort to the initial copy of the paper in which the summons is being published, or he must inspect the proofs of publication after they are returned and filed in court. The same sources of information are equally open to him, whether the words omitted here are or are not included in the summons as published. The insertion of the words, therefore, cannot instruct, nor can their omission mislead, the defendant; and, since only a substantial compliance with the statute is required, it would seem to be sacrificing the substance to the shadow to hold that the omission of the words is fatal to a judgment entered thereon." This case is direct authority in support of the sufficiency of the summons in the case at bar; and, as we are satisfied with the rule there announced, we hold the present summons sufficient in substance and form.

[4] By the Code (section 9260, Rem. & Bal.), it is provided that all sales of property under a tax foreclosure judgment shall be made on Saturday, between the hours of 9 o'clock in the morning and 4 o'clock in the afternoon, after first giving notice of the time and place, where such sale is to take place for 10 days successively by posting notice thereof in three public places in the county where the land lies, one of which shall be in the office of the county treasurer. The statute prescribes no form for making and preserving a record of such sales, and it is alleged in the complaint that it does not appear that the required notice was given in the case now before us. But the treasurer's return of the sale of the premises does appear in the record. In the return it is recited that the sale was made on December 1, 1906, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon, "after first giving due legal notice of the time and place of such sale by posting

notice thereof for ten days successively in three public places in Ferry county, one of which was at my office. * * * If it be necessary, in order to hold the sale valid, to find in the record proofs that the statute was complied with in respect to giving notice of the time and place of sale, we think the return supplies such proof. But it is not necessary that this fact appear of record, in order to sustain the sale in this proceeding. In addition to the fact that in a collateral attack all presumptions are in favor of the record, it is provided by statute that the deed executed by the county treasurer to lands sold for taxes shall be prima facie evidence, in all controversies and suits in relation to the right of the purchaser to the real estate thereby conveyed, of the fact "that the sale was conducted in the manner required by law." Rem. & Bal. Code, § 9267. This is conclusive of the regularity of the proceedings as against any mere omissions in the recitals contained in the record.

[5] The foregoing considerations lead us to conclude that the appellant's contentions are without force when considered upon their merits. There is, however, another reason why the appellant cannot prevail in this particular suit, even were the contentions considered all well taken. It is provided by statute that no action or proceeding shall be commenced or instituted in any court in this state for the recovery of property sold for taxes, unless the person desiring to institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs justly due and unpaid on the property sought to be recovered. Rem. & Bal. Code, § 955. In this case no tender was made to the county of the taxes, penalties, interest, and costs for which the property was sold. On the contrary, the appellant, instead of making the tender required, sought to excuse such a tender by alleging "that the defendant county has given out, proclaimed, and stated unto the plaintiff that any tender of taxes, interest, penalties, and costs made by your orator on account of the taxes assessed for the year 1900, or any other years, would be refused and would not be accepted; that the said county further asserted that it was the owner in fee of said mining claims, subject only to the terms and conditions of the lease heretofore referred to; and that your orator has no interest in said mining claims or either of them." This allegation is wholly inadequate to show a waiver by the county of the statutory tender. It is impossible that the county could make such a declaration. The officer to whom a tender would be proper, and to whom it is made, could, in his official capacity, refuse to accept the tender; but he cannot, in advance of such

tender, waive the right of the county to have a tender made its proper officer as a condition precedent to submitting itself to an action. It is true this court has held that a private individual may waive a tender required under a similar statute. But the individual represents only his own interests, and may waive such statutory rights given him as he chooses. The officer, on the contrary, represents the county, and his power in his representative capacity is only such as the statute gives him. There is no statute conferring upon him the power to waive a tender made by statute a condition precedent to the right to maintain an action against the county.

The judgment appealed from is affirmed.

MOUNT, ELLIS, MORRIS, and PARKER, JJ., concur.

JIM BLAINE GOLD MINING CO. v. FERRY COUNTY et al.

(Supreme Court of Washington. Aug. 21, 1912.)

Department 2. Appeal from Superior Court, Ferry County; E. K. Pendergast, Judge.

Action by the Jim Blaine Gold Mining Company against Ferry County and another. Judgment for defendants, and plaintiff appeals. Affirmed.

John Salisbury and E. C. Macdonald, both of Spokane, for appellant. Frank M. Allyn, for respondents.

PER CURIAM. This is an action brought by the plaintiff to set aside the sale of a mining claim, made by the county of Ferry to enforce the payment of delinquent taxes. The assignments of error made by the appellant question the sufficiency of the summons by which the appellant was sought to be brought into court in the tax foreclosure proceeding and the sufficiency of the record as to notice of the tax foreclosure sale. The proceeding questioned was a general tax foreclosure proceeding, in which the county of Ferry foreclosed in one action all of the delinquency certificates that had been issued to the county. The questions presented were before us in the case of Old Republic Mining Company v. Ferry County, 125 Pac. 1018, where they were passed on adversely to the contentions made by the appellant.

On the authority of that case, the present case will stand affirmed.

MILLER et ux. v. SPOKANE BAKERY CO.

(Supreme Court of Washington. Aug. 26, 1912.)

1. APPEAL AND ERROR (§ 1005*)—VERDICT—CONCLUSIVENESS.

A verdict approved by the trial court will not be disturbed on appeal, where counsel of the parties do not agree in their interpretation of the testimony, and the court on appeal is unable to determine the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3880-3876, 3948-3950; Dec. Dig. § 1005.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. APPEAL AND ERROR (§ 1078*)—QUESTIONS REVIEWABLE—QUESTIONS NOT ARGUED.

Claims of error not discussed in the briefs, nor referred to on the oral argument, will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Department 2. Appeal from Superior Court, Spokane County; W. W. Black, Judge.

Action by Samuel Miller and wife against the Spokane Bakery Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Cannon, Ferris & Swan and Walter A. White, all of Spokane, for appellant. O. C. Moore, of Spokane, for respondents.

MORRIS, J. Action to recover damages for injuries sustained by the respondent wife as the result of being struck by an automobile truck driven by an employé of appellant. A verdict for \$1,000 was returned, and this appeal is taken from the judgment, alleging error in denying motions for nonsuit, for directed verdict, and for judgment notwithstanding verdict.

These motions all raise the question of contributory negligence on the part of Mrs. Miller, and are predicated upon appellant's contention as to the point in the street where the accident occurred, and as to whether Mrs. Miller was crossing the street at the regular crossing, or whether she was walking diagonally across the street between crossings, paying no attention to traffic.

[1] Mrs. Miller's testimony is not free from doubt upon this point; but after a careful reading of her whole testimony we cannot say appellant's theory is so well sustained as to cause us to hold, in the face of the verdict, that she was guilty of contributory negligence. The case is not similar in this respect to *Harder v. Matthews*, 67 Wash. 487, 121 Pac. 983, upon which appellant strongly relies. In that case Mrs. Harder was attempting to diagonally cross a crowded street near the middle of the block while looking nearly opposite to the direction she was going, and stepped from behind an express wagon into the street, and was immediately struck by the automobile. We held, under such circumstances, she was guilty of contributory negligence. The evidence before us does not establish kindred facts to such an extent as to cause us to overrule the verdict and say, as a matter of law, Mrs. Miller was guilty of contributory negligence. No good purpose would be served by quoting the testimony as to the point in the street Mrs. Miller had reached when she was struck. Counsel do not agree in their interpretation of the testimony as to this point, and we confess to being unable ourselves to determine it. We cannot therefore say the verdict is erroneous, or that it should have been set aside.

[2] Error is predicated upon two instructions. These claims of error are not discussed in the briefs; nor were they referred to upon the oral argument. We therefore assume counsel for appellant does not now desire to raise any question on the instructions.

Some complaint is also made upon the admission of testimony as to the distance within which the auto truck could be stopped. We find no error here sufficient to reverse the judgment.

The judgment is affirmed.

MOUNT, ELLIS, PARKER, and FULLERTON, JJ., concur.

SMITH v. BOLSTER.

(Supreme Court of Washington. Aug. 26, 1912.)

SALES (§ 261*)—WARRANTIES—EXPRESSIONS OF OPINION.

Statements by a seller of an automobile, which had been used as a demonstrating car, and had been run about 1,500 miles, made to a buyer who knew the facts, that the car, sold for less than 20 per cent. less than the price of a new car, was in first-class condition, as good as new, and would go 11 miles to a gallon of gasoline on an average, were mere expressions of opinion, and did not constitute a warranty of the car.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

Department 2. Appeal from Superior Court, Spokane County; J. D. Hinkle, Judge.

Action by Stanley W. Smith against J. F. Bolster. From a judgment for partial relief, plaintiff appeals. Modified and remanded.

Bruce Blake, for appellant. John C. Kleber, for respondent.

MORRIS, J. Action to recover \$900 balance due on the purchase of an automobile and \$39.05 balance due on an open account. Respondent resisted recovery, upon the ground that the car was not in the condition represented at the time of the purchase, and that there was a further breach, in that it would not run 11 miles on a gallon of gasoline, as guaranteed by appellant. The court below found that the car was not in as good condition as represented by appellant, and because thereof respondent was damaged to the extent of \$250. It was also found that the car would not run 11 miles on a gallon of gasoline, and because of this failure respondent was awarded \$250 as damages. The court then gave appellant judgment for \$400, as due on the purchase price after deducting the awards of damage, together with the amount claimed on the open account, and, alleging error in the findings awarding respondent damages, appellant brings the case here.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

Previous to the sale, the car had been used by appellant as a demonstrating car, and had been run about 1,500 miles. These facts were known to respondent. On account of them, the car was priced at \$1,800, a reduction of \$500 from the price of the car, had it been new. The warranty is predicated upon the statement of appellant that the car was "in first-class condition, as good as any new car," and that appellant "guaranteed the car to go 11 miles to a gallon of gasoline, on an average." These statements, in our opinion, do not constitute a warranty. The fact that the price was fixed at over 21 per cent. less than the price of a new car was of itself evidence that the car was to that extent of less value than a new car. To say that it was in first-class condition is nothing more than the expression of an opinion as to its then condition, or what the law sometimes terms "seller's praise." The same may be said of the statement that it would run 11 miles on a gallon of gasoline.

Morley v. Consolidated Mfg. Co., 196 Mass. 257, 81 N. E. 993, is a similar case. The car there referred to was a demonstrating car that had run about 500 miles, and the statement relied upon was that the car "was in good condition, first-class condition." It was held not to constitute a warranty, being "mere seller's talk." Similar expressions may be found in 28 Cyc. 44; *Warren v. Walter Auto Co.*, 50 Misc. Rep. 605, 99 N. Y. Supp. 393; *Clark v. Ralls*, 50 Iowa, 275.

The sale was made April 30, 1910. Nine hundred dollars was paid upon delivery, and the balance was to be paid in a few days. Some time in the following September, respondent, not having paid this balance, took the car to appellant's garage for some repairs. Appellant then refused to deliver the car to respondent until the \$900 was paid. He did, however, permit respondent to use the car, sending a driver to take charge of it. This continued for about a week, when, while at luncheon with this driver, respondent telephoned his wife and arranged with her to have his son come and take the car, thus depriving appellant of his possession. It would seem by this act he was not only willing but anxious to retain the car, leaving appellant to his remedy to obtain the balance due. He knew then, if he speaks the truth, that the car would not average 11 miles on a gallon of gasoline; for during this week he made a trip to Coeur d'Alene, and, when appellant's counsel sought an admission from him that the car had made the trip at the rate of 11 miles to a gallon of gasoline, he answered that it did not average six miles. Nevertheless he wished to retain it, even to the extent of wrongfully depriving appellant of its possession. Under these circumstances, courts will spend little time listening to his plea

of a breach of warranty. We are of the opinion that there was neither warranty nor breach, and that the judgment of the lower court in so holding is error.

The judgment should be modified, and the case remanded, with instructions to enter a judgment in appellant's favor as prayed for.

MOUNT, ELLIS, GOSE, and FULLERTON, JJ., concur.

(69 Wash. 615)

EILERS MUSIC HOUSE v. ORIENTAL CO.

(Supreme Court of Washington. Aug. 21, 1912.)

1. SALES (§ 479*)—CONDITIONAL SALES—RESCISSIION—LIQUIDATED DAMAGES.

Where a chattel is sold under a contract reserving title in the seller until payment of the price, the seller's retention of payments, as liquidated damages for the buyer's breach, estops it to claim any other damages for the breach or for use of the property on retaking it, and hence need not show specific damages from the buyer's breach to entitle it to judgment in an action for possession.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

2. DAMAGES (§ 76*)—STIPULATION FOR LIQUIDATED DAMAGES.

Where several acts to be performed or omitted under a contract widely vary in importance, a stipulation for payment of the same amount as damages for performance or non-performance of each must be construed as a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 154, 155; Dec. Dig. § 76.*]

3. DAMAGES (§ 78*)—STIPULATION FOR LIQUIDATED DAMAGES.

Under a contract to sell a chattel, reserving title to the seller until payment of the price, and providing that on breach by the buyer the seller might retain all payments as liquidated damages, the buyer's failure to pay for the instrument, or removal, or attempt to remove or sell it, were of equal importance, upholding a stipulation for liquidated damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

4. DAMAGES (§ 80*)—STIPULATION FOR LIQUIDATED DAMAGES.

Where a contract, in purporting to stipulate for liquidated damages, provides for a payment as large or larger where failure to perform is only partial as where the failure is complete, the stipulation will usually be construed as a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*]

5. DAMAGES (§ 78*)—LIQUIDATED DAMAGES—VALIDITY OF STIPULATION.

Stipulation in a contract for sale of a musical instrument, which reserved title in the seller until payment of the price, that on the buyer's breach all payments should be treated as liquidated damages, will not be treated as one for a penalty, because the damages thus increase as additional payments are made, since there is a constant depreciation in the value of the instrument.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6. EVIDENCE (§ 441*)—TESTIMONY AFFECTING CONTRACT—ADMISSIBILITY.

A written contract of sale cannot be added to nor varied by parol testimony concerning antecedent negotiations tending to show representations or warranties not embodied in the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765, 2030-2047; Dec. Dig. § 441.*]

7. APPEAL AND ERROR (§ 1074*)—REVIEW—HARMLESS ERROR—COSTS.

The Supreme Court will not review an objection that the cost bill was not properly itemized and verified, in the absence of affirmative showing that the costs allowed were not necessarily expended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248-4252; Dec. Dig. § 1074.*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Ellers Music House against the Oriental Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Howard O. Durk, for appellant. Wright & Kelleher, Charles S. Gleason, and Edward W. Allen, all of Seattle, for respondent.

ELLIS, J. On March 15, 1909, the defendant purchased from the plaintiff, upon a written conditional sale contract, a mandolin pianorchestra for an agreed price of \$1,900. The defendant was credited with \$393.85 for amounts paid upon other instruments formerly purchased by it and returned in exchange, and with \$200 cash paid at the making of the contract. By the contract the defendant agreed to pay the balance of the purchase price in monthly installments of \$100 each. It was agreed that title to the instrument should remain in the vendor until payment, and that if the vendee should fail to make any payment at the times mentioned, or should remove, attempt to remove, or sell the instrument, the vendor should have the right to take possession thereof and retain all payments as liquidated damages for breach of the agreement, and as payment for the use of the instrument. The contract also declared that "any agreement, other than that expressed on the face of this contract, will not be recognized." The defendant paid the installments maturing on the 15th of April, May, and June, but refused to pay the installment due July 15, 1909. The plaintiff demanded a return of the instrument, which being refused it brought this action and obtained possession by statutory process.

The complaint set out the contract in full, claimed the plaintiff's right to possession by virtue of the breach, alleged demand by plaintiff for possession on August 9, 1909, and the refusal to deliver the same by the defendant. It alleged damages for the unlawful detention in the sum of \$500, and

that the value of the use of the instrument was \$10 a day.

The answer admitted the execution of the contract, denied the alleged damages for unlawful detention, denied the allegation that the value of the use of the instrument was \$10 a day, and set up an affirmative counterclaim for the recovery of the money paid on the purchase price, amounting to \$893.95, on the ground that the instrument failed to meet certain alleged verbal warranties made by the plaintiff at and prior to the time of the execution of the written contract. The reply put in issue the affirmative allegations of the answer.

At the trial the defendant admitted that the plaintiff was entitled to judgment for the possession of the instrument. The plaintiff admitted that it had credited the defendant with \$598.95, mentioned in the contract as allowed upon the purchase price, and \$300 for the three monthly installments which had been paid. The plaintiff waived any claim for damages or rent of the instrument accruing subsequent to its demand for possession.

The defendant moved for judgment on these admissions for the amount credited on the contract and demanded in its counterclaim. The motion was denied. The defendant then offered evidence in support of its counterclaim. The trial court refused to admit evidence of any verbal representation or warranties made by the plaintiff prior to the execution of the contract, on the ground that the contract was complete in itself, and such warranties, to be available, would have to be found in the written instrument. The court, however, did admit evidence of certain defects in the instrument, on the ground that there was an implied warranty that the instrument was adapted to the purpose for which it was sold. The evidence showed that a certain automatic device was so defective that the instrument frequently failed to properly furnish music until adjusted. No evidence was offered to show that the defendant had suffered any monetary loss or injury to its business by reason of this or any other defect in the instrument. Upon the conclusion of the defendant's evidence, the plaintiff moved to dismiss the counterclaim, upon the ground that there was no evidence showing damages in any amount. The motion was granted, and judgment was entered, awarding to plaintiff the possession of the instrument. The defendant has appealed.

[1] The appellant first assigns as error the denial of its motion for judgment at the close of the respondent's case. The argument briefly is that, the respondent having admitted that \$893.95 had been credited upon the contract, and having waived any claim for damages and rent for the detention of the instrument after demand for

possession, and having neither asked for nor proved specific damages for the breach of the contract, and having procured possession of the instrument by replevin, it had no right to retain the money paid upon the contract. A sufficient answer to this argument is found in the nature of the action. It was an action to enforce the contract, not to rescind it. It was an action to recover possession of the chattel, not to recover damages for breach of the contract. Respondent had already received payment of damages by retaining, under the stipulation of the contract, the part of the purchase price which had been paid. The contract declared that any payments made prior to the breach might be retained as liquidated damages for the breach, and as payment for the use of the instrument. The breach of the contract was admitted by the appellant. The respondent, having retained this money as liquidated damages for the admitted breach, could not claim any other damages for the breach, or for the use of the instrument. If the stipulation for liquidated damages is to be held valid, the respondent was not required to prove that he suffered any damage. *Sanford v. First National Bank*, 94 Iowa, 680, 68 N. W. 459; *Little v. Banks*, 85 N. Y. 259; 13 Cyc. p. 105.

If the stipulation for liquidated damages was a valid stipulation, then the appellant could only recover the money paid upon the purchase price by rescinding the purchase for sufficient cause and voluntarily returning the instrument, or by proving damages in the amount paid upon the contract for failure of the instrument to perform the functions for which it was purchased. Appellant never sought to rescind the contract, but ratified and affirmed it by refusing to return the instrument; and at the time the motion was denied it had introduced no evidence in support of its counterclaim for damages for the alleged breach of warranty.

[2, 3] The appellant further contends that the provision for liquidated damages should be treated as a penalty or security for the actual damages which the respondent could prove that it suffered from the breach of the contract. It is first argued that the several acts for which respondent might retake the instrument and retain the payments as liquidated damages, namely, failure to pay any installment, removal of the instrument, or attempt to sell or remove it, are so different in degree of importance that the same measure of damages could not be appropriate for each; and hence the stipulation must be construed as a penalty or security for the damages actually suffered. It must be conceded on authority a sound rule that, where there are several acts to be performed, or not performed, in contemplation of the contract, widely varying in degree of importance, a stipulation for payment of the same amount as damages for the performance or

nonperformance of each must be construed as a penalty. *Pomeroy's Equity Jurisprudence* (3d Ed.) § 443.

This contract, however, presents no such case. The vendee's failure to pay for the instrument, removal, or attempt to remove or sell, the instrument are plainly of equal importance, since they lead to the same result. They would each constitute such a breach of the contract as to make a resumption of possession by the vendor absolutely necessary to his protection. Whatever breach forces that result, the damages consequent thereon are necessarily the same; hence the same sum as liquidated damages, if appropriate to either, is appropriate to each of such breaches.

[4, 5] It is next argued that, inasmuch as the sum to be applied as liquidated damages constantly increases as the performance of the contract continues, the damages paid would be greater when the failure to perform was only partial than when the failure was complete. Again, it must be conceded on sound authority that, where the stipulated sum to be paid is the same or larger where the failure to perform is only partial as where the failure is complete, the stipulation will usually be construed as a penalty. *Pomeroy's Equity Jurisprudence* (3d Ed.) § 444.

This rule, however, cannot be applied blindly and without reference to the nature of the contract, or without regard to the plainly expressed intention of the parties. The same eminent author, after stating this and other general rules, adds: "There are undoubtedly numerous instances which cannot be easily referred to either of these rules; and this must be so almost as a matter of necessity. Since agreements are of infinite variety in their objects and in their provisions, and since the question of penalty or liquidated damages is always one of intention, depending upon the terms and circumstances of each particular contract, there must be many agreements which cannot be brought within the scope of any specific rule, and with which a court can only deal by applying the most general canon of interpretation." 1 *Pomeroy's Eq. Juris.* (3d Ed.) § 445, p. 747.

In the case here it is manifest that the damage must be the greater the longer the vendor is kept out of possession, and the longer the vendee has the use of the instrument. The longer the vendee keeps up his payments and retains the possession of the property, the greater will be the deterioration of the property, and the longer will the vendor be deprived of its use and disposition by sale or rental. It seems clear that in such a case the fact that the sum fixed as liquidated damages increases as the actual damage increases is no ground for declaring the stipulation one for a penalty, rather than for liquidated damages. The case is one in which the stipulation for liquidated

damages is peculiarly appropriate. The actual damages by deterioration of a delicate and highly complicated piece of machinery, such as that here involved, could hardly be determined by evidence. The uncertainty inheres in the very nature of the subject-matter of the contract. The case falls within the two cardinal rules of construction laid down in *Cyc.*, as follows: "There are two excellent rules given for inferring that the parties intended the sum as liquidated damages: (1) Where the damages are uncertain, and not capable of being ascertained by any satisfactory and known rule, whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case; or (2) where, from the nature of the case and the tenor of the agreement, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties." 13 *Cyc.* p. 90.

The following language is peculiarly applicable to the case before us: "In determining whether a sum claimed upon a breach of contract for sale is liquidated damages or a penalty, the court should look at the nature of the contract and the words and intentions of the parties; but such sums have usually been held liquidated damages, for the reason that the damages sustained are, in almost all cases, uncertain and very difficult to estimate." 13 *Cyc.* p. 102.

The intention of the parties to stipulate for liquidated damages is so plainly expressed in the contract, and the stipulation is so palpably appropriate to the very subject-matter of the contract, that we are constrained to enforce the contract as written, rather than by construction make a new one for the parties.

As said by the Supreme Court of the United States, in *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642-662, 22 Sup. Ct. 249, 248, 46 L. Ed. 366: "The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bind themselves, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed; it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract." And, again, in *United States v. Bethlehem Steel Co.*, 206 U. S. 105-119, 27 Sup. Ct. 450, 455, 51 L. Ed. 781: "The question always is,

What did the parties intend by the language used? When such intention is ascertained, it is ordinarily the duty of the court to carry it out." A review of the multitude of authorities cited by the appellant would avail nothing, since we conceive the principles, above outlined, controlling upon the facts of this case.

[6] The court's refusal to admit evidence as to certain representations or warranties, alleged to have been made by respondent prior to the execution of the written contract, is assigned as error. The court said: "I sustain the objection to any representations made prior to the execution of this instrument. They ought to be embodied in the instrument." The ruling was correct. We find nothing in the case to take it out of the rule that express warranties must be found in the written instrument, which was freely executed by the parties. It cannot be added to nor varied by parol testimony as to antecedent negotiations. *Tobias v. McArthur*, 56 Wash. 523, 106 Pac. 180.

We find no error in the dismissal of the appellant's counterclaim for lack of sufficient evidence. The court permitted proof as to the alleged defects in the machine as tending to show that it did not meet the implied warranty that it would fill the purpose for which it was intended. There was, however, neither evidence, nor offer of evidence, of any specific damages suffered by reason of such defects. The appellant, having retained the instrument, and having sought no rescission of the contract, was only entitled to such damages as he could prove. Having proved no damages, his counterclaim must fail.

[7] Upon motion of the appellant, the trial court reduced the costs from \$140.50 to \$59.90. It is now urged that the cost bill was not properly itemized and verified. The objections are technical. We have uniformly declined to sustain such objections, in the absence of some affirmative showing that the costs allowed were not necessarily expended. *Roebeling's Sons Co. v. Washington Alaska Bank*, 56 Wash. 102, 105 Pac. 174; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369; *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737; *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193.

The judgment is affirmed.

FULLERTON, MORRIS, and MOUNT, JJ., concur.

(60 Wash. 637)

STONER v. SHULTZ.

(Supreme Court of Washington. Aug. 24, 1912.)

L. DAMAGES (§ 80*)—LIQUIDATED DAMAGES—CONSTRUCTION OF STIPULATIONS.

A contract for the purchase by the principal stockholder in the S. Company of the shares of another stockholder, who was also

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

its general manager, provided for a cash payment and the execution and delivery of notes for \$3,000; that the seller should fully adjust and settle differences and disagreements then existing between the S. Company and another corporation; and that if he failed to adjust such differences the notes should be surrendered for cancellation and treated as liquidated damages from such failure. The differences between the two corporations could have been fully settled by the payment of \$1,800, and the loss to the S. Company and its principal stockholder from such a settlement would have been much less than that sum. Held, that the provision for the cancellation of the notes was a stipulation for a penalty, and not for liquidated damages, and was unenforceable; the purchaser being entitled to offset against a recovery on the notes only his actual damages from the failure of the seller to adjust the differences.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*]

2. DAMAGES (§ 80*)—LIQUIDATED DAMAGES—CONSTRUCTION OF STIPULATIONS.

When the payment of a smaller sum is secured by a larger, the larger sum thus contracted for cannot be treated as liquidated damages, but must always be considered as a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170-175; Dec. Dig. § 80.*]

3. DAMAGES (§ 79*)—LIQUIDATED DAMAGES—CONSTRUCTION OF STIPULATIONS.

Where an agreement is for the performance or nonperformance of an act, and there is no adequate means of ascertaining the actual damage which may result from a violation, the parties may fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation for such a purpose will be treated as one for liquidated damages, unless the intent is clear that it is designed to be a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 164-169; Dec. Dig. § 79.*]

4. DAMAGES (§ 78*)—LIQUIDATED DAMAGES—CONSTRUCTION OF STIPULATIONS.

That the parties to a contract, in fixing the sum to be paid by one party in case of default, designate such sum as liquidated damages does not necessarily make it so.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by J. A. Stoner against Frank W. Shultz. From a judgment for plaintiff on motion after a verdict for defendant, defendant appeals. Affirmed.

Samuel Edelstein, for appellant. Alex M. Winston and Fred H. Witt, both of Spokane, for respondent.

PARKER, J. The plaintiff commenced this action seeking recovery from the defendant upon a nonnegotiable promissory note, executed in part payment of the purchase price of shares of capital stock of the Standard Motor Car Company, a corporation, of Spokane. The execution of the note, together with two others representing the purchase price of the stock, was admitted by the defendant; but he pleaded as an affirmative de-

fense, in substance, that under his contract with the plaintiff for the purchase of the stock, in part payment of which the note sued upon was given, the plaintiff had failed to do certain things agreed by him to be done, which, under the sale contract, were conditions precedent to the defendant becoming liable upon the notes; or, in other words, that the agreement contained in the contract was in effect for liquidated damages which would result to the defendant upon the failure of the plaintiff to do certain things agreed by him to be done, and that his failure in that regard resulted in the satisfaction of the debt which was evidenced by the three notes. A trial before the court and a jury resulted in a verdict in favor of the defendant. Thereupon the plaintiff moved for judgment notwithstanding the verdict, and in the alternative for a new trial. The court granted the motion for judgment notwithstanding the verdict, and rendered judgment accordingly in favor of the plaintiff and against the defendant for the full amount of the note sued upon, with interest, reciting in the judgment as grounds thereof the following: "The court having heretofore, on Friday, December 1, 1911, announced his decision upon said motions to counsel for each of the parties hereto, and said decision being that the court believed that the provisions in the contract set up in the answer herein were provisions for a penalty, and not for liquidated damages, the court thereupon announced, by reason thereof, the said verdict would be set aside and a new trial granted, and that defendant might, if he elected so to do, amend his answer to show the actual damage, if any, suffered by defendant by reason of the breach or breaches, if any, by plaintiff of the covenants and conditions in said contract to be by him performed, and that if defendant did not elect to so amend that judgment would be rendered, notwithstanding said verdict, for the reason that, as aforesaid, the provisions in said contract are, under the evidence, provisions for a penalty, and not for liquidated damages; and, the said defendant having elected to stand upon his said answer, and declining to amend the same, it is by the court ordered, adjudged, and decreed. * * * From this disposition of the cause, the defendant has appealed.

[1] There are certain undisputed facts disclosed by the record which we regard as determinative of the correctness of the court's decision. They are as follows: The Standard Motor Car Company is a corporation with its principal place of business at Spokane, having a capital stock of \$25,000. At the time of the making of the contract between the parties to this action, portions of which are hereinafter quoted, appellant was the principal stockholder of the Standard Motor Car Company, and then owned nearly

all of the shares of stock in that company, excepting 30 shares thereof of the par value of \$3,000, owned by respondent. The Standard Company then and for some time prior thereto had an agency contract with the Stoddard-Dayton Motor Company of Los Angeles, Cal., for the sale of Stoddard-Dayton automobiles in Spokane and its tributary territory. At that time and for some time prior thereto, respondent was the general manager of the Standard Company, being actively engaged in the conduct of its business, and was acquainted with the Stoddard-Dayton people through his dealings with that company. Appellant was not actively engaged in the business of the Standard Company, though the principal stockholder therein, and did not have any acquaintance with the Stoddard-Dayton people. At that time and for some time prior thereto, there existed two controversies between the Standard Company and the Stoddard-Dayton Company, which, if not amicably adjusted, might result in the termination of the agency contract by the Stoddard-Dayton Company. If these controversies were amicably settled, it is apparent that all cause for or desire on the part of the Stoddard-Dayton Company to terminate the agency contract would be removed. One of these controversies was because of the refusal of the Standard Company to settle with the Stoddard-Dayton Company the claim of that company for a limousine body, which had been shipped by it to the Standard Company, and for which it had made a charge of \$1,080; settlement being refused by the Standard Company upon the terms demanded by the Stoddard-Dayton Company by reason of defects in the body, claimed by the Standard Company to exist. The other of these controversies was because of the refusal of the Standard Company to settle with the Stoddard-Dayton Company the claim of that company, amounting to approximately \$700, for parts shipped by it to the Standard Company to carry in stock to supply broken parts of machines; the Standard Company insisting that these parts were only received by it on consignment, while the Stoddard-Dayton Company insisted that they were sold to the Standard Company, and that it make payment therefor. It is plain from the record that the settlement of these two claims by the Standard Company with the Stoddard-Dayton Company would have removed all the differences existing between the two companies, and that nothing else threatened the termination of the agency contract. The affairs of the Standard Company being in this condition, so far as its relation with the Stoddard-Dayton Company was concerned, on December 10, 1910, the parties to this action entered into a written contract for the sale by respondent of his 30 shares of stock to appellant, the portions of which contract material to our present inquiry are as follows:

"Memorandum of agreement, entered into this 10th day of December, 1910, by and between Frank W. Shultz, first party, and J. A. Stoner, second party, witnesseth:

"(1) Second party shall immediately, upon the execution and delivery of this agreement in duplicate, assign and deliver to the first party thirty shares of the capital stock of the Standard Motor Car Company, a corporation organized under the laws of the state of Washington, and also execute and deliver to the first party an assignment to the first party of all of the rights of the second party of every nature whatsoever created in favor of the second party under and by virtue of an agreement entered into between the second party and the Standard Motor Car Company, a corporation, as appears from the minutes of the trustees' meeting of said company bearing date October 28, 1909, wherein, among other things, the said company, in consideration of the services of the second party as general manager, the second party is to receive, in addition to his salary, one-fourth of the profits of said corporation for the ensuing year, etc.

"(2) Upon the delivery of said certificates of stock and the assignment aforesaid, the first party agrees to pay to the second party the sum of \$1,250.00, the receipt whereof is hereby acknowledged, and the first party will also sign and deliver his three promissory notes each payable to the second party and each in the sum of \$1,000.00 bearing interest from date until paid at 8% per annum, one note payable on or before February 1, 1911; one note payable on or before March 1, 1911; and one note payable on or before April 1, 1911.

"(3) That said notes and the cash payment aforesaid are given to the second party upon the express agreement and condition that the second party shall and will, on or before January 10, 1911, fully adjust and settle, to the satisfaction of the first party and the officers of the Standard Motor Car Co., each and all of the differences and disagreements now existing between the Standard Motor Car Co. and the Stoddard-Dayton Motor Company, of Los Angeles, Calif., a corporation organized under the laws of the state of California, and will also receive from the said Stoddard-Dayton Motor Co. and deliver to the first party a written assurance to the effect that said Stoddard-Dayton Motor Co. will fully and promptly comply with a fair and liberal construction of the terms of the automobile subagency contract for the season of 1911 and the supplemental agreement thereto, both bearing date the 8th day of September, 1910, entered into between the Stoddard-Dayton Motor Company and the said Standard Motor Car Company, both of which said agreements are hereby referred to and made a part of this agreement to all intents and purposes as though herein set forth in full. It is further agreed that said written assurance-

es shall be of such a nature as to satisfy the first party that the Standard Motor Car Company aforesaid will receive at the hands of the Stoddard-Dayton Motor Company the same prompt and satisfactory treatment for the season of 1911 as has been received by the said J. A. Stoner and the Standard Motor Car Company in the past before said disagreements now existing arose. The first party agrees that he and the remaining officers of the Standard Motor Car Company will assist the second party as far as reasonable in bringing about an adjustment of said differences, and will comply with a fair and liberal construction of the terms of said automobile contract and supplement.

"(4) It is further expressly understood and agreed between the parties hereto that in the event the second party shall fail or refuse, within the time aforesaid, to fully comply with the terms of the preceding paragraph, or in the event the said Stoddard-Dayton Motor Company of Los Angeles, California, shall fail or refuse to make an adjustment of the differences and disagreements aforesaid, or shall fail or refuse to give the written assurances aforesaid, then and in either of said events the said second party agrees to accept the said payment of \$1,250.00 in full accord and satisfaction for the stock aforesaid and the assignment aforesaid, and said second party further agrees in either of said events to surrender up to the first party the three notes aforesaid for cancellation, said unpaid three notes for \$3,000.00 to be considered as liquidated damages sustained by the first party by reason of the breach of the terms of this agreement aforesaid, and the first party shall be released from any and all obligations to pay any further sum to the second party by reason of the assignment of said stock and the assignment of the rights of second party in said corporation."

On February 1, 1911, the date of the maturity of the first note, this action was commenced by respondent to recover the amount due thereon. Upon the trial appellant offered no evidence of the amount of his actual damages sustained on account of the failure of the respondent to settle the differences between the Standard Company to the Stoddard-Dayton Company, but relied entirely upon the provisions of the stock sale contract, above quoted, referring to the conditions upon which the notes were given and the so-called "liquidated damages," insisting that no proof of actual damages was required from him to successfully defend against the notes sued upon, but that he was only required to prove that respondent had failed to adjust the differences between the two companies, in order to entirely defeat recovery of the debt evidenced by the notes. It is not claimed that respondent was to adjust these differences at his own expense, but that he was to adjust them upon the

basis claimed as correct by the Standard Company, and without yielding to the demands of the Stoddard-Dayton Company. It is apparent that the settlement of these differences was left in his hands because of his acquaintance with the Stoddard-Dayton people. The verdict of the jury in favor of the defendant, of course, amounts to a finding that he did not settle these differences, which fact we will assume as proven. The verdict must have been by the jury rested alone upon this fact and the apparent letter of the stock sale contract, since there was no proof of actual damage to appellant offered by him.

It is at once manifest that these differences could have been completely adjusted by the Standard Company by paying the claims of the Stoddard Company, and thereby sustaining a possible loss in no event exceeding the amount claimed by the Stoddard-Dayton Company—that is, not exceeding the sums of \$1,000 and \$700—and in all probability much less; for it is evident that the limousine body and the parts in stock were of considerable value, and these, of course, would in any event have become the property of the Standard Company upon payment of these claims. It, of course, follows that the loss or damage to appellant by such a settlement would in no event have been more than these sums, as a stockholder of the Standard Company, since the value of his stock would not have been lessened more than the loss to the company from such a settlement. The evidence shows that these differences were thereafter settled by appellant for the Standard Company at a less loss than the amount of these sums, though that is of little moment here.

It seems to us that when these parties entered into this contract for the sale of this stock, wherein respondent agreed to settle these differences, it could then be readily seen that the amount of damage which might result to appellant from a failure of respondent to perform that part of his contract would be readily ascertainable. It could even then be seen that the maximum amount of such damages could in no event exceed the total amount of the two claims of the Stoddard-Dayton Company, which, it will be noticed, did not exceed \$1,800, and was approximately \$1,200 less than the \$3,000 indebtedness evidenced by the notes given by respondent to appellant in part payment of the purchase price of the 30 shares of stock, all of which indebtedness he is now insisting was satisfied by respondent's failure to settle the differences between the two companies.

These facts, it seems to us, render the law of the case comparatively free from difficulty. Appellant's contentions are no different in principal than they would be, were he now insisting that respondent owed him \$3,000 as stipulated damages, and such dam-

ages in that amount were being set up by him as an offset against his indebtedness to respondent upon these notes. In its last analysis, his claim is that his debt is satisfied by liquidated damages, the amount of which is fixed by the stipulation of the stock sale contract, growing out of respondent's failure to perform certain things therein agreed to by him, and that appellant is thereby freed from the necessity of offering proof of his actual damages. Now, if the stipulations of the contract are in effect valid stipulations providing for liquidated damages, appellant's position is well founded. But if they are in effect stipulations providing for a forfeiture as a penalty by respondent of the \$3,000 due him from appellant, because of respondent's failure to effect a settlement of the differences between the two companies, then, under well-settled rules, appellant can only recover, or offset, as in this case, which amounts to the same thing, his actual damage caused by such failure. 1 Sutherland on Damages (3d Ed.) § 283.

[2, 6] That these stipulations are in effect agreements for a penalty in the sum of \$3,000 to be suffered by respondent for failure to effect settlement of the differences between the two companies, which failure could in no event damage appellant more than \$1,800, seems to us plain. This being true, the appellant is not entitled to enforce the whole of such penalty in satisfaction of damages, which, as we have seen, could in no event amount to but little more than half of the amount claimed by appellant, under the guise of agreed liquidated damages; but he is required to prove the amount of his actual damages, and can be awarded no more. The law controlling the rights of parties under contracts of this nature was quoted approvingly by this court from Pomeroy's Equity Jurisprudence, in Johnson v. Cook, 24 Wash. 474, 478, 64 Pac. 729, 731, as follows: "First. Wherever the payment of a smaller sum is secured by a larger, the larger sum thus contracted for can never be treated as liquidated damages, but must always be considered as a penalty. Second. Where an agreement is for the performance or nonperformance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose will be treated as one for 'liquidated damages,' unless the intent be clear that it was designed to be only a penalty." This doctrine is again noticed at some length in Madler v. Silverstone, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. (N. S.) 1, where our previous decisions are reviewed.

[4] It is true that it is stated in the contract that, in the event of the failure of respondent to make settlement of the differences between the two companies "he is to surrender up to the first party the three notes above for cancellation, said unpaid three notes for \$3,000 to be considered as liquidated damages sustained by the first party [appellant]. * * * " But the mere naming of the amount as "liquidated damages" does not necessarily make it so. We are not controlled by the mere name by which parties may designate an obligation of one to the other, when the substance of their contract shows that such name is erroneously used. Erickson v. Green, 47 Wash. 618-615, 92 Pac. 449; Styers v. Stirrat & Goetz Inv. Co., 65 Wash. 676, 679, 118 Pac. 896; Condon v. Kemper, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671.

The latter case contains an exhaustive review of the subject, and, together with the note in 13 L. R. A., is particularly applicable as indicating the slight attention the courts will give to the name used by parties as designating their respective legal obligations, when the true nature of such obligations is clearly deducible from the terms of their contract.

We are of the opinion that, in view of the admitted facts that the note sued upon was duly executed and delivered to respondent by appellant, that appellant has offered no evidence as to his actual damages by reason of respondent's failure to settle the difference between the two companies, and that the stipulations of the stock sale contract are in effect stipulations providing for a penalty rather than liquidated damages, respondent was entitled, as a matter of law, to a directed verdict in his favor for the amount due upon the note sued upon, or for a judgment to that effect, notwithstanding the verdict, as was ultimately awarded to him by the trial court.

It follows that the judgment should be affirmed. It is so ordered.

MOUNT, MORRIS, GOSE, and CHADWICK, JJ., concur.

(69 Wash. 684)

WISSINGER v. REED et al.

(Supreme Court of Washington. Aug. 24, 1912.)

ADVERSE POSSESSION (§ 65*)—MISTAKE AS TO BOUNDARIES.

That a person's adverse possession and claim of title to a strip of land was under a mistake of fact as to the true location of the boundary line between his land and the land of an adjoining owner did not prevent such possession ripening into title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 365-370; Dec. Dig. § 65.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by Laura E. Wissinger against T. R. Reed and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. E. Foster, for appellant. H. D. Moore, of Seattle, for respondents.

PARKER, J. The plaintiff commenced this action in the superior court, seeking a decree establishing what she alleges to be the lost or uncertain boundary between her land and adjoining land of the defendants upon the west, under the provisions of sections 947-949, Rem. & Bal. Code. The action is in effect one to recover from the defendants a strip of land lying along and immediately to the west of a line up to which they have possession, and which they claim to be true boundary line between their land and the plaintiff's, and which the plaintiff claims is east of such true boundary line. The defendants interposed two affirmative defenses. One of these was a claim of title by adverse possession to the strip of land involved. The trial court made findings in favor of the defendants upon their claim of adverse possession for so much of the land as they had inclosed by fence, which was practically all of the land involved, and rendered judgment accordingly in their favor. The plaintiff has appealed to this court.

Appellant has record title to the southeast 40 acres of a certain quarter section, and respondents have record title to the southwest 40 acres of the same quarter section. This results in their common boundary line being a line running northerly and southerly through the center of the quarter section, assuming that their respective titles are in fact as shown by their record titles. Respondent acquired the westerly 40 acres by deed of conveyance in April, 1896. At that time the land here involved had been inclosed with a fence by their grantor with other land included within the west 40-acre tract. The easterly fence of this inclosure runs northerly and southerly some little distance to the east of the line now claimed by appellant as the true boundary line between the two tracts. This fence has been maintained by respondents, and the land inclosed thereby occupied and used by them at all times since the year 1896 for pasture and cultivation. Such occupancy has been open and visible to the world during all of this period, and has at all times had the outward appearance of adverse possession and claim of ownership on the part of respondents to all of the inclosed land. This fence has been maintained by respondents, under the belief that it was upon the true line between the two 40-acre tracts, at least for more than 10 years following their going into possession of the land in 1896. About the year 1909 appellant made known to respondents her

claim that the fence was not on the true boundary line between the two 40-acre tracts, and that such line was some distance to the west of the fence. For the sake of argument, we will assume that surveys made about that time support the claim of appellant that the true line between the 40-acre tracts is as claimed by her, and that it then became known to respondents that the fence was not on such line. There is some conflict in the testimony as to the claims of ownership made by respondents after the surveys of 1909 to the land in their possession between their fence and the true common boundary line of the 40-acre tracts; but we think the evidence fully warranted the trial court in believing that respondents have at all times claimed ownership of all of the inclosed land up to their fence, which they have been in possession of since 1896.

Aside from the question of respondents' claim of ownership in connection with their occupancy and possession of the land since 1896, which question we think the court rightly resolved in respondents' favor, counsel for appellant now contends that, since respondents' claim of title and possession was under a mistake of fact as to the true location of the common boundary line between the two 40-acre tracts, their possession and claim of ownership could not ripen into a title by adverse possession. There are some decisions of other courts which in a measure seem to lend support to this contention; but our former decisions are clearly against such contention. Respondents' adverse possession and claim of ownership of all the land up to their fence having continuously existed from April, 1896, up to the commencement of this action in March, 1910, a period of approximately 14 years, the fact that they were mistaken in the location of the true boundary line between the 40-acre tracts did not prevent such possession and claim of ownership from ripening into title by adverse possession. *McCormick v. Sorenson*, 58 Wash. 107, 107 Pac. 1053, 137 Am. S. Rep. 1047; *Naher v. Farmer*, 60 Wash. 606, 111 Pac. 768; *Johnson v. Ingram*, 63 Wash. 535, 115 Pac. 1073.

It follows that the judgment must be affirmed. It is so ordered.

MOUNT, CROW, GOSE, and CHADWICK, JJ., concur.

(60 Wash. 643)

MOHNEY v. ELLIS et al.

(Supreme Court of Washington. Aug. 21, 1912.)

MORTGAGES (§ 597*) — REDEMPTION — ESTOPPEL.

A purchaser at mortgage foreclosure sale is estopped to deny the right of redemption for the benefit of minors, though proceedings to redeem were not taken according to Rem. & Bal. Code, §§ 594, 595, 599, where such non-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

compliance was induced by his agreement to assign his certificate of sale and make a quitclaim deed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1742-1752; Dec. Dig. § 597.*]

Department 1. Appeal from Superior Court, Whitman County; Chester F. Miller, Judge.

Action by J. M. Mohny against Thomas H. Ellis and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. N. Pickrell, of Colfax, for appellant. U. L. Ettinger, of Colfax, D. O. Dow, of Pullman, and Chas. F. Voorhees, of Colfax, for respondents.

CROW, J. On January 5, 1903, Thomas H. Ellis and Sarah C. Ellis, his wife, the owners of 320 acres of land in Whitman county, their community property, mortgaged the same to Ladd & Bush, to secure their note for \$4,500. Sarah C. Ellis died intestate on or about September 17, 1903, leaving surviving her Thomas H. Ellis, her husband, and certain children of herself and husband, hereinafter mentioned. On March 4, 1908, Ladd & Bush commenced an action in the superior court of Whitman county to foreclose the mortgage. A decree was entered, and on June 13, 1908, the land was sold by the sheriff of Whitman county to J. M. Mohny, the plaintiff herein. Subsequent to the foreclosure, Thomas H. Ellis leased the land to R. W. Hall, who raised a crop of wheat thereon. On June 19, 1909, a sheriff's deed was executed and delivered to Mohny, and on August 11, 1909, he commenced this action against Thomas H. Ellis and R. W. Hall to recover possession and for other relief. On October 22, 1909, Lon L. Ellis, of the age of majority, son of Thomas H. Ellis and Sarah C. Ellis, deceased, and brother of Elmer T. Ellis, Elga J. Ellis, Dora A. Ellis, and Claude H. Ellis, all of whom were minor children and heirs at law of the deceased, petitioned the court to appoint a guardian ad litem for the minor heirs, alleging that he and they claimed an interest in the real estate. The petition was granted, the guardian ad litem was appointed, and with leave of court Lon L. Ellis and the minor heirs, by their guardian ad litem, filed their complaint in intervention. The defendant Thomas H. Ellis in his answer, and interveners in their complaint in intervention, pleaded their interest in the real estate, alleged that they were entitled to redeem, and had in equity redeemed, from the sheriff's sale, demanded that the sheriff's deed be canceled, and that their title be quieted. There is no contest between Thomas H. Ellis and the interveners as to their respective interests. The facts upon which they predicated their claim need not be now mentioned. They were substantially found by the trial judge as hereinafter stated. From a decree canceling the sheriff's deed and quieting title in

the defendant Thomas H. Ellis and the interveners, the plaintiff has appealed.

Most of the assignments of error involve the contention that the facts found by the trial court are not supported by the evidence. We have carefully examined the evidence and conclude the findings must be sustained. While in many instances these findings rest upon the oral evidence of J. H. Ellis as against appellant's testimony, yet we conclude the preponderance is in favor of the findings made, as the statements of J. H. Ellis harmonize more perfectly with undisputed facts and circumstances, and are corroborated by other witnesses. The trial judge saw the witnesses, observed their demeanor, passed upon their credibility, and found in favor of the respondents. From his findings, which must be sustained, the following facts appear, in addition to the foreclosure proceedings above stated: That about six weeks before the year of redemption had expired, to wit, on or about May 1, 1909, J. H. Ellis, acting for Thomas H. Ellis and the interveners, asked appellant if he would accept a mortgage on the land for the sum necessary to redeem; that appellant replied he would require the money; that J. H. Ellis then informed appellant he could obtain the money to redeem, but that he would have to raise it by mortgage upon the land; that, as there were minor heirs who could not execute a mortgage, it would be necessary for him to acquire the title, execute the mortgage, and then convey to Thomas H. Ellis and the heirs; that for such purpose it would be necessary that appellant assign the certificate of sale and make a quitclaim deed to J. H. Ellis; that appellant then told J. H. Ellis that would be satisfactory; that he would assign the certificate of sale and execute the quitclaim deed upon payment to him of the money due on the redemption; that, relying upon appellant's promise and agreement, J. H. Ellis, acting for the respondents, negotiated from Balfour-Guthrie & Co. a loan for a sum sufficient to pay appellant; that he temporarily borrowed \$7,948.80 from a Colfax bank, the amount due appellant on his certificate of sale to June 12, 1909, inclusive, and on that day tendered the same to appellant in the form of a certificate of deposit issued by the bank, payable to appellant, and requested appellant to assign the certificate of sale, and execute the quitclaim deed; that appellant did not except to the amount or form of the tender, but did refuse to assign the certificate of sale or to execute the deed, and at the time stated that he believed J. H. Ellis was attempting to defraud the minor heirs and deprive them of their interest in the land; that at all times while J. H. Ellis was attempting to redeem the land appellant well knew he was acting for Thomas H. Ellis and the interveners; that the re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

spondents, relying on appellant's promise made to J. H. Ellis, did not give the statutory notice to redeem; that when appellant declined the tender and refused to assign the certificate or execute the quitclaim deed it was too late to give such notice; that on account of appellant's failure to perform his agreement J. H. Ellis could not mortgage the land to Balfour-Guthrie & Co.; that, relying on appellant's agreement, neither J. H. Ellis nor the respondents made any effort, other than those above stated, to raise the money with which to redeem; that on October 18, 1909, after the commencement of this action, respondents' attorney tendered appellant \$8,175.05 in gold coin, for the purpose of preserving the tender theretofore made, and for the further purpose of redeeming the land; that \$8,175.05 thus tendered covered the entire amount then due appellant, including taxes and interest; that the tender last mentioned was refused, but that respondents forthwith deposited the same with the clerk of the superior court for payment to appellant; and that on June 12, 1909, when the first tender was made, the fair market value of the land was \$20,000.

Upon these facts we fail to understand how any court of equity could enter a decree other than the one of which appellant now complains. The appellant relies on the fact that no redemption was made in the manner or within the time provided by statute; that the sheriff's deed was issued; and that the respondents have lost all their rights. He testified that on June 12, 1912, when the first tender was made, he believed that J. H. Ellis, who made the tender, was defrauding the minor heirs; that if they were not to have the land he thought he might as well have it himself; that he then told J. H. Ellis to pay the money to the sheriff, to whom he would then surrender his certificate of sale. There was not a shadow of proof nor a syllable of evidence outside of appellant's suspicions, stated by himself, which tended to show or even suggest that J. H. Ellis intended to defraud the minor heirs. Appellant claims he wanted to protect the minor heirs, yet he made no effort to do so by any practical method or procedure; nor did he attempt to find a trustee whom he could trust. On the contrary, he asserted and still asserts his right to hold land worth \$20,000, which, but for his acts, the respondents might otherwise have arranged to redeem for about \$8,000. When on June 12, 1909, appellant directed J. H. Ellis to pay his borrowed money to the sheriff, he well knew that J. H. Ellis had perfected his plans in the belief that he was to obtain the title, upon which he could by mortgage obtain funds to repay the money he had temporarily borrowed from the bank before he conveyed the title to the respondents. He also knew that if the money J. H. Ellis had borrowed from the bank should be paid to the sheriff, and appellant should surrender to the sher-

iff the certificate of sale, and should at the same time waive the statutory notice to redeem, which he did not agree to do, the title would pass to respondents, a number of whom were minors and could not secure J. H. Ellis by a mortgage lien for the money which he would thus advance. At that late day appellant was in no position to insist that J. H. Ellis should proceed in any such manner, knowing, as he did, that J. H. Ellis and the respondents had all acted in good faith upon his promise and agreement to assign the certificate of sale and execute the quitclaim deed.

Citing sections 594, 595, and 599, Rem. & Bal. Code, appellant argues that the only right a judgment debtor has remaining after an execution sale is the statutory right of redemption, which must be asserted in the exact manner and within the limit of time prescribed by the statute. He further insists that the statutory method to be available must be strictly pursued. Even though no criticism be made on this contention, it will not avail appellant. Respondents' failure to redeem within the statutory period, or by exact compliance with the statutory method, resulted from appellant's acts, which misled them into the belief that he would cause the title to vest in J. H. Ellis, so that he might mortgage the land, raise the redemption money advanced by him, and then in turn permit respondents to redeem by accepting the title, subject to the mortgage lien, for the satisfaction of which the land, then worth \$20,000, would have been primarily liable and ample security. In other words, appellant, with the assistance of J. H. Ellis, who was acting for respondents, agreed upon a procedure for redemption other than that provided by the statute, and then refused to perform his agreement when it was too late for respondents to perfect other arrangements or give the statutory notice. Agreements to extend the time for redemption have been repeatedly enforced by courts of equity, and we see no reason why appellant's agreement to change the form of procedure for redemption should not be likewise sustained.

"So, if any agreement is entered into subsequently to the sale, though by parol, the substance of which is that the purchaser, or other holder of the certificate of sale, will treat it as a mere security, or will give a definite time in which to redeem, it will be enforced. The effect of such an agreement is to prevent any effort on the part of the debtor to redeem within the time designated by the statute; and not to enforce it in his favor, when it had been the means of lulling him into inaction, would be to pervert it into a cruel and fatal decoy. This the courts will not permit; nor will they heed the plea that the contract cannot be received in evidence because within the statute of frauds." 3 Freeman on Execution (3d Ed.) § 316, p. 1859.

In *Newman v. Locke*, 38 Mich. 27, 36 N. W. 103, the court, in holding that the time for redemption should be extended, said: "The equity of redemption was of considerable value, and a relinquishment of it would have been too great a sacrifice to make, unless it was absolutely hopeless to save it. Considering all the testimony, it has convinced me that complainant, from the acts and conversation of defendants, was led to giving up efforts to get money in other quarters, and to rest on the assurance that his interests were secure from further peril."

In the recent case of *Murphy v. Teutsch*, 132 N. W. 435, 35 L. R. A. (N. S.) 1139, the Supreme Court of North Dakota, citing authorities, stated the equitable rule, saying: "The power of courts of equity to give relief in certain class of cases and permit a redemption of real estate sold under execution after the statutory period of redemption has expired has been generally recognized, and such power has been exercised when a proper state of facts required it. See *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738; *Wilson v. Eggleston*, 27 Mich. 257; *Grafam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839; *Schroeder v. Young*, 181 U. S. 334, 18 Sup. Ct. 512, 40 L. Ed. 721; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246. Such power has been exercised by courts of equity most frequently upon a sufficient showing of either fraud, accident, or justifiable mistake."

The controlling question before us is whether appellant did in fact agree to accept the money which would be due him on redemption, and, in lieu of the regular statutory method of redemption, did further agree to assign the certificate of sale and make a quitclaim deed to J. H. Ellis. The evidence shows and the trial court found that he did. This being true, he cannot, in a court of equity, now assert his right to the land; nor can he now deny the respondents' right to redeem, or that in equity they did redeem within the statutory period. The following cases, although not decided on facts entirely similar, announce equitable principles which should be controlling in this action: *Union Mut. Life Ins. Co. v. Kerchoff*, 133 Ill. 368, 27 N. E. 91; *Chytraus v. Smith*, 141 Ill. 221, 30 N. E. 450; *Butt v. Butt*, 91 Ind. 305.

The judgment is affirmed.

DUNBAR, C. J., and PARKER and GOSB, JJ., concur.

(70 Wash. 15)

In re TRESIDDER'S ESTATE.

(Supreme Court of Washington. Aug. 26, 1912.)

1. WILLS (§ 155*)—"UNDUE INFLUENCE."

"Undue influence," which will avoid a will, is not mere persuasion of testator, but such an

influence as deprived him of the free exercise of his intellectual powers, exercised by coercion, imposition, or fraud, and impelling him to act in fear, a desire for peace, or some feeling which he is unable to restrain (citing 8 Words and Phrases, 7166-7172).

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 376-381; Dec. Dig. § 155.*]

2. WILLS (§ 164*)—"UNDUE INFLUENCE"—EVIDENCE.

On the question of the undue influence of testator, the relation of the parties, surrounding circumstances, the habits and inclination of testator, and his purposes and wishes, expressed when he was likely to be telling the truth, constitute competent evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.*]

3. WILLS (§ 166*)—"CONTEST"—UNDUE INFLUENCE—"BURDEN OF PROOF."

When it is shown that the proposed will is in the handwriting of the sole beneficiary, that, though he knew of a will in favor of the testatrix's son, he did not bring to the son's attention the repudiation thereof, and that he took care to have a physician witness the will to preserve proof of mental capacity, this is enough, in view of former wills, all in favor of the son, and of the admitted attachment of testatrix and her son, to put the executor on his proof that there was no undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

4. WILLS (§ 166*)—"CONTEST"—UNDUE INFLUENCE—"EVIDENCE."

The evidence on a contest of a will held not to sustain the burden put on the executor by proof of certain circumstances, of proving that there was no undue influence in the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

5. WILLS (§ 307*)—"PETITION FOR PROBATE"—WITHDRAWAL.

One who has contested a will and petitioned for probate of a prior will may not withdraw the petition, with the effect of reducing the estate to one of intestacy, his contest being successful, especially where his interest in case of intestacy would be greater than under such will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 734; Dec. Dig. § 307.*]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

In the matter of the estate of Martha J. Tresidder, deceased. Richard Seymour Conklin successfully contested a will of deceased, and Thomas W. Tresidder appeals. Affirmed and remanded, with instructions.

Frank A. Noble and Peters & Powell, all of Seattle, for appellant. Brady & Rummens, of Seattle, and W. D. Peters, of Bremerton, for respondent.

CHADWICK, J. Martha J. Tresidder and Thomas W. Tresidder were married in the state of New York in the year 1890. At the time of their marriage Mrs. Tresidder was a widow with one son, Richard Seymour Conklin. A short time after they were married Mr. Tresidder came West, and after a time he was followed by Mrs. Tresidder and her son. It is contended that the major part of the property owned by Mr. and Mrs. Tresidder at the time of her death was the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

accumulated earnings of the sums she brought with her from New York. Her son testifies that she had about her person a sum in excess of \$9,000, when she left New York. We are inclined to believe that he is mistaken in this, for it seems that Mrs. Tresidder pawned her diamond earrings to bring the two of them from Bonner, Mont., to Seattle. The son, who was employed in a hotel, was left behind for a time. So far as the record shows, Mr. and Mrs. Tresidder struggled against adverse circumstances for several years. He followed various employments, and Mrs. Tresidder kept roomers and for a time worked in a real estate office. In 1897 Mr. Tresidder induced a party with some capital to bank it against his experience, and they started a small lumber business. This was sold out in January, 1901, Mr. Tresidder receiving \$8,400 for his share. On the 9th day of March, 1901, there was deeded to Mrs. Tresidder two lots in Union addition to the city of Seattle. The consideration was \$2,700, and the deed recites that the property was sold and conveyed to Martha J. Tresidder, "as and for her sole and separate property, use and benefit, and not as community property." There is much controversy over the status of this property, but it is our judgment that, wherever the money may have come from, the form of the deed (Mr. Tresidder having had charge of the transaction) would bind him to its terms, and that the property became the separate property of his wife. Prosperity measured in dollars seems to have followed the Tresidders from this time on. Mrs. Tresidder died May 22, 1910. The appraised value of the whole estate was about \$67,000. From the time that prosperity began to dawn on them, Mrs. Tresidder seems to have developed a penchant for executing wills; the first will being drawn in 1901 at about the time the property which became the home property had been deeded to her. This circumstance, though slight, tends to discredit the testimony of Seymour that Mrs. Tresidder brought \$9,000 with her and had always been possessed of some means. People without means do not as a rule make wills, although our literature is adorned with one purporting to be the will of a pauper. We are therefore disposed to believe that the whole of the property, saving and excepting only the home property, is community property. Mrs. Tresidder became ill of tuberculosis in 1909, and rapidly declined in health, and for a time before her death was unable to sit up in bed or to assist herself in any way. On May 18th, at the solicitation of her son Seymour, Mr. Walter D. Peters went to the home of deceased, and in his presence and in the presence of one Margaret Hopkins, a trained nurse, Mrs. Tresidder executed a will, the material parts of which follow:

"First. I give, devise and bequeath unto my son, Richard Seymour Conklin, of Seattle, aforesaid, lot one (1), north five feet

of lot two (2) of and in block sixteen (16), of Union addition to the city of Seattle, county of King, state of Washington, U. S. A., house lot and all of its contents, and all of my personal property, including my jewelry, and the money in the Scandinavian-American Bank, of the aforesaid Seattle, Washington, of which I may die possessed.

"Second. I give, devise and bequeath all the rest, residue, of my estate be the same real or personal or mixed and wheresoever situated, equally unto my said son, Richard Seymour Conklin, and unto my husband, Thomas W. Tresidder, both of Seattle, Washington, share and share alike."

Her mental capacity to execute this will is not denied. Consequently we shall not discuss it. On May 19th, so the testimony on behalf of Mr. Tresidder shows, Mrs. Tresidder told the nurse to telephone to Mr. Tresidder and ask him to come to the house. When he arrived, she is reported to have said: "Oh, papa, I have done something. I want to tell you about;" that she then said that she had executed the will which we have just referred to, and that she felt that it was "forced on her." Mr. Tresidder then prepared in his own handwriting a will which his wife attempted to execute; but having misspelled her name, he made another draft of the will, which was properly signed. The will is as follows:

"I, Martha J. Tresidder, of Seattle, Washington, being of sound mind and fully able to make a will, do hereby will and bequeath all of my property both real and personal of which I may die possessed to my husband, Thomas W. Tresidder of Seattle, Wash.

"I ask my husband, Thomas W. Tresidder, to make provision for my son, R. Seymour Conklin, as requested by me.

"I appoint my husband, Thomas W. Tresidder as administrator of my estate without bonds.

"All other wills that may have been made by me before this are void."

This will was admitted to probate on June 1, 1911. On July 6th the son Seymour filed a contest, setting up that Mrs. Tresidder was not mentally competent to make the second will; that she had been overreached and unduly influenced by her husband, who was made her sole legatee. He also offered the will first quoted for probate.

[1] Without reviewing the evidence, we believe that, although Mrs. Tresidder was in a very weak and emaciated condition, she was nevertheless mentally competent in the sense that she understood what she was doing. The right of a party to change his will at any time, so long as he has capacity to do so, cannot be questioned. Nor will mere persuasion on the part of a beneficiary overcome the will of a party, if from the whole record it is made to appear that it is his will. It is not influence alone, but an undue influence, which has been defined to be such an influence as deprived the party of

the free exercise of his intellectual powers, an influence which is exercised by coercion, imposition, or fraud, an influence which impels the testator to act in fear, a desire for peace, or some feeling which he is unable to restrain. 8 Words and Phrases, 7166, 7172; *In re Patterson's Estate*, 123 Pac. 515.

[2] From the very nature of things, undue influence can rarely be proved by direct evidence. The relations of the parties, surrounding circumstances, the habits and inclinations of the testator, his purposes and wishes, expressed at times when his words were clothed with the likelihood of truth, all furnish competent sources for the guidance of the courts when called upon to decide a case of this kind. *In re Patterson's Estate*, supra; *Rollwagon v. Rollwagon*, 63 N. Y. 506. There is no "uniform rule capable of application apart from the facts of each case." *Wigmore on Evidence*, § 2503.

[3, 4] To sustain the second will, the one proposed by Mr. Tresidder and admitted to probate, he seeks to show that the property was all accumulated through his efforts and as the result of his business acumen; that the mother felt that, because of her son's habits, he being addicted to the use of intoxicating liquors and occasional sprees, he was unfit to handle money or property, and it was better to leave all of her property to her husband; that he was attached to his wife and she to him; that the son is a profligate and ne'er-do-well, and has been supported in the main by his stepfather and mother ever since their marriage.

On the part of the contestant testimony has been offered to show that Mrs. Tresidder had frequently expressed the opinion that her husband had no affection for her; that she kept accounts and books, and had money on deposit in her own name which was unknown to Mr. Tresidder at the time of her death; that she was deeply attached to her son and he to her, and on frequent occasions she had expressed her affection for him and her intention to leave him her property; that she executed no less than five separate wills, in all of which she indicated an intention to provide for her son by way of specific devise; that she had executed a will in 1901 in which she had devised a part of her property to her husband, but thereafter, in all of the wills she had executed, she had favored her son to the exclusion, or partial exclusion, of her husband; that in one of these wills she had named a stranger as a joint executor to act with her son; that all of these wills had been concealed from her husband, as was also the fact that she carried money on deposit in her own name in the banks; that, although contestant was in the house at the time the last will was drawn, its execution was concealed from him; that the will as drawn and probated in effect disinherited her son, and it is so understood by Mr. Tresidder, who served a written notice

on Seymour to move out of the house a few days after his mother's death and to seek lodgings elsewhere. There is further testimony tending to show that the contestant is an architectural draftsman, and has supported himself, except during the two years just preceding his mother's death; that during that time he was in constant association with his mother, and nursed her up to a month or two preceding her death; that he has contracted tuberculosis from his mother, and is now its victim, and that this fact was known by her before she executed either of the wills now before the court. It is further shown that Mr. Tresidder drew the will with his own hand; that the deceased could not, or at least did not, spell her name correctly in the first draft of the will, and that a new one had to be made; that Mr. Tresidder waited until the next day in order to get the attending physician to act as a witness, and that he did this over the suggestion of the nurse, although neighbors were handy and might have been called. The position of Mr. Tresidder is strongly supported by the nurse, but her testimony is not entirely satisfactory, and it is evident that the trial judge did not credit it. She was, to say the least, neither a frank nor apparently a disinterested witness. Upon this showing, and minor details not now necessary to rehearse, the court annulled the order probating the will proposed by Mr. Tresidder.

It will be seen that the case is not without difficulty, which furnishes an additional reason for following the trial court in its judgment. "In cases of this character the conclusions of the surrogate are highly important." *Rollwagon v. Rollwagon*, 3 Hun, 127. That there is something, or was something, connected with the execution of the last will that has not been disclosed, we have no doubt. It is indicated by all the proved facts. To ascertain the will of a party, it is proper to look to the purpose of the testator. The naturalness of the act is a strong supporting circumstance, and has ever been the readiest weapon of those who would sustain a will. That it had ever theretofore been the intention of the testator to care for her son there is not the shadow of a doubt. The four or five wills previously executed are competent evidence to prove this fact. *Seale v. Chambliss*, 35 Ala. 19. That Mrs. Tresidder was not unmindful of the care and attention and faithful devotion of her son is certain. Mr. Tresidder states that Seymour was very gentle with his mother during her last illness. Having the means, she must have intended—in fact, the last will asserts, although ineffectually—that her son, who had so tenderly cared for her, and whom she had provided for in her previous wills, should not go entirely stripped of her bounty.

We find, and we have no doubt that the trial judge found, the key to this case in the

second clause of the will: "I ask my husband Thomas W. Tresidder to make provision for my son R. Seymour Conklin, as requested by me." This clause should be construed in the light of all former wills and the circumstances surrounding its execution. We have no doubt that, when Mr. Tresidder found that his wife had made a will favoring her son, he put before her the same theory we find expressed in his testimony and maintained by counsel; that is, that the son was addicted to the intemperate use of liquor, that to leave him a part of the property would be to unnecessarily handicap a business that he had built up by his own efforts, and that if she would leave the matter to him he would do as she "requested." This clause indicates the true intention of the testator. What had she "requested"? Not merely that the son be provided for. If that were all, the use of the precatory words was sufficient, and the words "as requested by me" are redundant to that intention. The use of the words "as requested by me" (and we must give every word a meaning if we can) indicates a way, a manner, or a method. This, then, brings us to one of two propositions: Either the will operates to totally disinherit the son (and, indeed, Mr. Tresidder has put that construction upon it) or its meaning depends upon oral evidence which it is impossible to reveal, for it lies in the conscience of the sole legatee. The will "to provide . . . as I have requested" depends upon the unexpressed oral promise of the devisee. Dangerous indeed would be the doctrine that would sustain a will of that kind under the admitted facts of this case. There seems to have been no particular affection between the son and husband. There is no tie of blood. The provision quoted, if the son was of tender years and the sole beneficiary was the father, would be a natural expression. But here it is highly improbable that Mrs. Tresidder rescinded the will and intent of years' standing, unless she had some specific promise to do as she requested. The will is in a sense the will, but not the whole will, of the deceased. It may be noted as a circumstance sustaining our theory that the reason—the habits and ill health of the son—that must have prompted the suggestion that Seymour be provided for "as requested" is the very same reason urged by Mr. Tresidder for repudiating the duty to provide. The case of *Rollwagon v. Rollwagon*, 3 Hun, 121 (same case, 63 N. Y. 504), is similar to this. The evidence there showed that there was no real love between the husband and wife; that there was a bond of sympathy and affection between the deceased and his children; that the devises were exclusively for the benefit of the wife, who proposed the will; that she had arranged and managed all details leading up to its execution; that the children of decedent were not apprised of what she was do-

ing or had done; that he had executed previous wills dealing fairly with his children and grandchildren; that nothing was shown to have occurred in the meantime which could naturally be expected to produce changes in his intent and will. These facts, combined with his enfeebled condition, justified the court in rejecting the will, although there was no direct evidence of undue influence to sustain its judgment.

It is earnestly maintained that the burden of proof is on the contestant, and that this burden has not been sustained. This is true as a general rule, but when it is shown that the will as proposed is in the handwriting of the sole beneficiary, that, although he knew of the will in favor of the son, he did not bring the fact of its repudiation to his attention, that care was taken to have a physician act as witness in order to preserve the proof of mental capacity, we think enough has been shown, when considered in the light of the former wills and the admitted attachment between mother and son, to put the executor to his proof that there was no undue influence. It is our judgment that this burden has not been sustained.

[5] At the close of the trial, counsel for contestant withdrew his prayer for the probate of the will offered by him; this for the evident purpose of reducing the estate to one of intestacy. This he could not do. The original petition for probate of the repudiated will and its contest invested the court with jurisdiction of the estate, and, under that proceeding, the court was vested with full authority and jurisdiction to administer the estate; and, it appearing that the will offered by the contestant is a valid will, it becomes the duty of the court to execute it. The contestants are not alone concerned. The state has an interest in the administration of every estate, and its courts having acquired jurisdiction it will be exercised to the end. Contestant might have withdrawn his contest, but he cannot withdraw his petition for probate of the will proposed by him. "It would be a strained construction of the law as to probate of wills if the court should be compelled to hold that, after a will was presented for probate and presumptively proven by the executor [proponent or contestant], he could discontinue the whole proceedings. He was not a party to the record with any such power. The executor could not suppress a will before it was offered for probate or afterwards." *Matter of Lasak*, 57 Hun, 417, 10 N. Y. Supp. 844; *Bonds v. Gray*, 2 Ga. Dec. 136, pt. 2. This is especially true where the effect of the waiver or dismissal would be to put the proponent in a better position than he would be in if he relied on the will. Mr. Tresidder has an equal interest in the residue of the estate under the will; whereas, if the estate be intestate, he would take nothing but his own share of the community property. We have found no case bearing directly on this.

point, but it may be resolved by reference to the doctrine of election. A legatee may elect to waive the greater and take the lesser share, but he cannot waive the lesser share under a will and take a greater share under the statutes of descent. If it were so, it would be always possible to defeat the will and intention of the testator.

The decision of the lower court is affirmed, and the case remanded, with instructions to proceed to execute the will proposed by the contestant.

GOSE, CROW, and PARKER, JJ., concur.

BENNETT et al. v. NOURSE et al.
(Supreme Court of Idaho, July 3, 1912. On Petition for Rehearing, Aug. 27, 1912.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 30*)—IRRIGATION—POINT OF DIVERSION—CHANGE.

Under the provisions of section 3157, Rev. Stat. of 1887, a person entitled to the use of water may change the place of diversion, if others are not injured thereby.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 20; Dec. Dig. § 30.*]

2. WATERS AND WATER COURSES (§ 19*)—PRIORITIES—AMOUNT.

Held, that the court erred in not granting B. a water right of 160 inches with a priority as of April 8, 1885.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

3. WATERS AND WATER COURSES (§ 24*)—APPROPRIATION—PLACE OF MEASURE.

Water that is appropriated for irrigation purposes must be measured to the claimant at the point of diversion.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.*]

4. WATERS AND WATER COURSES (§ 19*)—APPROPRIATORS—RIGHT.

Held, that the court erred in not granting D. a water right of 160 inches with a priority of March 31, 1885.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

5. WATERS AND WATER COURSES (§ 18*)—IRRIGATION—DIVERSION DITCH—SLOUGH.

An appropriator of water may adopt as his ditch, or a part thereof, a depression or slough, where it is feasible, and thus save the cost of the construction of a ditch.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 10; Dec. Dig. § 18.*]

6. WATERS AND WATER COURSES (§ 17*)—APPROPRIATION—IRRIGATION—APPLICATION TO USE.

An appropriator of water for irrigation purposes has a reasonable time in which to apply water to his land after conducting it to the point of intended use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 9; Dec. Dig. § 17.*]

7. WATERS AND WATER COURSES (§ 17*)—APPROPRIATION—APPLICATION TO USE—TIME.

Held, under the evidence, that a period of 24 years is more than a reasonable time in which to reclaim the 160 acres of land owned by A., and more than a reasonable time to put the water intended for that purpose to a beneficial use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 9; Dec. Dig. § 17.*]

8. WATERS AND WATER COURSES (§ 19*)—PRIORITY—EXTENT OF USE.

Held, that the court erred in granting F. P. A. more than 50 inches of water with a priority as of April 1, 1884, and 80 inches with a priority as of March 31, 1885, as he had reclaimed only about 70 acres of his land in 24 years.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

9. WATERS AND WATER COURSES (§ 19*)—APPROPRIATION—PRIORITY.

The court erred in granting L. A. more than 80 inches of water, and her priority of right should date from March 31, 1885. (Date changed on rehearing to March 15, 1885.)

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

10. WATERS AND WATER COURSES (§ 17*)—APPROPRIATION—AMOUNT OF WATER.

Held, that A. and L. were entitled to 100 inches of water for the irrigation of certain lands held by them with a priority of June 1, 1876, and no more, since they had only reclaimed 100 acres of their 240-acre tract in 32 years.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 9; Dec. Dig. § 17.*]

(Additional Syllabus by Editorial Staff.)

11. WATERS AND WATER COURSES (§ 19*)—APPROPRIATION—DIVERSION.

Where an association procures the rights of other appropriators on a stream and diverts the water at the mouth of a canyon into a reservoir, it is bound to permit sufficient water to pass down the stream to give each of the prior appropriators at the head of the ditch the amount of water awarded to them.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.*]

Appeal from District Court, Elmore County; Edward A. Walters, Judge.

Action between Richard Bennett and others and F. A. Nourse and others to determine the amount and priorities of water rights in and to Canyon creek, in Elmore county. From a decree establishing such rights, Bennett and others appeal. Modified.

L. B. Green, of Mountainhome, and Wyman & Wyman and Richards & Haga, all of Boise City, for appellants. E. M. Wolfe, W. C. Howie, and Daniel McLaughlin, all of Mountainhome, for respondents.

SULLIVAN, J. This action is to determine the amount and priorities of water rights from Canyon creek, Elmore county. Canyon creek rises in the Danskin Mountains, about 20 miles north of Mountainhome, and flows in a southerly direction through the foothills and mountains about 12 miles

out upon the sagebrush plain. At the mouth of the canyon is situated what is known as the Ake and Lockman ranch. From that point the creek flows in a southerly direction about three miles, where it divides; one fork going in a westerly direction, and called the West fork of Canyon creek, the other in a southerly direction, and called the East fork of Canyon creek.

The appellant Bennett owns land about four miles south of where said stream forks, and has taken a ditch out of the West fork of said creek near the junction, which ditch carries water to and upon his land. The appellant Dienst owns land about six miles south of the Bennett land, and has been getting water out of the East fork of the creek for the irrigation of his land. The respondent the Elmore Irrigated Farms Association, a corporation (which will hereafter be referred to for convenience as the Elmore Association), constructed, or had constructed, in 1891 a reservoir on Rattlesnake creek several miles easterly from Canyon creek, which reservoir is supplied partly by water taken out by a feeder canal from Canyon creek at the mouth of said canyon, and partly from the waters of Rattlesnake creek. The Elmore Association claims to have acquired the water rights of several persons who had theretofore settled on Canyon creek, and have conveyed said water from Canyon creek through its said feeder canal to its reservoir, and thereafter conveyed it through distributing canals to the lands theretofore irrigated by such water and other lands. The evident purpose of said change of method of conveyance of the water was to avoid the loss of seepage, which occurred in the gravelly creek bed, and it appears that the only irrigated lands on Canyon creek to which water is not thus conveyed by said Elmore Association are the lands of appellants Bennett and Dienst. It is claimed by appellants that the change in the point of diversion of the water rights of those who transferred their rights to the Elmore Association has greatly injured them; and it is also claimed by appellants that before such association changed the points of diversion of said acquired water rights the water which is now claimed by said Elmore Association flowed down the creek to the forks, and helped to swell the volume of water in the creek at the fork, so that more water went down the West fork than is now possible with only a small amount of water at the forks; and it is contended that after the extreme high water recedes the company takes all of the water out through its said feeder canal, and does not leave sufficient water in said channel to reach the appellants' lands. The respondent Ake first took water from the East fork of said creek; but after appellant Bennett's ditch had been constructed from the West fork Ake abandoned his ditch from the East fork and constructed a new ditch, diverting water from the main creek above the forks;

and it is contended that the court erred in giving Ake the same priority for his water which is taken out of the main creek as he was entitled to for water taken out of the East fork, and that the change in the point of diversion by Ake injured appellants. It appears that there was no conflict between Ake and Bennett when Ake took his water from the East fork; but when he changed his point of diversion it is contended that Bennett was affected in the same manner as if Ake had changed his ditch from the East fork to the West fork.

After the Elmore Association had made its agreement with several of the respondents, whereby it was to furnish said parties water from its said reservoir in consideration of their permitting said association to divert the water at the mouth of the canyon, and thus change the point of diversion from said stream of the water rights of said respondents, it is contended that said change has greatly injured the appellants. The question is thus presented to the court whether such change in point of diversion may be made, where others are injured thereby.

[1] The appropriator of water, or his successor in interest, may change the place of diversion, if the rights acquired by others are not thereby interfered with by the change, and no injury results to other appropriators therefrom. See section 3 of an act to regulate the use of water, Sess. Laws 1881, p. 267; section 3157, Rev. Stat. of 1887, and section 3247, Rev. Codes. Section 3157, Rev. Stat. of 1887, was in force at the time the changes referred to were made. That section provides that an appropriator may change the place of diversion, if others are not injured by such change. It thus clearly appears that the policy of the Legislature was to permit a change in the point of diversion, if such change injured no subsequent appropriator. A subsequent appropriator has a vested right, as against his senior, to insist upon a continuance of the conditions that existed at the time he made his appropriation, provided a change would injure the subsequent appropriator. See Baer Bros., etc., Co. v. Wilson, 38 Colo. 101, 88 Pac. 265; Handy Ditch Co. v. Loudon Irr. Canal Co., 27 Colo. 515, 62 Pac. 847; Mills Irrigation Manual, p. 68.

Wiel on Water Rights (3d Ed.) § 302, states as follows: "A subsequent appropriator has a vested right against his senior to insist upon the continuance of the conditions that existed at the time he made his appropriation. A second appropriator has a right to have the water continue to flow as it flowed when he made his appropriation. The subsequent appropriator is entitled to the surplus, and any attempt of the prior appropriator to make a sale of such surplus to some one else, to the injury of existing appropriators, though subsequent, is of no avail."

Under the statute and decisions, a prior appropriator has no right to change the

point of diversion, which it will in any manner injure a subsequent appropriator.

[2, 3] (1) It is first contended that the court erred in awarding to Bennett 160 inches with a priority as of May 1, 1886, instead of 240 inches as of April 8, 1885. It appears from the evidence that the land owned by Bennett was first owned by one Tregaskis, and that he filed in the office of county recorder of Alturas county, which county then included Elmore county, a water right notice, dated April 8, 1885; and the evidence shows that he and a man by the name of Field constructed a ditch, taking water from said Canyon creek upon the land now owned by Bennett, and that he raised a crop of about 15 or 20 acres of barley or rye on the land that year; that said ditch was of sufficient capacity to carry water for the proper irrigation of said land, and carried approximately 400 inches, and has not been enlarged since Bennett bought Tregaskis' land and right therein in 1887. There is evidence which shows that Tregaskis was actually diverting water through said ditch in the fore part of May, 1885. That being true, his right would relate back to the 8th of April, 1885, the date of his notice; and the court erred in not giving him a right as of that date. Bennett's ditch is about four miles in length; and it is contended that the loss of water turned in at the head of the ditch is about one-half before it reaches the land, and that it requires an inch to the acre to properly irrigate said land after the water reaches the land, and that Bennett ought to have been awarded 240 inches at the head of his ditch. We are not disposed to change the finding of the court upon this point, for it stands every water user in hand to construct his ditch so that there will be the least possible waste of water; and, no doubt, by either piping or cementing portions of the ditch where the greatest waste occurs Bennett can save much of his water. In the decision of this court in *Stickney v. Hanrahan*, 7 Idaho, 424, 63 Pac. 189, it was held that water appropriated for irrigation must be measured at the point of diversion.

[4, 5] (2) It is next contended that the court erred in fixing John Dienst's priorities 130 inches as of April 1, 1885, and 30 inches as of April 1, 1886. The evidence shows that Dienst entered his land in the fall of 1884, and that he first put water on the land in March, 1885, by putting a dam in the creek and running the water out through sloughs upon his land; that he irrigated about 50 or 60 acres that year in that way; but it is contended by counsel for respondents that, as Dienst did not make a ditch to divert the water from said creek prior to April, 1886, but conducted it through sloughs, his right could not date prior to the completion of his ditch. There is nothing in that contention. This court has held, in *Parke v. Boulware*, 7 Idaho, 490, 63 Pac. 1045,

that one may adopt as a part of his ditch a depression or slough. In case he can use such slough in place of a ditch, through which to run water to irrigate his land, he may do so, and thus save the cost of the construction of a ditch. The appellant Dienst constructed a dam and diverted the water into a natural channel, and thereby raised wild hay on 50 or 60 acres of his land, and thereafter constructed ditches. It is stated in 1 *Wiel on Water Rights*, § 388, that a person making an appropriation of water from a natural stream need not construct any headgate at the place of diversion; and if a simple cut will accomplish the purpose of diverting the water from the stream it is, if accompanied with a beneficial use, a good appropriation as against others making a subsequent diversion and use. Under the evidence, the court erred in not decreeing to appellant Dienst a water right for 160 inches, delivered at the head of his ditch, as of March 31, 1885.

[6-8] (3) It is next contended that Frank P. Ake owned individually 160 acres of land, and that only about 70 acres of said land had been irrigated at the time of the trial. It appears from the evidence that Ake located on said land in 1883 and took water out upon the land in 1884, and constructed a ditch, diverting water from the East fork of said creek, and that he irrigated a few acres from such ditch during the season of 1884. In 1885 he irrigated about 10 acres all together. Only about 40 acres could be irrigated from the first ditch made. He did not file on his land until March, 1885. In the fall of that year he constructed a new ditch, diverting water from the main ditch above the forks, and thereupon abandoned the old ditch, constructed in 1884. He constructed the ditch in 1885 so that he could get water on more of his land than he could through the ditch constructed in 1884. Through the ditch constructed in the fall of 1885, he first used water upon his land in 1886. He could not irrigate more than 40 or 50 acres of his land from the ditch first made, and from 1884 to the time of the trial (which was in 1908) he had only placed under cultivation about 70 acres of his entire tract of 160 acres, and the court awarded him 210 inches. Thus, in a period of 24 years, he had reclaimed not quite half of his 160 acres of land, and the court awarded him 210 inches of water therefor; 135 inches thereof dating from April 1, 1884, and 75 inches as of March 1, 1885. This court held, in *Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250, that an appropriator of water, after conducting the same to the point of intended use, had a reasonable time in which to apply it to such intended use. It was not intended by that decision to give an appropriator a quarter of a century in which to apply water to a beneficial use. Under the evidence, the court erred in granting Frank P. Ake 210 inches of water. Under all of

the evidence, we think said respondent is entitled to not more than 50 inches of water from April 1, 1884, and 30 inches from March 31, 1885.

[9] (4) It is next contended that the court erred in awarding Laura Ake 160 inches as of March 15, 1885, for the irrigation of 160 acres of land. Said land was entered by her in November, 1884, and she irrigated a few acres thereof in 1885. Only about 60 or 70 acres of said 160 acres had been reclaimed or was under cultivation at the time of the trial of this case in 1908. It also appears that she receives her water through the same ditches as does her husband, Frank P. Ake, and it is contended that her water right should date from the spring of 1886 and be limited to 80 inches, which amount of water, it is contended, will be abundant for the irrigation of the 60 or 70 acres which has been under cultivation in the 24 years that have elapsed since she first made her appropriation. Laura Ake and Frank P. Ake receive their water from the same ditch or ditches. The ditch constructed in 1884, some 40 rods below said forks of said creek, diverted water from said East fork. The ditch which was constructed in the fall of 1885 and first used in 1886 did not divert water from the East fork, but was higher up the stream, and diverted water from the main channel above said forks. The reason for making that change, as testified to by Frank P. Ake, was that the new ditch would cover higher ground and a larger acreage, and that there was a good head of water at the head of the last ditch constructed, when there was not any at the head of the first-constructed ditch down the stream. The evidence shows that Laura Ake first used water on her land in March, 1885, and irrigated during that season 4 or 5 acres thereof, which water she diverted from the stream through Frank P. Ake's ditch. In the fall of 1885 a new ditch was constructed that would cover more land; but water was not diverted through it until the spring of 1886. From all of the evidence, it appears that she had only reclaimed about 60 or 70 acres of her 160-acre tract at the time of the trial of this case in 1908. It is the established rule of decision in this state that an appropriator of water for irrigation purposes, after conducting the water to the point of intended use, has a reasonable length of time to apply it to such intended use (see *Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250), and we think a quarter of a century is more than a reasonable time for that purpose; and from all of the evidence the court erred in granting Laura Ake more than 80 inches of water, which right should date March 31, 1885.

[10] (5) Ake and Lockman were given 100 inches of water from June 1, 1876, and 140 inches from March 1, 1886. The land claimed by Ake and Lockman consisted of 240 acres of school land, being a part of section

36. It was purchased from the state at a public land sale on November 9, 1901. It appears from the evidence that a part of said land had been irrigated for about 25 years before it was purchased from the state, and the respondents, knowing that it was school land all of that time, cultivated it as if it were their own, taking all of the proceeds therefrom during such period of time without paying any rental whatever to the state.

It is contended by counsel for appellant that the only persons who were entitled to divert water from said Canyon creek for irrigation purposes were those "owning and claiming any lands situated on the banks of or in the vicinity of any stream," as provided by the tenth section of the act of the Legislature of the territory of Idaho, relating to water rights. See Sess. Laws 1881, p. 269. Said section is as follows: "All persons, companies, and corporations, owning or claiming any lands situated on the banks or in the vicinity of any stream, shall be entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed."

In 1876, when a part of said Ake and Lockman land was first irrigated, the land did not belong to the state, for the reason that Idaho was then a territory and not a state. However, sections 16 and 36 of each township had been reserved for school purposes by the provisions of section 1946, Rev. Stat. of the U. S. Idaho was not admitted as a state until about 14 years after the first irrigation of said land. Under the Idaho admission act, sections 16 and 36 in each township were granted to the state as school lands. It appears from the evidence that about 100 acres of said land claimed by Ake and Lockman had been reclaimed in 1876, and were irrigated and produced a crop each year from that date until Idaho was admitted as a state. Ake and Lockman continued to cultivate and crop said land from the time Idaho became a state until the 8th of November, 1901, when they purchased said land from the state. They were at least claiming the right to the possession of said land during all of that time. And after Idaho became a state the state was then the only party that could complain of their holding, cropping, and cultivating said land. The water they used each year during that time for the irrigation of said land was certainly not used by any other person. Under all of the facts, we conclude that they are entitled to 100 inches of water for the irrigation of said land with a priority as of June 1, 1876, and no more, as the evidence shows they had irrigated only about 100 acres of the land up to the time this action was tried in the district court. Conceding that sufficient water had been taken out on said land in 1876 to irrigate the entire tract, they would certainly not have been entitled to more than sufficient to irrigate the amount

of land they had reclaimed in the 32 years up to the date of the trial, which was in 1908; and 32 years was certainly more than a reasonable time for the purpose of reclaiming said tract of land. If they reclaimed only 100 acres in 32 years, at that rate per annum it would require a half century to reclaim the whole tract; and when this court laid down the rule, in *Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250, that an appropriator of water for irrigation purposes, after conducting water to the point of intended use, had a reasonable time in which to apply it to such use, it did not intend to hold that a half, or even a quarter, of a century was a reasonable time for that purpose. As to what is a reasonable time must be determined upon the facts of each case.

(6) Some question is raised as to the water right of C. T. Rohrer, which right had been decreed to the Elmore Association with a priority as of May 1, 1885, for 230 inches. The evidence is conflicting in regard to this right. Rohrer testifies that he, with three other parties, constructed a ditch in April, 1885, and that said ditch would cover about 230 acres of his land, and that he first turned water on said land through said ditch in the latter part of April, 1885. This evidence sustains said finding of the court.

[11] If the Elmore Association has procured the rights of other appropriators on said stream and diverted the water at the mouth of the canyon and turned it into its reservoir, it must let sufficient water pass down the stream to give each of the appellants at the head of his ditch the amount of water above awarded to them.

As above held, the appellant Bennett is entitled to have delivered to him at the head of his ditch 160 inches of water with a priority as of April 8, 1885, and the decree of the trial court must be modified to that extent. The appellant Dienst is entitled to a water right of 160 inches with a priority as of March 31, 1885, the water to be delivered at the head of his ditch, and the decree must be modified accordingly.

As to the other rights referred to in this opinion, the decree must be modified as above indicated; and the cause is remanded, with instructions to the trial court to amend its findings and decree in accordance with the views herein expressed. Costs are awarded to the appellants.

STEWART, C. J., and AILSHIE, J., concur.

On Petition for Rehearing.

SULLIVAN, J. A petition for a rehearing has been filed in this case, in which it is earnestly contended that Laura Ake's water right of 18 inches should be dated as of March 15, 1885, instead of March 31, 1885, as held by this court in the original opinion.

Upon a re-examination of all the evidence in regard to her water right, we have concluded to amend or modify the former opinion in regard to her said water right to date from March 15, 1885, instead of March 31, 1885, as originally held. The record contains some evidence that the water was first applied to her land about the middle of March, 1885. The original opinion of this court in this case will therefore be modified as above indicated, dating Laura Ake's right as of March 15, 1885. In this view of the case, it will not be necessary to grant a rehearing, as all that was asked for by the rehearing is hereby granted.

STEWART, C. J., and AILSHIE, J., concur.

STATE v. LAYMAN.

(Supreme Court of Idaho, Aug. 21, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 238*)—PRELIMINARY EXAMINATION—SUFFICIENCY OF EVIDENCE.
Held, that the committing magistrate did not abuse his discretion in requiring the defendant to appear for trial in the district court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 493; Dec. Dig. § 238.*]

2. CRIMINAL LAW (§ 238*)—PRELIMINARY EXAMINATION—SUFFICIENCY OF EVIDENCE.

It is not necessary for the committing magistrate to be convinced beyond a reasonable doubt that one accused of crime is guilty thereof; but if from all of the evidence he has reasonable or probable cause to believe, and does believe, that the accused is guilty it is his duty to hold him for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 493; Dec. Dig. § 238.*]

3. INTOXICATING LIQUORS (§ 213*)—CRIMINAL PROSECUTIONS—INFORMATION.

Held, that the information sufficiently charges the crime of which the defendant was convicted.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 255-257; Dec. Dig. § 213.*]

4. CRIMINAL LAW (§ 808½*)—TRIAL—DELIBERATIONS OF JURY—TAKING LAW BOOKS TO JURY ROOM.

Where counsel for defendant suggests to the court that the jury be permitted to take to the jury room the Session Laws containing the sections of the statute under which the prosecution was had, and the court grants the request and declines to give, in addition thereto, instructions covering the sections of the statute referred to, held, not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1811; Dec. Dig. § 808½.*]

5. INTOXICATING LIQUORS (§ 236*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

Held, that the evidence is sufficient to support the verdict.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.*]

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Herman Layman was convicted of maintaining a common nuisance in keeping for sale, delivery, or distribution, in violation of law, intoxicating liquors, and was sentenced to pay a fine of \$500, and appeals. Affirmed.

Millsaps & Moon, of St. Anthony, for appellant. D. C. McDougall, Atty. Gen., J. H. Peterson and O. M. Van Durn, Asst. Attys. Gen., and B. H. Miller, of St. Anthony, for the State.

SULLIVAN, J. The defendant was convicted of maintaining a common nuisance, and was charged by the information with willfully and unlawfully, within a prohibition district, maintaining a place where intoxicating liquors were sold, furnished, delivered, given away, or otherwise disposed of, in violation of law, and was sentenced to pay a fine of \$500, and, in default of payment, was ordered to be confined in the county jail until said fine be paid, at the rate of \$2 per day. A motion for a new trial was denied, and this appeal is from the judgment and order denying a new trial.

[1, 2] Numerous errors are assigned and a reversal of the judgment demanded. On the filing of the information in the district court, counsel for appellant moved to set aside and quash the information, on the ground that the depositions taken at the preliminary examination were not sufficient to justify the committing magistrate in binding the defendant over to the district court. We think the testimony introduced in the preliminary examination was sufficient to satisfy the committing magistrate that a crime had been committed, and that there was reasonable and probable cause to believe that the defendant committed it, and, that being true, it was the duty of the magistrate to hold the petitioner for trial, and it was not an abuse of his discretion to do so.

This court held, in *Re Squires*, 13 Idaho, 624, 92 Pac. 754, that "by 'reasonable or probable cause' is meant such evidence as would lead a reasonable person to believe that the accused party has probably or likely committed the offense charged," and that the phrase "reasonable or probable cause," as used in subdivision 7 of section 8354, Rev. Stat. 1887, is not equivalent to the phrase "beyond a reasonable doubt."

The statute under which this prosecution was had is commonly known as the "Search and Seizure Act," passed by the Eleventh Session of the Legislature. See Sess. Laws 1911, p. 31. The learned counsel for the defendant argues that, as the liquor found was in a private residence, under no circumstance could that be construed to be sufficient evidence to make a prima facie case under said statute, and that a prima facie case must be made before the committing magistrate has any authority to bind the defendant over to

the district court. On a careful examination of the evidence produced at the preliminary examination, it is revealed that there was circumstantial evidence, aside from the mere finding of liquor at the residence of defendant, sufficient to justify the committing magistrate in binding the defendant over to the district court. One hundred and twenty-five half pint bottles of liquor were found at the residence of the defendant, and the finding of this quantity of liquor in half pint bottles is a circumstance which goes to show that the defendant was engaged in disposing of such liquor. Would a private party, keeping liquor in his residence for his own use, be apt to purchase 125 half pint bottles when 1, 2, or 3 would have been sufficient for him? The fact that the whisky was kept in half pint bottles, a quantity commonly sold and easily handled, is a circumstance itself that the magistrate might take into consideration in determining whether or not the defendant was engaged in the practice of selling liquor. A wide discretion must be given to a committing magistrate in binding over; and, in order to vacate and nullify his action in this regard, it must be shown that such action was a plain case of abuse of discretion.

Counsel for appellant cites the cases of *State v. White*, 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132, and *Rice v. State*, 5 Okl. Cr. 68, 113 Pac. 203, which were in effect that the mere possession of whisky, without proof of the purpose for which it is held, is not sufficient to sustain a conviction of one charged with having whisky in his possession for unlawful purposes. Those cases lay down the rule applicable to the trial of a defendant charged with the offense of illicitly selling liquor, where the defendant must be proven guilty beyond a reasonable doubt, but have no reference whatever to the proceedings at a preliminary hearing, where the act complained of need not be proven beyond a reasonable doubt. The court did not err in overruling said motion.

[3] It is next contended that the court erred in overruling defendant's demurrer to the information. It is contended that the information is defective in not alleging any offense, or in not stating facts sufficient to constitute a probable offense. There is no merit in this contention, as the information is amply sufficient to charge the defendant with the offense of which he was convicted, and it is couched in language so plain as to leave no doubt as to the crime charged. The charging part of the complaint is as follows: "That the said Herman Layman * * * did then and there, willfully and unlawfully, within a prohibition district, occupy, maintain, and control a certain place where intoxicating liquors were sold, delivered, furnished, given away, or otherwise disposed of, in violation of law, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where

intoxicating liquors were kept for sale, delivery, or distribution and disposal, in violation of law," etc.

[4] It is contended that the court erred in permitting the jury in this case to take with them to the jury room a copy of the Session Laws containing the statute under which the prosecution was had. On an examination of the record, it reveals the fact that it was defendant's own counsel who made the suggestion that the jury take the Session Laws to the jury room for the purpose of reading said sections, and counsel will not be permitted to take advantage of an error made by the court on his own request. It was error for the court to permit the jury to take said Session Laws to the jury room; but it was not reversible error, as it was done at the request of counsel for the defendant.

It is also contended that it was error for the court to refuse to give certain instructions offered by the defendant. However, as said instructions were substantially a copy of the sections of the statute above referred to, the jury was given the benefit of said instructions by permitting them to take the Session Laws containing them to the jury room.

[5] It is next contended that the evidence is not sufficient to sustain the verdict. The evidence shows that the deputy sheriff searched the premises of the defendant on the date alleged in the information, and found an empty barrel and 125 bottles of whisky on the premises. The bottles of whisky were found in a wardrobe in a bedroom in the residence. The bottles were lying on a shelf, and were in pasteboard boxes, except about 25 or 30, which were not inclosed in boxes. On the premises were found 10 or 15 empty barrels similar to the one introduced in evidence.

One witness testified that he had seen people going to the defendant's house at various times in the day and night; that, perhaps, three would go to the house, and one would leave the other two and go into the house, and the other two would go up the street, where the third party would join them later. He also testified that he had seen individuals go there at early hours in the morning and late at night; that individuals with carriages and conveyances of different kinds would drive up there, and one of them would leave the other in the carriage and go to the house of defendant, and when he returned he would have a box with him, perhaps a foot and a half square.

Another witness testified that he had frequently seen persons go to the defendant's residence; that he saw one party drive up to within two rods of the entrance of the house, saw defendant come from his residence, go up to the buggy, take out of his pocket a small parcel and throw it into the baggy; and the occupant thereof put his hand in his pocket and hand something to defendant, and

defendant put his hand in his pocket and walk back to the house; that the parcels thus transferred were from five to seven inches in length and from four to five in width, and were wrapped in paper.

Others testified that they saw parties drive up to defendant's house and stop by a telephone pole; that defendant came from his residence and handed them a package, then returned to the house and got another package and delivered it in the same way. Another witness testified that he is a drayman, and delivered the defendant, at his residence, shipments composed of barrels, marked "Beer."

The defendant failed and refused to introduce any evidence on his own behalf. We think the evidence sufficient to support the verdict.

Other errors are assigned, which we have considered, but shall not refer in detail to them here.

We find no reversible error in the record, and the judgment must be affirmed; and it is so ordered.

STEWART, C. J., concurs. ALLSHIE, J., concurs in the conclusion.

SCHWARTZ v. CALIFORNIA GAS & ELECTRIC CORPORATION et al.
(Sac. 1,827.)

(Supreme Court of California. Aug. 3, 1912.
Rehearing Denied Aug. 31, 1912.)

1. NEGLIGENCE (§ 140*)—INJURY TO HORSE—INSTRUCTIONS—PROXIMATE CAUSE.

In an action for injuries to a horse, caused by its stepping on a broken insulator which it was claimed, defendant's employes dropped while working on one of its poles, where the undisputed evidence showed that the insulator, at the time of the accident, was 60 feet in one direction and 72 feet in the other direction from any pole of defendant's, an instruction that defendant was not liable, unless its employes negligently placed the insulator on the premises and at the point where the horse was injured, was improperly denied, and a modification thereof, only requiring a finding that it was negligently placed at some point where injury might result, was improper, since the evidence justified an inference that the insulator had been moved between the time it was dropped and the time of the accident.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 371, 377; Dec. Dig. § 140.*]

2. NEGLIGENCE (§ 62*)—INJURY TO HORSE—PROXIMATE CAUSE—INTERVENING CAUSE.

If an employe of defendant negligently dropped on plaintiff's premises a glass insulator, but it was afterwards picked up by some one else and moved to the place where plaintiff's horse was injured by stepping on it, the negligence of the employe was not a proximate or concurring cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. § 62.*]

3. NEGLIGENCE (§ 62*)—PROXIMATE CAUSE—INTERVENING CAUSE.

A negligent act, which would not have resulted in injury except for the intervention

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of an independent cause, does not give rise to a cause of action.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. § 62.*]

4. TRIAL (§ 191*)—INSTRUCTIONS—CHARGES ON FACTS.

In an action for injuries to a horse, caused by its stepping on a broken insulator, a requested instruction that defendant was not liable, unless its employes negligently placed the insulator at the place "where the evidence shows said horse was in fact injured," was not improper as a charge on the facts, since it did not assume any fact as proven, but stated what must be shown to justify a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

In Bank. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Eliza J. Schwartz against the California Gas & Electric Corporation and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Wm. B. Bosley and John P. Coghlan (Chas. W. Thomas, of counsel), for appellants. Arthur C. Huston and Harry L. Huston, for respondent.

PER CURIAM. This action was brought to recover damages for injuries to a horse, known as "Joe Terry," belonging to plaintiff, caused, it is alleged, by the horse stepping upon or against an insulator dropped by an employe of defendants upon a tract of land in Yolo county, known as the "Van Zee Place," occupied by plaintiff at the time of such injuries. The jury gave a verdict in favor of plaintiff for the sum of \$6,475.00, for which amount judgment was entered. An appeal was taken by defendants from the judgment, and from an order denying their motion for a new trial. Two decisions have been rendered on these appeals by the District Court of Appeal for the Third district, the judgment and order being reversed by the first decision on account of error of the trial court in refusing an instruction as requested by defendants, and giving the same in a modified form; and, a rehearing having been granted by said court, the judgment and order were affirmed by the second decision. An application for a hearing in this court was then granted.

We are of the opinion that the first decision of the District Court of Appeal was correct. It is essential to a proper understanding of the question presented in the matter of said instruction that a statement be made as to some of the facts.

The defendants maintained and operated an electric transmission line, consisting of poles, crossarms, wires, and insulators along certain highways in Yolo county, and the line passed the Van Zee place just outside the city of Woodland. In the summer and early autumn of the year 1906, the line was reconstructed by defendants, new insulators

put in on many poles, and every alternate pole removed, making the distance between poles 264 feet, instead of 132 feet, which was the distance prior to the reconstruction. At the time of this work, the Van Zee place was occupied by one L. E. Hutchings. A portion of this place consisted of an inclosed parcel of land fronting on the road, on which was a house, and another adjoining inclosed parcel, on which was a barn. The land inclosed with the barn was known as the barnyard or corral. The land inclosed with the house was known as the houseyard and old vineyard. The vineyard portion fronted on the road, and contained some 10 or 12 rows of vines, varying, according to the testimony of Mr. Schwartz, the husband of plaintiff, from two inches to three feet in height. The inclosed portion containing the vineyard was not used by Mr. Hutchings for stock. Some time in November, 1906, plaintiff leased from Mr. Hutchings the two parcels of land we have referred to, and went into occupancy thereof. On April 10, 1907, plaintiff's husband turned the horse into this old vineyard portion while his stall was being cleaned. A few minutes later, the stall having been cleaned, he went after the horse to take him back. He testified: "As I started to halter him, he bit at me, and I stepped back. I stepped back and corrected him for attempting to bite me. I held the halter for him to put his nose in, and the horse, in stepping back to put his nose in the halter, moved back and came in contact with something, which I found afterwards was a broken insulator." The insulator was similar to those in use on defendants' line at the time the reconstruction work was done, some of which were then removed. They had an 11-inch porcelain top, shaped something like a saucer, and a glass center, about 9 inches long, and weighed about 12 pounds. Mr. Schwartz said that the saucer part of this insulator was whole, and laid next to the ground. The result of the contact of the horse with this insulator, the glass part of which was broken, was, according to Mr. Schwartz, that the horse was severely cut on the right hind foot between the hoof and the fetlock. The horse was a stallion and valuable only for breeding purposes, and there was testimony sufficient to sustain a conclusion that he was thereby rendered useless for such purposes. There was testimony, given by one William Weight, who was over 80 years of age, and who was employed by Hutchings on the Van Zee place at the time of such reconstruction work in the summer and autumn of 1906, to the effect that he saw one of the men engaged in such work drop an insulator from the crossarm of one of the poles into this vineyard, and that the insulator fell into the vineyard at the north-west corner, some seven or eight feet from the fence. This testimony was given some

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

two years after the accident to the horse. He said that he saw the insulator in the vineyard many times thereafter, "passed it nearly every day," but did not pick it up, because it did no harm there, and that they were not using the vineyard for stock. It was clearly established that the horse was injured in the northwest corner of the vineyard, and Mr. Schwartz said that the insulator was at a point two or three feet from the north fence and between six and ten feet from the west fence, which was the road fence. Evidence introduced by the defendants was very clear to the effect that at the time this work was done by the defendants the nearest pole to the northwest corner of the vineyard on one side was 60 feet and on the other side 72 feet. Mr. Hutchings, then and for many years prior occupant of the place, testified in effect that there had been no change in the poles, except that every other pole was taken out; and his testimony and that of Mr. Ashley, taken together, is clearly to the effect already stated. This evidence was in no way contradicted, except in so far as it was inferentially contradicted by the evidence of Mr. Weight, to which we have already referred.

In the light of these facts, which we have stated as strongly in favor of plaintiff as the record warrants, the District Court of Appeal in its first opinion declared in part as follows:

"Many points are made for a reversal of the judgment. Most of them are without merit, some of them probably involve error without prejudice; but one necessitates, as we view it, a new trial of the action.

[1] "Defendants requested the court to instruct the jury as follows: 'You cannot find for the plaintiff in this case, unless you believe from the evidence: (1) That plaintiff's horse was injured by an insulator, the property of defendants. (2) That the employees of defendants negligently placed said insulator on the premises where, it is claimed, said horse was injured, and at the point where the evidence shows said horse was in fact injured.' As given by the court, the second subdivision was modified to read as follows: 'That the employees of defendants negligently placed or permitted said insulator to remain on the premises where, it is claimed, said horse was injured, and at a point where the evidence shows some injury might result.'

"In the language of appellants: 'As proposed, this instruction limited responsibility to the placing of the insulator at the point where the horse was injured. The modification made the defendants liable if they placed it anywhere on the premises.'

[2] "The proposed instruction was based upon the theory that an intervening, independent agency may have been the proximate cause of the injury. It seems plain that if appellants carelessly dropped the insulator

upon the premises and did not remove it they would be guilty of negligence; but after it was dropped, if somebody else picked it up and moved it to this spot where the damage was done, it was the negligence of the latter that proximately caused the injury.

[3] "It would not be a case of correlative and concurring causes, but of proximate and remote agencies independent of each other. The rule is well settled that 'an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause.' Chicago, etc., Ry. Co. v. Elliott, 55 Fed. 949 [5 C. C. A. 347, 20 L. R. A. 582]; Cole v. German Savings & Loan Society, 124 Fed. 115 [59 C. C. A. 593, 63 L. R. A. 416]; Western Union Telegraph Co. v. Schriver, 141 Fed. 550 [72 C. C. A. 596, 4 L. R. A. (N. S.) 678].

"In the Cole Case, supra, it appears that the plaintiff entered and passed along a hall in the building of the defendant to take the elevator, the well or shaft of which opened into the hall. A boy, who was a stranger to her and to the defendant, hurried past her in the hall, pushed the sliding door of the well of the elevator, which was open from one to ten inches, back as far as it would go and stepped back. The plaintiff supposed the boy was the operator of the elevator, and stepped in. The elevator was at an upper floor, in charge of its regular operator, and plaintiff fell to the bottom of the well and was injured. The hall was so dark that it was difficult, but not impossible, to see the elevator when it was at the lower floor; and when it was not there nothing but darkness was visible in the well. It was held that the negligent acts and omissions of the defendant were not, and those of the strange boy were, the proximate cause of the injury. 'The latter constituted an independent, intervening cause which interrupted the natural sequence of events between the negligence of the defendant and the injury of the plaintiff, insulated the defendant's negligence from the plaintiff's hurt, broke the causal connection between them, and produced the injury.' The negligence of the defendant in that case, as stated by the court, consisted of permitting such a degree of darkness in the hall, of allowing boys to ride upon and sometimes operate the elevator, of neglecting to provide a lock for the door, which would prevent any one from unlocking it from the outside, and of permitting the door to stand open from one to ten inches. Defendant there was indeed guilty of gross negligence; but it was held not to be the proximate cause of the injury.

"In Berry v. S. F. & N. P. R. R. Co., 50 Cal. 435, it was held that the injury done to plaintiff's wheat by the hogs of third persons was not the direct damage resulting from the trespass of defendant in destroying a portion of plaintiff's fences, by reason of which the hogs obtained access to said premises.

"In *Lottas v. De Hall*, 133 Cal. 214 [65 Pac. 879], the action was brought to recover damages for injuries sustained by the plaintiff, an infant seven years of age, from falling into a cellar of defendants, situated on a vacant lot in the city of Los Angeles. The defendants were the owners of the lot, which was located in a populous and thickly settled quarter of the city. Upon the lot had stood a house, which had been removed, leaving upon the premises a cellar partially filled with debris. The premises were left in an open and unguarded condition. The plaintiff lived in the neighborhood of the lot, and, upon the day of the accident, was engaged with other children in playing around the cellar, and while so engaged was by her younger brother pushed into the cellar, sustaining the injuries complained of. It was held by the court that his act was the proximate cause of the injury, and that 'it was not in her play and as part of her play and in ignorance of the danger of her play,' but she was injured by the violence of her little brother in a matter apart. The foregoing are a few of many cases illustrating the operation of an independent, proximate cause producing injury, and they seem to be in harmony with the principle embodied in said proposed instruction here.

"Of course, if there were no evidence in the record tending to support said theory, the court's action would be adjudged entirely without prejudice. While there was no direct evidence that any third party moved said insulator, circumstances do appear from which a rational inference might be drawn to that effect; and therefore it was a proper question to submit to the jury. The only witness who testified that he saw the insulator fall from the pole was one William Weight, an old man past 80, who admitted his eyesight was bad. He testified that he was employed on the Van Zee place during the summer and forepart of the fall of 1906, when it was occupied by Lee Hutchings. During that time men worked on the electric pole line. They were changing insulators and putting up wires, and one of the men dropped an insulator into the northwest corner of the vineyard. The man was on a crossbar when he dropped the insulator, which was as large as a cuspidor. Other evidence shows clearly that the nearest pole to the northwest corner of the vineyard was 60 feet, and, in another direction there had been one 72 feet from the corner. The insulator weighed 12 pounds, and the poles were 30 feet high. It was, therefore quite a probable inference that within the eight or nine months intervening before the accident some other party moved the insulator, as it could not have 'dropped' to a point on the ground sixty or seventy feet from the foot of the pole.

[4] "To this complaint by appellants of

the action of the court in refusing said instruction, the only answer made by respondent is as follows: "The modification of instruction 18 was proper, because the instruction as proposed was erroneous, in that it was an instruction as to the facts. The language of subdivision 2 of the instruction was a straight statement that the evidence shows that the horse was not injured. In this respondent is clearly in error. The instruction is altogether hypothetical; it does not assume any fact as proven, but states what must be shown to justify a verdict for plaintiff. The point seems to be a vital one in the case, and it is believed that the defendants were entitled to the instruction, and for this reason the judgment and order are reversed."

Learned counsel for plaintiff ably and earnestly assailed this opinion and the consequent judgment of reversal in their petition for a rehearing in the District Court of Appeal, and in their brief filed subsequently in this court; but we believe that it correctly disposes of this appeal. Some of the points so made by counsel are sufficiently disposed of by such opinion. We are of the opinion that the requested instruction was not an instruction as to the facts, and that it correctly stated the law applicable in view of the testimony. We are satisfied that none of the instructions given the jury substantially covered the subject-matter of the requested instruction, in so far as the same referred to the question of an intervening, independent agency. We do not consider *Merrill v. Los Angeles, etc., Co.*, 158 Cal. 499, 111 Pac. 584, 139 Am. St. Rep. 134, in any way opposed to our conclusion herein.

The judgment and order denying a new trial are reversed.

SLOSS, J., deeming himself disqualified, does not participate herein.

HALL v. CLARK. (L. A. 2,800.)

(Supreme Court of California. Aug. 3, 1912.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3957; Dec. Dig. § 1002.*]

2. MASTER AND SERVANT (§ 228*)—NEGLIGENCE—DIRECTIONS TO EMPLOYE.

An employé is not warranted in obeying a direction involving danger to him, unless he acts under duress or coercion, if the danger is so obvious and serious that no ordinary prudent person of similar age and experience would obey the order; and this rule is unchanged by Civ. Code, § 1970, as amended in 1907 (Laws 1907, p. 119), which provides that knowledge by an employé injured by the defective or unsafe character of machinery, etc., shall not bar recovery for injury caused thereby, unless it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appears that he fully understood the dangers incident to the use of the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

3. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—NATURE OF QUESTION.

Ordinarily it is a jury question whether an injured employe was guilty of contributory negligence in obeying an order which involved danger to him; but the facts of the particular case may make it a question of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 280.*]

4. MASTER AND SERVANT (§ 245*)—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDER.

A teamster was guilty of contributory negligence, as a matter of law, in obeying an order to drive his team and wagon into an excavation about four feet deep, where the embankment was perpendicular at that point, and there was a runway at another point, down which he could have driven safely.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 778-788; Dec. Dig. § 245.*]

In Bank. Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by C. H. Hall against Wesley Clark. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Anderson & Anderson and Gibson, Trask, Dunn & Crutcher, for appellant. E. B. Drake, for respondent.

PER CURIAM. In an action for damages for personal injuries, plaintiff had verdict for \$1,800, and judgment was given him for that amount. This is an appeal by defendant from such judgment, and from an order denying his motion for a new trial.

Substantially, the case made by the complaint was as follows: Plaintiff was in the employ of one Crandall, a contractor, as a teamster, and was in charge of a three-mule gravel wagon of Crandall. Under a contract with Crandall, defendant had charge and control of plaintiff and his mule team and wagon, using them in making an excavation in a lot of land on the corner of Pico street and Vermont avenue, in the city of Los Angeles. While plaintiff was engaged in this work on May 14, 1909, he was negligently directed and required by defendant's foreman, in charge of the work, to drive said team and wagon into said excavation, which was about four feet deep, and by reason of obeying said order the wagon became uncoupled, and its bed fell upon him, causing the injuries for which compensation is claimed. At the time the said foreman directed him to drive into said excavation, plaintiff by reason of his inexperience in such work, did not fully understand, comprehend, and appreciate the danger of so doing, while said foreman, by reason of his long experience in such business, did realize and know such danger. The an-

swer of defendant denied the allegations of the complaint and set up the defense of contributory negligence on the part of plaintiff.

While it is suggested by appellant that the complaint does not state facts sufficient to constitute a cause of action, that point is not pressed. It is earnestly claimed, however, that the evidence is not sufficient to sustain the verdict, in that it shows, as matter of law, that plaintiff either was guilty of contributory negligence, or assumed the risk of injury in doing the act resulting in the accident.

Plaintiff was 26 years of age, and testified that he had driven a team all his life practically, hauling wood, rock, and sand, handling a horse and wagon, and that he knew pretty well about horses and wagons on good roads, but that he had only about two weeks' experience in excavating. The dimensions of the excavation where he was working at the time of the accident were 57x84 feet. His duty was to drive his team into this excavation, there help load his wagon with earth, and drive out with his load. A driveway or "runway" into the excavation existed, along which the wagons could safely be taken down. Plaintiff's wagon was what was called a "patent gravel wagon" with four wheels. There was a front running gear and a king bolt which held the front gear to the remainder of the wagon. The wagon was not over 10 feet long, exclusive of the pole. The three mules were worked abreast. Plaintiff had worked at this place for three days before the accident. According to his testimony, the accident occurred as follows: Seated on his empty wagon, he was about to drive into the excavation by a runway on the easterly side of the excavation, when defendant's foreman told him to drive around to a place on the southerly side. When he reached that place, the foreman told him that there was the place he wanted him to drive down. He said that there was no runway, no "slanting place" there, but "just a straight embankment" 3½ or 4 feet deep. "It was almost straight up and down." He stopped his team and asked the foreman: "Where? Off here?" The foreman answered, "Yea." He said, "I can't drive off there." The foreman asked him, "Why?" and he said, "It will hurt the mules." The foreman answered: "Never mind that. That is where I want the wagon over there." Thereupon he drove over the edge. Two of the mules were "almost wild" and "did not need any persuading to make them go." The mules "jumped off"; the front gear of the wagon very naturally dropped down when the wheels thereof no longer had earth upon which to rest, and in some way became uncoupled from the rest of the wagon, which followed the front gear over the edge; the plaintiff jumped from his seat, and the wagon turned over, pinning him to the ground and breaking one of his legs.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

He further testified: "I didn't consider it was a dangerous place if the foreman instructed me to drive in it. I relied on him and his direction." Plaintiff's testimony was corroborated as to the direction given him by the foreman by two witnesses.

[1] On the part of the defendant there were several witnesses, including the foreman. Their evidence was to the effect that no such direction was ever given to the plaintiff as was testified to by him and his witnesses; that, in fact, plaintiff was proceeding to drive into the excavation near a driveway, when the foreman called to him, "Come around the corner and go into the driveway straight," and he answered, "This is all right," and went on down into the excavation, with the result already stated. So far as the number of witnesses, at least, was concerned, the preponderance of testimony on that point was with defendant. In view of the verdict of the jury, however, we must accept as true the testimony of plaintiff and his witnesses in regard to the matter of direction by the foreman, and have stated the substance of the evidence given in behalf of the defendant solely to show that there was nothing therein to support a conclusion in favor of plaintiff. The verdict must find its whole support in the testimony of plaintiff and his witnesses, the material parts of which we have stated.

For the purposes of this appeal, we have, then, a case in which the plaintiff, an adult and a teamster of experience, in obedience to the direction of the defendant's foreman in charge, deliberately drove his three-mule team and empty gravel wagon over the edge of an excavation at a point where the side of the excavation was practically perpendicular and from $3\frac{1}{2}$ to 4 feet high, when he actually had knowledge of these conditions and was not acting under such circumstances as would warrant a conclusion that he was acting under coercion or duress.

[2] It is thoroughly settled that an employé is not warranted in following the direction of an employer, except where he acts under what, under the law, amounts to duress or coercion, where the danger to be encountered in doing so is at once so obvious and so serious that no ordinarily prudent person of similar age and experience, situated as was the employé, would have obeyed the order; and that, where the rules as to contributory negligence and assumption of risk are such as they were in this state at the time of this accident, the employé receiving personal injuries by reason of following such direction cannot recover damages therefor from his employer. See 1 Labatt on Master and Servant, § 442. It is not disputed by counsel for plaintiff that this was the law in this state prior to the amendment of section 1970, Civil Code, in 1907 (Laws 1907, p. 119), by which the Legislature added to that section, among other

things, a provision that knowledge by an employé injured by the defective or unsafe character of any machinery, etc., shall not be a bar to recovery for any injury caused thereby, unless it shall also appear that such employé "fully understood, comprehended, and appreciated the dangers incident to the use of" the same. This amendment did not change the rule we have stated. If the danger is so obvious and serious that no ordinarily prudent person of similar age and experience, situated as was the employé, would have done the act, even though ordered by his employers to do it, it is manifest that the situation is such that the employé will not be heard to say that he did not fully understand, comprehend, and appreciate the danger incident to the doing of the act. As said by this court in *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 600, 60 Pac. 176, 177 (49 L. R. A. 33): "He cannot be allowed to close his eyes to the danger, and thereafter say, 'I did not know it was dangerous.'" We are cited to no case and know of none that is opposed to the view we have stated above.

[3, 4] While the question whether the situation is such, under the evidence, as to compel the application of this rule is ordinarily one for the jury, rather than one of pure law for the court, there are cases where the admitted facts are such that but one conclusion can reasonably be arrived at therefrom, and the question is one of law for the court. For instance, if an adult employé of ordinary intelligence was told to drive his team over a perpendicular embankment 10 or 12 feet high, and he, with full knowledge of these conditions, voluntarily obeyed and thereby received injuries, no one would be bold enough to suggest that a verdict of a jury awarding him damages therefor could be upheld by the courts, if properly brought in question. It would be held, as matter of law, that the situation was such that he was precluded from recovery, both by reason of contributory negligence and voluntary assumption of risk. The physical facts actually known to him would be such that his mere statement that he did not consider it a dangerous place, and that he relied on the person directing him, would be ineffectual for any purpose. By reason of his admitted knowledge of all the facts, no other conclusion would be possible than that he fully understood, comprehended, and appreciated the danger incident to the act. While here, according to plaintiff's testimony, there was a difference in the height of the embankment from that spoken of in the illustration just made, the difference is not so great, in our judgment, as to affect the legal situation. We think the admitted facts of this case are such as to bring it within the rule we have already stated. They are such as to require the conclusion, as matter of law, that the plaintiff was guilty of contributory negli-

gence in obeying the order that he testified was given to him by the foreman. The case is not to be distinguished in its material facts from *Lindsey v. Hollerback, etc., Co.* (Ky.) 92 S. W. 294, 4 L. R. A. (N. S.) 830. No case has been cited by learned counsel for plaintiff that appears to us to support a contrary conclusion. The nearest case in point among those cited by him is that of *Haley v. Case et al.*, 142 Mass. 316, 7 N. E. 877. But it appears to us that there were facts in that case which might reasonably be held to take it out of the operation of the rule that we have enunciated. The court in that case recognized the rule to be as we have stated it, saying: "As the plaintiff was of full age, and an experienced teamster, if the danger of driving the horses with the van under the gateway was well known to him, he cannot recover, although he was acting under the immediate personal direction of Dodge. The fear of the plaintiff that he would be discharged from his employment, if he did not obey the orders of Dodge, his employer, would not justify him in running a risk which was well known to him; and then, if injured, in recovering damages from his employer."

In view of our conclusion on this point, it is unnecessary to consider any of the other points discussed in the briefs.

The judgment and order denying a motion for a new trial are reversed.

MEGARRY v. MEGARRY et al. (Sac. 1,947.) (Supreme Court of California. Aug. 3, 1912.) TRUSTS (§ 89*)—SALE OR TRUST—EVIDENCE.

In an action to have the plaintiff declared the sole owner of a business, evidence held not to show that there was a sale of the business to plaintiff by his father, but rather that he was made a trustee for his brothers and sisters as to their interest in the property.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 134-137; Dec. Dig. § 89.*]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by James Megarry against Mary Megarry and others. From a judgment for plaintiff, and an order denying a motion for new trial, defendants appeal. Reversed.

W. U. Goodman and Leon Samuels, for appellants. L. G. Harrier and W. T. O'Donnell, for respondent.

ANGELLOTTI, J. By his complaint in this action, plaintiff sought a decree adjudging that he is the sole owner of a certain grocery business in the city of Vallejo, Solano county, "conducted at No. 310 Georgia street, under the name of James Megarry & Company [the term 'business' including the stock in trade, money on hand, accounts and good will thereof]," and perpetually restraining defendants from interfering therewith "by

claiming or asserting any control or domination over the same, from taking possession of, or attempting to take possession of, said property, or any part thereof, or from making any claim of ownership therein adverse to this plaintiff." The complaint contained the allegations usual in complaints to quiet title to real property, and alleged that the plaintiff was in the sole possession of said business. The defendants by their answer denied various allegations of the complaint, including those relating to the ownership of the property. The issues so made were tried, and the trial court found in accord with the allegations of the complaint and gave judgment as prayed therein. This is an appeal by defendants from the judgment, and from an order denying their motion for a new trial.

Passing certain claims apparently made for the first time on the oral argument in this court, we will consider the claim made in the briefs to the effect that there is not sufficient support in the evidence for the conclusion of the trial court that plaintiff is the sole owner of the property in question.

The defendants are Arthur Megarry, Mary Megarry, and Letitia Megarry, sole surviving brother and sisters of plaintiff, and Mary Megarry and Letitia Megarry, as executrices of the last will of Walter Megarry, a deceased brother of plaintiff. The persons named, including plaintiff, were children of William Megarry, who died March 15 or 17, 1891, and his wife, Elizabeth Megarry, who died in the year 1901. The father left surviving him, in addition to the children already named, two other sons, John and William. At the time of his death the children were of the following ages, viz.: Plaintiff 22 years, John 19, William 15, Walter 13, Mary 11, Arthur 9, and Letitia 7.

The father was then engaged in the grocery business, under the name of William Megarry, and also owned some land, lots 8 and 16, block 215, and lot 10 and the west half of lot 14, block 268, Vallejo. So far as appears, the sole source of income of the family was the grocery business. The only evidence as to the then value of the grocery business was that of plaintiff, to the effect that the stock was worth not over \$1,500, and that the business then did not amount to \$1,500. Plaintiff was then working in the store, and had been so working for some 12 years. John and William were also working in the store.

On March 12, 1891, the father, who was then confined to his bed by his last illness, with the aid of a notary public, attempted to make disposition of his property. He executed a deed of gift to his wife, conveying to her his real property, and executed what was called a "bill of sale" of the grocery business, according to the testimony of the notary and plaintiff, to plaintiff for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes.

a consideration of \$10. This instrument was never recorded and has been lost; but the evidence is sufficient to support a conclusion that it was in part in the form of a bill of sale, and that \$10 was in fact paid by plaintiff to the father at the time. It may also be assumed that the evidence was sufficient to show that the instrument was at once delivered to plaintiff by the notary, together with the deed to the mother, although plaintiff in one place testified that it was delivered after the death of his father. According to plaintiff's testimony, there was a "memorandum" on the "bill of sale," written by the notary, being "a request that I take care of my mother and raise my brothers and sisters, and educate them to the best of my knowledge, and so far as the business would go." He further testified that "my father gave me that bill of sale with the understanding that I was to keep the family together and support them with that business;" that he told me to "support my mother, educate the children, take care of them to the best of my ability with the business, what I got out of it;" and that he thought it was placed in his name "for the benefit of the entire family."

Upon the death of the father a few days later, plaintiff changed the name under which the business was conducted to "James Megarry & Co." It has ever since been conducted under this name, and undoubtedly plaintiff has always been at the head of the business. William and John continued to work in the store with plaintiff until they died; William dying in the year 1890, and John dying in the year 1901. In the meantime, the other brothers, Walter and Arthur, had come into the store, and continued there until Walter died in 1910.

Plaintiff married in the year 1900. Up to that time the following conditions existed, viz.: All of the family lived together in the family home. None of the brothers received any salary from the business. Each of them took what money he needed for clothes, etc., from the drawer. There was never any account kept of these withdrawals. When the mother wanted any money, it was given to her. There was also taken from the store such supplies as were needed for the family home. The business was apparently well and profitably managed. In 1897 the property occupied for store purposes was purchased from funds accumulated by James Megarry & Co.; some \$6,000 to \$8,500 being paid therefor, and the title being placed in the name of the mother. Valuable improvements, costing some \$5,000, were added thereto, likewise from the funds of James Megarry & Co. A dwelling home for the family was also constructed at a cost of about \$5,000 by James Megarry & Co.

When plaintiff married, he commenced, and has ever since continued, to take from the business \$15 a week and his groceries.

The remainder of the family continued to live together. Walter and Arthur took \$35 a week "home to the family," and the family was provided from the store "with everything—vegetables, meat, and everything they wanted." No account was ever kept of these things. These conditions continued to the time of Walter's death.

Neither John nor William was ever married. No probate was had on the estate of either.

In 1901 the mother died. On May 29, 1901, she executed a deed of trust covering the land conveyed to her by her husband and the property subsequently purchased and improved by James Megarry & Co. for the benefit of her five surviving children, each to share equally in the rents, issues, and profits for the term of 10 years, and each to have an undivided one-fifth at the expiration of said 10 years. Plaintiff was one of the trustees, as well as beneficiaries, under the deed, and subscribed and acknowledged execution of the same. This, it will be observed, included the real property purchased and improved for the store purposes from the funds of James Megarry & Co. By a written statement addressed to the appraisers of the estate of Walter Megarry, deceased, plaintiff acknowledged Walter to have been the owner of an undivided one-fifth of this property, as well as of the other real property covered by the trust deed.

After the real property occupied for store purposes was acquired by purchase in 1897, no rent was paid therefor by plaintiff or any one else on account of the grocery business until the death of Walter in 1910. But the taxes on said property and other property of the Megarry estate, as well as all bills for improvements, etc., were paid out of the funds of James Megarry & Co.

While plaintiff was undoubtedly the active factor in the management of the business, we can see nothing in his testimony to indicate that he ever assumed, at any time prior to Walter's death, to be the sole owner thereof. The bill heads described the firm as "Jas. Megarry & Co.," and the letter heads, in addition, declared them to be "Grocers, Wine and Tea Merchants." The checks were signed, "James Megarry & Company by James Megarry." The application for United States internal revenue licenses contained the names, as members of the firm, of the brothers and sisters at first, and afterwards the names of the brothers alone; the sisters having requested that their names be not attached "to a liquor license." In some instances, plaintiff individually entered into contracts; the special instances shown being a purchase of certain store fixtures for \$250, and the contract for carpenter work on the extension added to the building on the property purchased in the name of the mother. Everything done by plaintiff was entirely consistent with the idea that the grocery

business was purely "a family affair," and many things done were absolutely inconsistent with any other theory. Up to a very short time before the death of Walter, certainly there was nothing to indicate to any of the others that plaintiff claimed to be the sole owner of the business.

A few months before the death of Walter, trouble arose among the members of the family, and there was some talk of arranging a settlement as to the property. At that time, according to Mary, each of the brothers and sisters claimed one-fifth of the business, while plaintiff claimed one-half. It does not appear that at that time plaintiff did anything indicating that he claimed to own the whole of the business.

Walter died in July, 1910. A few days before his death, he executed a will, subsequently admitted to probate, giving all of his property to his two sisters. Plaintiff was dissatisfied with the provisions of this will, and told his sisters that he owned absolutely the business of Jas. Megarry & Co. On August 20, 1910, he submitted to the appraisers of the estate of Walter a written statement, prepared and signed by himself, as to the firm of Jas. Megarry & Co., showing the property thereof, including \$14,000 cash, to be worth \$24,000, and the owners to be as follows: James Megarry one-half, Mary Megarry one-eighth, Arthur Megarry one-eighth, Lettie Megarry one-eighth, and Walter Megarry, deceased, one-eighth. This statement plaintiff claims to have made in view of certain pending arrangements for a compromise between himself and his sisters and Arthur, which he then thought would result in the compromise being made. Various writings, several of which were in the handwriting of plaintiff, were in evidence, showing his acquiescence in any arrangement by which he should be given one half of the business, while the other half was divided among the others. Owing to the advice of the attorneys for the sisters, the sisters refused to sign any agreement for a compromise. This action was commenced December 9, 1910.

We believe that we have stated the case as favorably as it can be stated for plaintiff on his own testimony, and are of the opinion that no warrant is to be found in such evidence for a conclusion that plaintiff is the sole owner of the property in question. Clearly there was never any sale of the business by the father to plaintiff. The transaction, as shown by plaintiff's own testimony, was a transfer in trust for the benefit of the family, which trust plaintiff accepted and has honestly and efficiently performed, without attempted repudiation of any kind, up to the moment of Walter's death. As we have substantially said, his conduct during all these years has been entirely inconsistent with any other idea than

that the business was the property of the family, and that he was managing it for the benefit of the family, including, of course, himself. Even after the death of Walter, he apparently never seriously made claim to be the absolute owner of the whole business until about the time of the commencement of this action; and this claim was apparently brought about by reason of the refusal of the others to consent to what he considered a reasonable adjustment of the respective claims in regard to this business, in view of the part he had played in making a success thereof and bringing it to its present prosperous condition. There was natural justice in plaintiff's claim that he should be given, in view of what he had done in building up the business, and the small amount he had taken therefrom by way of compensation for his work, a larger share than any of the others; and if courts were invested with the power to apportion this property in accord with their views as to what would be fair, under the circumstances, regardless of rules of law, we would unhesitatingly declare the proposed adjustment offered by plaintiff to be one that should be approved. But we cannot escape the conclusion upon the evidence before us that the surviving brother and sisters and the estate of Walter are each equally interested with plaintiff, as beneficial owners at least, in this property. It may be true that plaintiff is entitled to be awarded some compensation for his services as trustee, payable out of this property; but this is a question not presented in this proceeding, and one that we do not attempt to determine. The conclusion that the plaintiff is the sole owner, free of all lawful claim by the defendants, is not supported by the evidence.

In view of our conclusion on the point discussed, we deem it unnecessary to discuss other matters suggested in the briefs.

The judgment and order denying a new trial are reversed.

We concur: SLOSS, J.; SHAW, J.

NEALE v. MORROW. (S. F. 5,892.)
(Supreme Court of California. Aug. 6, 1912.)
APPEAL AND ERROR (§ 1194*) — REVERSAL—
JUDGMENT ON DEMURRER—EFFECT.

Defendant having demurred to the complaint for want of facts, and also because the action was barred by limitations, and that the complaint was uncertain in a specified respect, the demurrer was sustained and plaintiff appealed; whereupon the order was reversed, with directions to overrule the demurrer and allow defendant to answer. Held, that the order of reversal constituted an adjudication that the complaint stated facts sufficient to constitute a cause of action against defendant, and that the demurrer was not well taken, though the only question discussed on appeal was whether the suit was barred by limitations, so that on re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

mand the court had no authority to hear and sustain the demurrer for want of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648-4660; Dec. Dig. § 1194.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Vincent Neale, special administrator, etc., against Robert H. Morrow. Judgment for defendant, and plaintiff appeals. Reversed.

Vincent Neale, in pro per. R. H. Morrow and Garber, Creswell & Garber, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment given in favor of defendant in an action upon a promissory note. The judgment was based upon an order of the superior court, made September 6, 1910, sustaining an objection interposed by defendant at the time the action came on for trial that the supplemental and amended complaint of the plaintiff on file in said action does not state facts sufficient to constitute a cause of action.

The supplemental and amended complaint was filed September 18, 1903. A demurrer was interposed thereto on November 9, 1903, the grounds thereof being (a) that the same "does not state facts sufficient to constitute a cause of action against this defendant"; (b, c) that the cause of action set forth is barred by the provisions of sections 337 and 342 of the Code of Civil Procedure; (d) that said complaint is uncertain in a certain respect, specifying it. On February 23, 1904, the superior court made an order "that said demurrer be, and the same is hereby, sustained, with leave to the plaintiff to amend his said amended and supplemental complaint within ten (10) days." Plaintiff failed to amend, and judgment was thereupon given in favor of defendant. From this judgment an appeal was taken to this court. The appeal was decided by this court on February 2, 1907. The judgment given herein was as follows: "The judgment is reversed, with directions to the lower court to overrule the demurrer and allow the defendant to answer." The only question discussed by the court in its opinion was that presented by the objection that the alleged cause of action was barred by the statute of limitations. See *Neale v. Morrow*, 150 Cal. 414, 88 Pac. 815. On the going down of the remittitur from this court, the trial court overruled the demurrer in accord with the mandate of this court, and the defendant subsequently served and filed his answer. The case was set for trial, and when it was regularly called for trial the defendant made his objection that such complaint, which had not been changed in any respect since its filing on September 18, 1903, did not state

facts sufficient to constitute a cause of action. As already stated, this objection was sustained by the trial court, and thereupon judgment was given for the defendant.

Upon this appeal defendant, conceding that all the questions as to the statute of limitations are settled by the decision of the court on the former appeal, endeavors to support the action of the trial court by pointing out certain particulars in which it is claimed that such complaint fails to state a cause of action. We see no escape from the conclusion that the sufficiency of this complaint against any objection that it fails to state facts sufficient to constitute a cause of action, in whatever form such objections may be made, is *res adjudicata* by the judgment given on the former appeal. In the language used in *Phelan v. San Francisco*, 20 Cal. 39, 45, "It is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." Under the circumstances here existing, it can make no difference that this court in its opinion on such appeal confined its discussion to the question of the effect of the statute of limitations. The question of the sufficiency of the complaint against the objection of want of facts to state a cause of action was presented by the demurrer, and was necessarily presented by the appeal to this court. If the complaint did not state facts sufficient to constitute a cause of action, the ruling of the trial court in sustaining the demurrer was correct, and the judgment should have been affirmed, even though the objections based on the statute of limitations were not well taken. See *People v. Central Pacific R. R. Co.*, 76 Cal. 29, 43, 18 Pac. 90. The judgment of this court reversing the judgment of the lower court, with directions to the lower court to overrule the demurrer, was necessarily an adjudication that the demurrer was not well taken; in other words, that the complaint did state facts sufficient to constitute a cause of action against defendant; that the cause of action therein set forth was not barred by either sections 337 or 342 of the Code of Civil Procedure; and that the complaint was not uncertain. As we have said, it can make no difference that the contentions now made were not discussed in the opinion. They were adjudicated against defendant by the judgment given by this court; for such adjudication was "actually and necessarily included therein or necessary thereto." Section 1911, Code Civ. Proc. Section 434 of the Code of Civil Procedure has no application whatever to the matter under consideration. So far as pertinent, it simply provides that an objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur on that ground. The trial court was without power to consider such objec-

tions as are here urged, for the simple reason that this court had rendered an adjudication thereon that forever concludes the matter.

The judgment is reversed.

We concur: SHAW, J.; SLOSS, J.

FOERST v. KELSO. (S. F. 5,827.)

(Supreme Court of California. Aug. 6, 1912.)

1. JUDGMENT (§ 283*)—RESTORATION—APPLICATION—SCOPE.

The judgment roll in an action having been destroyed in a conflagration pending a motion for a new trial, an application by plaintiff for leave to supply, as authorized by Act June 16, 1906 (St. Ex. Sess. 1906, p. 73), involved no question as to the effect of the judgment roll when restored, nor as to the right of defendant to relief by or on account of the fact that the court reporter's notes and transcript had been destroyed in the same fire, and that it was impossible for him to prepare a bill of exceptions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 557, 558; Dec. Dig. § 283.*]

2. JUDGMENT (§ 283*)—DESTROYED JUDGMENT ROLL—RESTORATION.

Where the judgment roll and the records in an action were destroyed by a conflagration pending a motion for a new trial, plaintiff had a sufficient interest to entitle her to an order for the restoration thereof under Act June 16, 1906 (St. Ex. Sess. 1906, p. 73), providing for the restoration of court records lost, injured, or destroyed by conflagration or other public calamity.

[Ed. Note.—For other cases, see Judgment, Cent. Div. §§ 557, 558; Dec. Dig. § 283.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Minna Foerst against John Kelso. From an order granting plaintiff's application to supply a destroyed judgment roll in the action, defendant appeals. Affirmed.

J. C. Bates, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

ANGELLOTTI, J. In February, 1901, plaintiff filed in the superior court of the city and county of San Francisco an amended complaint stating a cause of action for damages. In March, 1901, defendant filed his answer. The cause was tried with a jury, which, on December 12, 1905, rendered its verdict in favor of plaintiff for the sum of \$7,000. Judgment was entered in accord with said verdict on December 14, 1905, and the judgment roll in said action was made up and certified by the clerk on the same day. Within 10 days after the rendition of such verdict, defendant served and filed his notice of intention to move for a new trial on some or all of the grounds specified in section 857, Code of Civil Procedure, stating in such notice that the motion would be made upon a bill of exceptions. Within the requisite time, his attorney served on plain-

tiff's attorneys his proposed bill of exceptions, and subsequently and in due time plaintiff's attorneys served on defendant's attorney amendments to said proposed bill of exceptions. At this stage, neither said proposed bill of exceptions, nor said proposed amendments, having as yet been filed among the papers of the case, and the same apparently being in the possession of the attorney of defendant, and no bill of exceptions having been settled, and said motion for a new trial being still pending, came the great conflagration of April 18 and 19, 1906, by which all of the records and files in said cause, and also all papers relating thereto in the office of said attorney for defendant, including said proposed bill and proposed amendments, and the shorthand reporter's transcript of the proceedings which such attorney had, were destroyed. Attorney for defendant, in his affidavit made November 9, 1910, which is not contradicted, states that the shorthand reporter who took down in shorthand the proceedings in said cause is dead, and that he believes it impossible to obtain another transcript of such proceedings, and that the evidence taken at the trial has passed from his memory, and that he cannot now state even the substance thereof. On November 3, 1910, plaintiff made her application to said superior court, in accord with the provisions of the act of June 16, 1906 (Stats. 1906, Extra Session, p. 73), for the restoration of court records "lost, injured or destroyed by conflagration or other public calamity," for an order reciting the substance and effect of the judgment roll in said action. After proper proceedings had, this application came on for hearing November 18, 1910. It was admitted that the judgment roll, as set forth in the application to restore such records, was correctly set forth, with the exception of a minor detail, which was corrected. The affidavit of defendant's attorney, the material facts stated in which have already been set forth, was read in evidence. Defendant's attorney claimed, both in his affidavit and at such hearing, that either the motion for a new trial should be granted, or that plaintiff's motion for restoration should be denied, on the ground that the granting of the same would give plaintiff an unfair advantage over defendant and leave defendant without any adequate remedy, as it was impossible for defendant to supply a new proposed bill of exceptions to be used on his motion for a new trial, and that the granting of such motion would be a violation of his rights under the fourteenth amendment to the Constitution of the United States. The trial court overruled the objections of defendant and made the order petitioned for by plaintiff, viz., "an order reciting what was the substance and effect" of such destroyed judgment roll. This is an appeal from such order, and from the judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment in said action as recorded on the restoration proceedings December 1, 1910.

Nothing is said in defendant's brief about an appeal from the judgment. We do not understand that it was intended to appeal from the judgment entered December 14, 1905, which is the only judgment in the case, and the time for appeal from which had expired several years prior to the taking of this appeal. The judgment referred to in the notice of appeal is one recorded and entered on December 1, 1910, on which date the order of the court, reciting the contents of the lost judgment roll, including the judgment, was recorded by the clerk of the court, the order of restoration. No judgment was entered on that day, but only an order reciting the contents of a lost judgment roll, including a judgment that had been entered on December 14, 1905. Practically the appeal is only from the order of the court restoring the records sought by plaintiff to be restored. There is no appeal from any order refusing to grant the defendant a new trial; nor does it appear that the trial court has acted upon any such motion. It simply regarded the facts stated in support of the demand of defendant for a new trial as an insufficient objection to the restoration of the record, and overruled the same.

So far as appellant bases any claim for a new trial upon the provisions of an act entitled "An act providing for the disposition of actions and proceedings in which bills of exceptions and statements on motion for a new trial have been lost or destroyed by conflagration or other public calamity," approved March 23, 1907 (Stats. 1907, p. 998), his claim would appear to be without force, in view of the express provision contained therein that "the motion provided for by this act must be made within thirty days after the loss or destruction of such records; provided, that in any case now pending such motion may be made at any time within sixty days after the passage of this act." No demand or motion based on facts warranting such action under this act was made until November 11, 1910, and no request was made to the court until November 18, 1910.

[1] But we are satisfied that no question as to the effect of the judgment roll when restored, or as to the right of defendant to relief by or on account of the facts set up by him in the affidavit of his attorney, was involved on the application for restoration of the record, or is involved on this appeal.

[2] A somewhat similar question was presented in *Estate of Jones*, 17 Cal. App. 327, 119 Pac. 670, in which a petition for hearing in this court was denied. The opinion of the District Court of Appeal in that case succinctly and clearly states the law applicable on such applications, so far as this matter is concerned. Substantially it is held that the sole object of such a proceed-

ing as this is to restore a record; that the obvious purpose of such a proceeding is to permit a person apparently having some interest in a lost record, even though his interest is, perhaps, doubtful, to have the same restored; so that it may afford conclusive evidence of its contents and obviate the necessity of resorting to secondary evidence in any litigation that may arise to enforce rights or obligations established by such record; that the ends of justice would not be promoted by complicating the question of restoration of the records with other issues, and that as a rule the regularity or legal effect of the record will not be considered; that questions affecting the judgment, other than those which appear on the face of the record sought to be substituted, should not be investigated in such a proceeding; and that in such a case the record should be restored substantially as it was, even if voidable, and the other party left to make whatever defense, not appearing from the face of the record, that might exist precisely as he could, had the record not been destroyed. Whatever rights or remedies defendant had at the time of this application for restoration, by reason of the matters set up in the affidavit, plaintiff was nevertheless entitled to such restoration, and the trial court did not err in making the order therefor.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

IN RE MARTIN'S ESTATE. (S. F. 6,227.)
(Supreme Court of California. Aug. 6, 1912.)
EXECUTORS AND ADMINISTRATORS (§ 32*)—
LETTERS OF ADMINISTRATION—PETITION FOR
REVOCATION—RIGHT TO PETITION FOR.

Under Code Civ. Proc. § 1383, which provides that when letters of administration have been granted to one other than the surviving husband or wife, child, parent, brother, or sister any one of them, or their nominee, may obtain revocation of the letters, and be entitled to administration, an incompetent relative cannot nominate a competent one; and hence, where decedent's living brother was incompetent to serve as administrator under section 1369, because he was a nonresident, he could not authorize his son, who was competent to serve, to petition for revocation of letters of administration issued to the son of a deceased brother of decedent.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 191-212; Dec. Dig. § 32.*]

Department 1. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

In the matter of the estate of Lawrence Martin, deceased: From an order denying a petition to revoke letters of administration issued to Clarence Martin, John Martin appeals. Affirmed.

Percy S. King and J. R. Pringle, for appellant. C. N. Riggins, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

ANGELLOTTI, J. The deceased died intestate, and Clarence Martin, a nephew and heir (being a son of a deceased brother of deceased), was appointed administrator of his estate on October 19, 1911. Letters of administration were issued to said Clarence Martin on October 24, 1911. On November 29, 1911, John Martin, a son of Andrew Martin, who is a brother of deceased and one of his heirs, at the written request of his father, filed his petition, under section 1383, Code of Civil Procedure, for the revocation of such letters of administration issued to Clarence Martin, and asking that he (John Martin) be appointed administrator of said estate. Said Andrew Martin, father of said petitioner, is in all respects competent to serve as administrator, except that he is a nonresident of the state, being a resident of Ireland. For this reason he is neither competent nor entitled to serve as administrator. Code Civ. Proc. § 1369. The petitioner himself is a resident of this state and in all respects competent. The lower court, finding that Andrew Martin was incompetent to be appointed by reason of nonresidence, concluded that petitioner had no right, under section 1383, Code of Civil Procedure, to a revocation of the letters theretofore granted to Clarence Martin; the theory being that such section authorized the revocation of letters only upon the petition of a relative who is himself competent to serve as administrator, or upon the petition of a competent nominee of such a relative who is himself competent. It therefore denied the petition. This is an appeal by said petitioner from the order denying his petition.

Section 1383, Code of Civil Procedure, provides: "When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him." The words "who is competent, or any competent person at the written request of any one of them," were inserted in this section by amendment April 16, 1880. Amendments to Codes 1880, p. 80. Sections 1384 and 1385, Code of Civil Procedure, provide for the notice and hearing on such petition; and the latter section provides that, "If the right of the applicant is established, and he is competent, letters of administration *must* be granted to him, and the letters of the former administrator revoked." By section 1369, Code of Civil Procedure, it is provided that "no person is competent or entitled to serve as administrator or administratrix" who is (1) under the age of majority, (2) not a bona fide resident of the state, (3) convicted of

an infamous crime, (4) adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding and integrity.

It is not disputed that Andrew Martin, by reason of his nonresidence, was not "competent or entitled to serve as administrator" (section 1369, Code Civ. Proc.), and that he was therefore not entitled to personally petition, under section 1383, Code of Civil Procedure, for the revocation of the letters theretofore granted to Clarence Martin. Does section 1383, Code of Civil Procedure, give his nominee any greater right in the matter than he himself has? Was it the intent of the framers of the amendment of 1880 to that section to give to a relative named therein the right, under the circumstances set forth therein, to clothe any competent person, not otherwise entitled to administer, with the authority to obtain a revocation of the letters previously issued to another and a grant of letters to himself, although he (such relative) could not ask for such revocation or be appointed administrator by reason of his own incompetency? This is the question presented by this appeal.

The meaning of section 1383, Code of Civil Procedure, in this regard is not entirely free from doubt; but we are of the opinion that the lower court was correct in its conclusion that the section authorizes the revocation of letters already granted only upon the petition of one of the designated relatives who is competent to serve as administrator, or the petition of a nominee of such a one, i. e., the nominee of one who is himself competent to serve as administrator. Taking the section as it stands, without regard to other sections of our probate act, and looking solely to its general purpose, such would appear to be a fair construction of its provisions. The general purpose of the section has been declared to be to allow a prior right to letters to be asserted against one who has obtained a grant of letters by virtue of a secondary right; to permit the former administrator to be superseded by a person of another and superior claim. See *Estate of Wooten*, 56 Cal. 322, 326; *Estate of Aldrich*, 147 Cal. 343, 345, 81 Pac. 1011. It is solely in the interest of the person having such prior right or belonging to such superior class. But if the relative is incompetent under the laws of this state to obtain letters or serve as administrator, he has no prior right to letters over the person theretofore appointed, and does not belong to a superior class in the matter of the right to letters. This being the situation, the Legislature provides for the initiation of proceedings for revocation when letters have been granted to any other person than to a husband or wife, child, father, mother, brother, or sister of the deceased "by any one of them who is competent, or any competent person at the written request of any one of them."

The right to obtain such revocation is solely for the benefit of the relative. It is limited by express terms, in the first instance, to such of the designated relatives as are themselves competent; and the words "at the written request of any one of them" may well be construed as referring solely to those described in the last preceding clause, viz., "any one of them who is competent," thus giving the competent relative the right to act either directly or through a nominee.

When we consider the section in the light of the well-settled law as to the rights of such relatives, other than a surviving husband or wife, on an original application for letters of administration, this would appear to be almost the necessary construction. Section 1365, Code of Civil Procedure, specifies the persons "entitled to administer," and the order in which they are severally entitled, being: "1. The surviving husband or wife, or some competent person whom he or she may request to have appointed. 2. The children. 3. The father and mother. 4. The brothers. 5. The sisters," etc. It is thoroughly settled that, except in the case of a surviving husband or wife, the competent nominee of a relative who is incompetent by reason of nonresidence is not "entitled" to letters, on an original application for letters, by virtue of his nomination by such relative. See *Estate of Beech*, 63 Cal. 458; *Estate of Muersing*, 103 Cal. 585, 37 Pac. 520; *Estate of Kelly*, 57 Cal. 81; *Estate of Morgan*, 58 Cal. 248. It is thus clear that the competent nominee of a nonresident child, father, mother, brother, or sister of the deceased would not have been entitled by reason of such nomination to letters of administration as against Clarence Martin at the time the latter was appointed, if he had then filed his petition asking for such letters; and this because of the incompetency of the person nominating him. The cases cited make this clear, and the fact is not disputed by learned counsel for appellant. It is unreasonable to assume, in the absence of language clearly compelling such a conclusion, that the Legislature intended that such a nominee should have the absolute right to insist on the revocation of letters, the issuance of which neither he nor the person nominating him could have successfully opposed in the first instance. Especially is this true when we bear in mind that the purpose of section 1383, Code of Civil Procedure, is, as we have said, to allow a prior right to letters to be asserted against one who has obtained a grant of letters by virtue of a secondary right.

Much reliance is placed by appellant on the fact that the amendment to section 1383 was made within a few weeks after this court de-

cided the case of *Estate of Cotter*, 54 Cal. 215, wherein it was held that the surviving husband or wife of a deceased person, though incompetent to serve on account of nonresidence, nevertheless is entitled to nominate a suitable person for administrator, who would thereupon become entitled to letters on an original application in preference to any of the other persons named in section 1365, Code of Civil Procedure. This section has already been referred to. The decision referred to was based upon the express language of subdivision 1 of that section, which gives the first right to letters to "the surviving husband or wife, or some competent person whom he or she may request to have appointed." It was said that this statute "does not make the right of the surviving husband or wife to nominate depend upon the matter of residence." But the Legislature was dealing with an entirely different question. In amending section 1383, Code of Civil Procedure, viz., the right to a revocation of letters already granted at the instance of one having a prior right; and we do not think that the language used by it in such amendment was such as to warrant a conclusion that it was endeavoring to apply the rule declared in the *Cotter* Case to applications for revocation. Especially is this true when we consider that no amendment was made, conferring upon the nominee of any heir, other than the surviving husband or wife, the right to letters of administration in place of said heir upon the original granting of letters.

It may be that there is no good reason why any heir should not be placed in the same position in the matter of obtaining letters in the first instance as is the surviving husband or wife; that is, with the absolute right to nominate in his place, even if incompetent by reason of nonresidence, some competent person to act in his place, who shall have the same right to letters that he would have if a resident of the state. That, however, is a matter within the legislative domain. As has been said by this court, "there have been, at various times, so many amendments to the Code concerning the right of administration that it is quite difficult to extract a harmonious system." *Estate of Kelly*, 57 Cal. 81. We cannot claim that our construction of section 1383, Code of Civil Procedure, makes our system in this regard absolutely harmonious; but as many, if not more, discordant notes would be found if the construction contended for by appellant should be adopted.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(163 Cal. 449)

In re EVERTS' ESTATE.

(S. F. 6,072, 6,073.)

(Supreme Court of California. Aug. 6, 1912.
Rehearing Denied Sept. 5, 1912.)**1. APPEAL AND ERROR (§ 979*)—NEW TRIAL (§ 68*)—WILLS (§ 153*)—WANT OF EVIDENCE—REVIEW.**

The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within the discretion of the trial court, which will not be reversed in the absence of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979; New Trial, Cent. Dig. §§ 135-140; Dec. Dig. § 68; Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

2. NEW TRIAL (§ 9*)—SEPARATE ISSUES.

It is within the power of the trial court, where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 12; Dec. Dig. § 9.*]

3. NEW TRIAL (§ 170*)—SEPARATE ISSUES—SEVERANCE.

Where a new trial is granted as to one of two separate issues, it authorizes a re-examination only of the issue on which the new trial has been ordered; the moving party's remedy as to the others being limited to an appeal from the part of the order denying the motion as to them.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 337; Dec. Dig. § 170.*]

4. WILLS (§ 166*)—EVIDENCE—FRAUD—UNDUE INFLUENCE.

Evidence held to sustain a verdict finding that a will offered for probate had not been procured by fraud or undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.*]

5. WILLS (§ 153*)—FRAUD—UNDUE INFLUENCE—PROMISE TO DISTRIBUTE.

A will executed on the faith of a promise that the sole beneficiary would distribute certain of testatrix's estate among certain charities is not procured by fraud or undue influence; but if, after testatrix's death, the donee fails or refuses to perform the promise the donee and the property may be charged with a trust in favor of the intended beneficiaries.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 371; Dec. Dig. § 153.*]

6. TRIAL (§ 253*)—INSTRUCTIONS—EXCLUDING EVIDENCE.

The court, having given instructions in a will contest concerning unsoundness of mind, in introducing the subject of undue influence, charged that unsoundness of mind and undue influence were entirely distinct grounds for denying the probate of a will; that a person might be the victim of undue influence, whether at the time sound or unsound in mind; and that, if the jury found the testatrix was of unsound mind at the time of the execution of the will, then it was entirely immaterial whether the principal beneficiary exercised any undue influence over her in the matter of the execution of the will, because unsoundness of mind would incapacitate her to execute the will, "influence or no influence." Held, that such instruction was not objectionable as authorizing the jury, after finding unsoundness of mind, to conclude that they need not consider the evidence relating to undue influence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

7. TRIAL (§ 194*)—INSTRUCTIONS—EFFECT OF EVIDENCE.

A request to charge in a will contest that two former wills were admitted as tending to raise a probability of undue influence, and that they were limited to that purpose, was improper, being a charge as to the effect of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

8. WILLS (§ 331*)—CONTEST—INSTRUCTIONS.

An instruction that two former wills were admitted in evidence to show the state of mind of testatrix toward the beneficiaries therein named, and not specifically to show that she made the will in controversy while of unsound mind, or through undue influence or fraud, was not erroneous.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 782-784, 786, 787; Dec. Dig. § 331.*]

9. TRIAL (§ 260*)—INSTRUCTIONS—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

Where, in a will contest, the court charged that in considering the issue of undue influence the jury should take into consideration the age and mental and physical condition of testatrix as shown by the evidence; that an influence which she was too weak to resist, and which destroyed her free agency and prevented the free and voluntary action of her judgment, amounted to undue influence, and that undue influence was the control of another will over that of testatrix, whose faculties had been so impaired as to submit to that control, such instruction covered a request to charge that the amount of undue influence which would invalidate a will varies with the strength or weakness of testatrix's mind and will, and the influence which would subdue or control a mind naturally weak, or which had become impaired by age, weakness, disease, or any other cause, might have no effect to overcome or mislead a mind naturally strong and unimpaired by any of the causes stated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

10. EVIDENCE (§ 350*)—DOCUMENTS—NURSE'S CHART.

A nurse's chart or memorandum of the pulse of testatrix and her symptoms during her last illness was not legal evidence of the facts stated therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1383-1397; Dec. Dig. § 350.*]

11. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in a will contest, it was shown that a nurse's chart showing testatrix's symptoms and pulse during her last illness had been lost, but there was no proof that it was willfully destroyed or suppressed, or that it was kept for or delivered to proponent, such facts did not furnish a basis for a refused instruction that evidence willfully suppressed was presumed to be adverse to the party suppressing it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 508-512; Dec. Dig. § 252.*]

Department 1. Appeal from Superior Court, Santa Cruz County; George H. Buck, Judge.

In the matter of the estate of Jeanette L. Everts, deceased. A writing purporting to be decedent's will having been offered for probate, certain legatees in an alleged will bearing prior date contested such probate. From an order granting proponent's motion for a new trial on the issue of insanity,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

and denying contestants' motion for a new trial on the issues of undue influence and fraud, contestants appeal separately. Affirmed.

Chas. M. Cassin and Benj. K. Knight, for appellants. Stratton, Kaufman & Torchiana, for respondent.

SHAW, J. Jeanette L. Everts died in Santa Cruz county on January 16, 1911. On January 19, 1911, a petition for the probate of a writing, dated January 13, 1911, purporting to be her will was filed. A will previously executed had given certain legacies to the contestants above mentioned. They appeared and filed a contest of the will of January 13th. The grounds of contest were, first, that the decedent was of unsound mind when said paper was executed; second, that it was procured by undue influence; third, that it was procured by fraud. The issues were tried by a jury, which found that the decedent was of unsound mind as alleged, but that the will was not procured by fraud or undue influence. Thereupon the proponent and contestants moved separately for a new trial of the issues decided against them respectively; the proponent asking a new trial of the issue as to insanity, the contestants for a new trial of the issues as to undue influence and fraud. The court granted the motion of the proponent and ordered a new trial of the issue as to insanity, and, denying the motion of contestants, refused a new trial of the questions of undue influence and fraud. The contestants appeal separately from each order; the appeal from the order relating to the issue of insanity being case No. 6,073, and that from the order upon the issues of undue influence and fraud being case No. 6,072.

[1] The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within the discretion of the trial court. Such order will not be reversed, unless an abuse of discretion appears. *Estate of Motz*, 136 Cal. 560, 69 Pac. 294; *Bjorman v. Ft. B. R. Co.*, 92 Cal. 501, 28 Pac. 591. The record contains no substantial evidence that the testatrix was of unsound mind or otherwise incompetent to make a will at the time of the execution of the will in question. The court very properly ordered a new trial of that issue.

[2, 3] It is within the power of the trial court, where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others. *San Diego L. & T. Co. v. Neal*, 78 Cal. 64, 20 Pac. 372, 3 L. R. A. 83; *Duff v. Duff*, 101 Cal. 4, 35 Pac. 437; *Mountain, etc., Co. v. Bryan*, 111 Cal. 38, 43 Pac. 410. These cases declare, also, that when such new trial is granted it opens for examination only the issue upon which it is ordered; that the determination of the other issues remain in

the record; and that they cannot be retried. The only remedy of the moving party as to those issues is to appeal from the part of the order denying the motion for a new trial as to them. This the appellants have done in this case. If we affirm that part of the order denying the new trial as to fraud and undue influence, the findings on those issues will stand unaffected, and the new trial to follow in the lower court must be confined to the question of the unsoundness of mind of the decedent.

[4] The decedent left but one heir at law, namely, the proponent, Sarah M. Chapman, her daughter. By the instrument of January 13, 1911, here offered for probate, the decedent gave all her property to her daughter, appointed her executor without bonds, and revoked all former wills. On December 3, 1909, she made a will giving the contestants, 10 in number, legacies amounting to \$17,000, and to other persons and institutions legacies amounting to \$13,800, her summer home to her cousin, Etta Alfred, for her life, and the residue to her said daughter. The contestant, Harry J. Bias, who was designated as executor in said former will, was the only natural person among the contestants who were named therein as legatees. His legacy of \$2,000 was said to be for past services and for his services as executor. The other contestants are benevolent and religious societies and corporations. The value of the estate is about \$55,000.

The undue influence, as alleged, consisted of the importunities, advice, solicitations, and representations of Sarah M. Chapman and others acting for her, whereby the will and purpose of the decedent to leave part of her property to others was overcome, and she was caused to make the will giving it all to said daughter. The fraud, as alleged, consisted of promises and representations, said to have been made by and for Sarah M. Chapman to the decedent, that if the decedent would execute the will in question leaving all her property to said Sarah, she, the said Sarah, would distribute a part of the same among certain nieces and cousins of the decedent and certain churches and charitable institutions, according to the wish and intent of the decedent, which promises, it is alleged, were made without any intention of performing them, and by means thereof she was induced to and did make said will.

So far as the point that the verdict against the contestants on these two issues is contrary to the evidence is concerned, no extended discussion is required. A perusal of the record shows that at least the great preponderance of the evidence was against the contestants. There was no satisfactory evidence of undue influence. The circumstances proven to show it were all readily susceptible of an innocent explanation. On the subject of fraud, the evidence was wanting upon the important element of fraudu-

lent or bad intent. There was evidence that the decedent desired to give a considerable part of her estate to certain churches and societies and to other relatives, and also that she wished to place it all in control of her daughter for distribution of that part according to her desires; that the daughter was informed of these desires, and promised the decedent that, if the will was made giving it all to her unconditionally, she would carry out those desires; and that the will was made upon the faith of this promise. But there is no substantial proof of bad faith on the part of the daughter, or of the allegation that she made such promise without any intention of performing it. She did not testify; but her counsel stated that she did not deny the promise, and that she intended to perform it. The only evidence of any consequence that might be supposed to indicate a contrary purpose is the testimony of the representatives of one of the contestant churches, who, the second day after the funeral of the testatrix, half playfully reminded the daughter of a promise she had a few hours before expressed to carry out her mother's wishes concerning the intended beneficiaries of the estate, to which the daughter answered: "You know my heart; but I am making no promises." It appeared, however, that at that time she had not seen the previous will, and was not fully advised as to the details of her mother's wishes; that she had received advice from her attorney in the meantime; and that she then again avowed her intention to carry out her mother's desires. The jury, on this evidence, was entirely justified in finding that the will was not procured by fraud.

[5] A will executed upon the faith of such a promise, honestly made, cannot be said to be procured by fraud or undue influence. If, after the death of the testatrix, the donee fails or refuses to perform the promise, a different question arises and, although the will stands unaffected, the donee and the property may be charged with a trust in favor of the intended beneficiaries. *De Laurencel v. De Boom*, 48 Cal. 585; *Estate of Brooks*, 54 Cal. 475; *Curdy v. Berton*, 79 Cal. 426, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157.

[6] The court instructed the jury that undue influence and unsoundness of mind were entirely distinct grounds for denying probate of a will; that a person might be the victim of undue influence, whether at the time sound or unsound in mind; and that, if they found that the testatrix was of unsound mind at the time of the execution of the will, then it was entirely immaterial whether or not the daughter "exercised any undue influence over her in the matter of the execution of the will," because unsoundness of mind itself would incapacitate her to execute the will, "influence or no influence." The appellants contend that the jury, after finding that such unsoundness of mind was

established, would conclude from this instruction that they need not consider the evidence relating to undue influence, and that, in effect, it did prevent, or may have prevented, them from considering that evidence. The contention is not tenable. This statement was made immediately following the instructions concerning unsoundness of mind and in introducing the subject of undue influence. It was correct in point of fact. It does not purport to tell the jury that it would, in the event stated, be unnecessary or immaterial for them to consider the evidence as to undue influence, or to find upon that issue. The court proceeded to instruct the jury fully upon the question of undue influence, and in effect directed the jury to consider the evidence relating to it, to decide the issue according to the evidence, and to return a verdict thereon. The jury must be presumed to have obeyed these directions. There is nothing in the record, or even in the evidence, to indicate the contrary.

[7] There was no error in refusing the requested instruction to the effect that the two former wills were admitted for the purpose of tending to raise a probability of undue influence, and that they were limited to that purpose. Such an instruction was improper, being an instruction as to the effect of evidence.

[8] The instruction that these two former wills were allowed in evidence for the purpose of showing the state of mind and feeling of the testatrix towards the beneficiaries therein named, and not specifically to show that she made the will while of unsound mind, or through undue influence or fraud, is not erroneous. It was for the jury to determine what feeling or state of mind toward those beneficiaries was indicated by these wills, and, having done so, to decide whether it did or did not tend to prove the facts stated. An instruction, to the effect that it did prove those facts, by the court would have invaded the province of the jury.

[9] The court refused instruction 7, asked by appellants, containing this passage: "The amount of undue influence which will be sufficient to invalidate a will must, of course, vary with the strength or weakness of mind and will of the testator; and the influence which would subdue or control a mind naturally weak, or which had become impaired by age, weakness, disease, or any other cause, might have no effect to overcome or mislead a mind naturally strong and unimpaired by any of the causes above stated." That the propositions stated are correct is self-evident. But it does not follow that they should have been given to the jury as an instruction by the court. The jury must decide all questions of fact arising from the evidence, at least where there is a substantial conflict. Where there is no such conflict, the court may direct a verdict, but otherwise it may instruct only as to the law. The instruction is argumentative to a degree

to which the court need not go. Where proper instructions on the point are given, a reversal should not follow either the giving or refusal to give such a proposition as an instruction. In other charges the jury was told that in considering the issue of undue influence they should take into consideration the age and mental and physical condition of the testatrix, as shown by the evidence; that an influence which she was too weak to resist, and which destroyed her free agency and prevented the free and voluntary action of her judgment, amounted to undue influence; that undue influence was the control of another will over that of the testatrix, whose faculties have been so impaired as to submit to that control. We are of the opinion that the contestants suffered no substantial injury from the lack of fuller instructions on the precise point.

[10, 11] The nurses in attendance on the testatrix at the time of the execution of the will kept a chart or memorandum of her pulse and symptoms. This was lost; but there is no evidence that it was willfully destroyed or suppressed, or that it was kept for or delivered to the proponent. It was not legal evidence of the facts stated in it. Estate of Flint, 100 Cal. 399, 34 Pac. 863. Consequently it did not furnish a basis for the instruction that evidence willfully suppressed is presumed to be adverse to the party suppressing it, which was asked by contestants and refused.

A number of other rulings and proceedings at the trial are objected to as erroneous. None of them, in our opinion, could have affected the case to the prejudice of the contestants, or are of sufficient merit or importance to require discussion.

The orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J

MITCHELL v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,699.)

(Supreme Court of California. Aug. 5, 1912.
Rehearing Denied Sept. 4, 1912.)

1. CONTEMPT (§ 54*)—AFFIDAVIT—SUFFICIENCY.

The affidavit or affidavits upon which a contempt proceeding is based constitute the complaint; and, unless they charge acts constituting contempt, the court is without jurisdiction to proceed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143-149; Dec. Dig. § 54.*]

2. DIVORCE (§ 269*)—ALIMONY—CONTEMPT—AFFIDAVIT—SUFFICIENCY.

An affidavit to punish for contempt of an order requiring a husband to pay his wife's counsel fees and monthly sums for her support pending a divorce suit brought by her was not insufficient for failing to state that a copy of the order for such payment was personally served on him, or that he knew of the order, where the affidavit recited that he appeared in

all the proceedings, and at all the times and dates mentioned in the affidavit, and that the order was made on a specified date.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

3. DIVORCE (§ 269*)—ALIMONY—CONTEMPT—EVIDENCE—MATERIALITY.

In a proceeding to punish a husband for contempt of an order in a divorce suit, proof of service of a copy of the order was immaterial, where it was undisputed that he was present when the order was made.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

4. CERTIORARI (§ 58*)—REVIEW—MATTERS NOT SHOWN BY RECORD.

Objection on certiorari to review a conviction of contempt that petitioner's counsel was not permitted to read his affidavit at the hearing of the order to show cause cannot be considered, where the certified record fails to indicate any such state of facts.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 146; Dec. Dig. § 58.*]

5. WITNESSES (§ 60*)—COMPETENCY—HUSBAND AND WIFE.

Pen. Code, § 1322, and Code Civ. Proc. § 1881; subd. 1, which disqualify a wife to testify against her husband in certain cases, does not prevent her from testifying against him in a proceeding to punish him for contempt of an order requiring him to make her certain payments pending suit by her for divorce.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 167-173; Dec. Dig. § 60.*]

6. DIVORCE (§ 269*)—TEMPORARY ORDERS—CONTEMPT—PROCEEDINGS TO PUNISH.

A proceeding to punish for contempt of an order in a divorce suit requiring a husband to make certain payments to his wife, while similar in some respects to a prosecution for a criminal offense, is properly entitled in the style of the divorce proceeding itself, and not as a separate action.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

7. DIVORCE (§ 269*)—CONTEMPT—PROCEEDINGS TO PUNISH—JUDICIAL NOTICE OF PROCEEDINGS.

In a proceeding to punish a husband for contempt of an order made in a divorce suit against him, requiring payments to his wife, the court takes cognizance of pendency of the main cause; and it is unnecessary to set forth in the affidavit to punish for the contempt the fact of such pendency, nor the provisions of the order violated.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756-763; Dec. Dig. § 269.*]

Department 2. Petition by G. W. Mitchell, Jr., for certiorari against the Superior Court in and for the City and County of San Francisco and another to review contempt proceedings. Writ discharged.

Rehearing denied; Beatty, C. J., dissenting.

F. H. Dam, for petitioner. Arthur E. Nathanson, for respondents.

MELVIN, J. Certiorari directed to a judge of the superior court to the end that this court might examine the proceedings whereby the petitioner, G. W. Mitchell, Jr., was found guilty of contempt.

[1, 2] It appears from the record that an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

action for divorce was pending in the superior court of the city and county of San Francisco, in which Edith Mitchell was plaintiff and this petitioner was defendant. On or about September 25, 1908, after due proceedings, the court ordered the payment of certain counsel fees and also monthly sums for the support of said plaintiff, Edith Mitchell, pendente lite. Thereafter, upon the affidavit of Edith Mitchell being filed, the court issued an order requiring G. W. Mitchell, Jr., to show cause why he should not be punished for contempt of court because of his failure to comply with the direction to pay alimony and counsel fees. After a hearing he was found guilty, and it was adjudged that he be imprisoned in the county jail of the city and county of San Francisco for the term of five days. Petitioner contends that the court never obtained jurisdiction of the proceeding because of the defects in the affidavit. The rule upon this subject in California is well settled. "The affidavit or affidavits upon which the contempt proceeding is based constitute the complaint; and, unless they, upon their face, charge facts constituting a contempt, the court is without jurisdiction to proceed." *Hutton v. Superior Court*, 147 Cal. 159, 81 Pac. 410. The same rule was announced in *Batchelder v. Moore*, 42 Cal. 415; *Overend v. Superior Court*, 131 Cal. 284, 63 Pac. 372; *Rogers v. Superior Court*, 145 Cal. 91, 78 Pac. 344; *Otis v. Superior Court*, 148 Cal. 130, 82 Pac. 853; *Frowley v. Superior Court*, 158 Cal. 226, 110 Pac. 817. Petitioner's first and principal objection to the affidavit is that it fails to state that a certified or any copy of the order for the payment of alimony was personally served upon him, or that he had actual knowledge of the signing and filing of said order, or of its contents. The affidavit, however, contains a recital "that the defendant has duly appeared in the above-entitled action in all the proceedings therein, and at all the times and dates herein mentioned." This is followed by the statement that on September 25, 1908, "upon due proceedings therefor first had and obtained, the above-entitled court duly made its order, ordering and directing that the said G. W. Mitchell, Jr., pay to the said Edith Mitchell, certain sums by way of allowance for maintenance and attorney's fees pendente lite. This language amounts to an allegation that defendant was present when the order was made. It was consequently unnecessary to allege or to prove that he had been served with notice of the original order. *Ex parte Cottrell*, 59 Cal. 418; *In re McCarty*, 154 Cal. 537, 98 Pac. 540.

[3] An effort was made to show by the affidavit of one Reinicke, made during the progress of the hearing, that he had served upon G. W. Mitchell, Jr., a copy of the order for the payment of allowance for maintenance and counsel fees shortly after it was made. Petitioner makes objection both to

the introduction of this affidavit and the denial to him of the right to cross-examine Reinicke, and also asserts that the affidavit is insufficient to show service of the order according to law. We find it unnecessary, however, to determine these matters, because the undenied allegation of defendant's presence at the time of the making of the order rendered a showing of service of notice upon him entirely unnecessary.

[4] Complaint is made that his counsel was not permitted to read petitioner's affidavit on the day of the hearing of the order to show cause. The certified record fails to indicate any such state of facts; consequently we cannot consider the point.

[5-7] Petitioner also insists that, the proceeding to punish him for contempt being in the nature of a criminal prosecution, it cannot be inaugurated nor supported by the affidavit of his wife. In this behalf he cites section 1322, Penal Code, and section 1881, subd. 1, of the Code of Civil Procedure. His position, briefly stated, is that the proceeding to punish for contempt of court one who disobeys a lawful order is a criminal proceeding designed to "vindicate the dignity and authority of the court." (*Ex parte Gould*, 90 Cal. 362, 33 Pac. 1112 [21 L. R. A. 751, 37 Am. St. Rep. 57]); that therefore it is not "a criminal action or proceeding for a crime committed" by the husband against the wife; and that if we regard it as a civil proceeding the result will be the punishment of the offending party by imprisonment for debt. If this were an independent prosecution unconnected with the civil action to which the husband and wife are parties, there would be much force in petitioner's argument; but the right of the wife to testify in an ancillary proceeding of this sort has never been questioned. This proceeding, although partaking of some of the characteristics of a prosecution for a criminal offense, is properly entitled in the style of the divorce proceeding itself, and not as a separate action. The court takes cognizance of the pendency of the main cause, and there is no necessity of setting forth in the affidavit that fact or "the provisions of the order which has been violated." *Ex parte Ah Men*, 77 Cal. 200, 19 Pac. 380, 11 Am. St. Rep. 268. It has been held that the sections limiting the right of one spouse to give testimony against the other should receive a liberal construction. *People v. Langtree*, 64 Cal. 256, 30 Pac. 813; *People v. Loper*, 159 Cal. 13, 112 Pac. 720, Ann. Cas. 1912B, 1183. A construction refusing to a wife, suing for a divorce, a right to institute this ancillary proceeding by her affidavit and to sustain it by her testimony would be most illiberal and strained. The purpose of the affidavit is not merely to set in motion the machinery of the law for the punishment of the delinquent litigant. Its prayer is that he be required to show cause why he has not complied with the court's command. This clearly differentiates

the proceeding from the ordinary criminal prosecution and emphasizes its quality as something ancillary to the divorce action and subject to the rules with reference to the competency of witnesses in that cause.

Let the writ of review be discharged.

We concur: LORIGAN, J.; HENSHAW, J.

DENNIS v. GORDON. (L. A. 2,937.)
(Supreme Court of California. Aug. 5, 1912.)

1. APPEAL AND ERROR (§ 671*)—RECORD—CONSIDERATION OF EVIDENCE—"BILL OF EXCEPTIONS" AND "STATEMENT OF THE CASE."

An order denying a new trial recited that the motion was presented on all the grounds stated in the notice of intention to move for new trial, and upon the statement of the case previously settled. The record contained a bill of exceptions in which the insufficiency of the evidence to sustain the findings was specified, but the order denying the new trial did not clearly state that the grounds on which the motion was based were those specified in the settled statement; the document referred to as a statement of the case being denominated on its face as a "bill of exceptions." *Held* that, since the expressions "bill of exceptions" and "statement of the case" would be considered synonymous when necessary to accomplish the ends of justice, the recital in the order that the motion was presented on the statement of the case previously settled would be deemed sufficient evidence that the objections set forth in the statement were the grounds of the motion, so as to authorize a consideration of the evidence on appeal, though the copy of the notice of intention printed in the transcript was not authenticated by a bill of exceptions, and therefore could not be considered, under Code Civ. Proc. §§ 661, 951, 952.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

For other definitions, see Words and Phrases, vol. 1, pp. 783-784.]

2. APPEAL AND ERROR (§ 340*)—REVIEW OF EVIDENCE—JUDGMENT—NOTICE.

A party wishing to take advantage of the fact that notice of the entry of judgment was served, in order to prevent a consideration of the evidence on appeal from the judgment taken more than 60 days after its entry, must show that such notice was served more than 60 days before the taking of the appeal; otherwise the appeal will be considered as having been taken under Code Civ. Proc. §§ 941a, 941b, 941c—the latter two sections providing that the sufficiency of the evidence is reviewable in the same manner as if the appeal had been taken within 60 days of the entry of judgment under section 939.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1888; Dec. Dig. § 340.*]

3. PARTNERSHIP (§ 94*)—DUTY OF PARTNERS.

By Civ. Code, §§ 2410, 2411, the relation between partners is declared to be confidential, and, with respect to the firm property and business, each is a trustee of the other and bound to act in the highest good faith toward the other, and may not obtain any advantage by the slightest misrepresentation or concealment.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 141; Dec. Dig. § 94.*]

4. PARTNERSHIP (§ 90*)—GENERAL PARTNER—DUTY TO FIRM—PERSONAL ATTENTION.

Under Civ. Code, §§ 2436-2438, relating to partners, a general partner, who agrees to give his personal attention to the partnership business, may not engage in any other business which gives him an interest adverse to that of the firm, or which prevents him from giving to the firm business all the attention which would be advantageous to it; but with such exception he may engage in any other business without being accountable to the firm for the profits thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 141; Dec. Dig. § 90.*]

5. PARTNERSHIP (§ 328*)—GENERAL PARTNER—ENGAGING IN OTHER BUSINESS—EVIDENCE.

In an action for an accounting between partners, evidence *held* to warrant findings that, as to certain corporate stock and other property acquired by defendant during the existence of the partnership, it was obtained with his own funds and effort, without misrepresentation or concealment or injury to the firm, and that he was not therefore required to account for any part of the value thereof to complainant.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 779-781; Dec. Dig. § 328.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by G. C. Dennis against F. V. Gordon for an accounting. From so much of a judgment as denied plaintiff an undivided half interest in property which defendant claimed to own individually, and from an order denying the plaintiff's motion for a new trial, he appeals. Affirmed.

Woodruff & McClure and Gibson, Dunn & Orntcher, for appellant. Haas, Garrett & Dunnigan, Hunsaker & Britt, and W. E. Mitchell, for respondent.

SHAW, J. Dennis and Gordon were partners, doing business under the firm name of Dennis-Gordon Company. The partnership was formed in September, 1907, and was dissolved by mutual consent on January 31, 1910. Dennis thereupon demanded of Gordon an accounting of the partnership business, which was refused. This action was then begun to compel such accounting. An account was rendered, and after it was settled by the court judgment was given, declaring that certain property standing in the name of Gordon was partnership property, and that Dennis was the owner of an undivided half thereof, and that certain other property in the name of Gordon or his wife was his individual property, in which Dennis had no interest. Dennis appeals from that portion of the judgment which is in favor of Gordon. He also moved for a new trial, and he appeals from an order denying the motion.

The property adjudged to belong to Gordon was, first, 17½ shares of the Wellman Oil Company; second, 75,000 shares of the Western Crude Oil Company and 1,500 shares of the 32 Oil Company; and, third, 100,000 shares of the Hale-McLeod Company. The

contention of Dennis is that, although the money paid by Gordon in the acquisition of this property was his own, and not the money of the firm, yet because he did not inform Dennis fully of the facts concerning it, so that Dennis could take an equal share, and, because a part of the consideration upon which Gordon acquired it was services performed and to be performed by Gordon in bettering the property, Gordon was not acting in good faith, and holds the property as trustee for the firm and as firm assets. The findings on this point are in general terms, as to each of said parcels, that it is not a part of the assets of the firm. There were special findings to the effect that Gordon paid \$1,000 for the property which he exchanged for the shares in the Western Crude Oil Company and in the 32 Oil Company, and that before buying any of the shares he offered to take Dennis in with him on the deal, but that Dennis refused. It is claimed that these findings are not sustained by sufficient evidence.

[1, 2] There is no merit in the preliminary objection of Gordon that the evidence cannot be considered. The order denying a new trial recites that the motion for a new trial was "presented upon all the grounds stated in the notice of intention to move for a new trial herein, and upon the statement of the case heretofore settled." A copy of the notice of intention is printed in the transcript; but it is not authenticated by a bill of exceptions. Hence it cannot be considered as a part of the record on appeal. Code Civ. Proc. §§ 661, 951, 952. But the record contains a bill of exceptions in which the insufficiency of the evidence to sustain these findings is specified. The order denying the new trial does not clearly state that the grounds upon which the motion was made were those specified in the settled statement, and the draftsman apparently failed to observe that the document referred to as a statement of the case is denominated on its face as a "bill of exceptions." But such orders are to be liberally construed, and substance, rather than form, is the essential thing. A bill of exceptions setting forth the evidence and proceedings taken at the trial, such as the one in this record, is in no wise distinguishable from a statement of the case. Wherever it is necessary for the ends of justice to do so, we will consider the expressions as synonymous. A recital in the order that the motion was presented upon the statement of the case heretofore settled will be deemed sufficient evidence that the objections set forth in the statement were the grounds of the motion. The misnomer, whereby the bill was referred to as a statement, will be disregarded. Furthermore, upon this point it is to be observed that the record does not show that any notice of the entry of the judgment was ever served upon Gordon's attorneys of record. The party

wishing to take advantage of the fact that it was served, for the purpose of preventing a consideration of the evidence on appeal from the judgment taken more than 60 days after its entry, must show that such notice was served more than 60 days before the taking of such appeal. Otherwise the appeal will be considered as having been taken under sections 941a, 941b, and 941c of the Code of Civil Procedure. In such a case, by sections 941b and 941c, the sufficiency of the evidence is reviewable in the same manner as if the appeal had been taken within 60 days of the entry of the judgment under section 939.

The Dennis-Gordon Company was formed without capital. Its business was to be the buying and selling of oil, bonds, stocks, oil leases, and real estate, either for others on commission, or on its own behalf, and the promoting of oil companies and the improvement of oil lands. The principal part of its business, however, was the business of selling property for others on commission. It was successful and profitable; but the profits received in money were immediately divided between them. Only a small amount of money was kept on hand, apparently for the purpose of paying current expenses. The agreement of partnership was oral. It contemplated the buying of lands by the firm as a part of the business; but, as there was no capital and no agreement that either should contribute money to the business, it would follow, necessarily, that if any property was bought by or for the firm requiring any considerable sum of money, a new agreement concerning it would have to be made before either would be obliged to contribute of his individual funds for that investment. Such new agreement might be made informally, as, for example, if either bought property for the firm and the other, after knowledge thereof, acquiesced therein, or made no objection thereto. In that case there would be an implied agreement by each to contribute such additional funds as might be required therefor.

It is conceded that Gordon did not use any partnership funds in acquiring the properties in question, and that the money he paid therefor was his individual property. The only grounds upon which it is claimed that the property belongs to the firm are, as before stated, that Gordon paid the consideration in part by the performance of services in and about the properties; that his attention thereto prevented him from giving due attention to the firm business; and that he obtained the consent of Dennis that it should not be bought on firm account by concealing from Dennis the real character of the property, or by failing to inform him thereof.

The shares in the 32 Oil Company, in the Western Crude Oil Company, and in the Hale-McLeod Company were all obtained in

exchange for interests in certain oil lands held by Gordon and transferred by him to those companies. The 82 Oil Company shares were procured by the transfer of a one-fourth interest in a part of section 32, those of the Western Crude by the transfer to it of a one-fourth interest in a part of section 4, and those in the Hale-McLeod Company by the transfer to it of an interest in lands in sections 28, 34, and 24. These lands were not all in the same township and range; but their particular location is not important. The fact of the exchanges of these lands for stocks is of no consequence. The material inquiry is with regard to the acquisition by Gordon of the interests in the lands. If such interests became firm assets, then the stocks received in exchange would also be firm assets.

The lands were all government lands, subject to location and acquisition as mineral lands, on condition that oil was discovered therein. The lands in section 32 and section 4 had been located as mineral lands by one McMurtry; but no discovery had been made, and they were entirely undeveloped. One McLeod had obtained control thereof, and had induced Wheat and Wilson to take each a one-fourth interest with him, and was endeavoring to get a fourth man to take another one-fourth interest. The agreement with McMurtry was in the name of McLeod's wife. McLeod had agreed to drill certain wells thereon for the discovery of oil in consideration of this contract. These three parties then proposed to Gordon to transfer to him a one-fourth interest with them in the enterprise, he to pay one-fourth of the expenses, estimated at \$1,000, and to assist in obtaining other parties to drill the wells. The plan was to erect derricks preparatory to drilling, and then make leases to others, who would complete the wells and discover the oil.

Gordon informed Dennis of this proposition, stating to him that the land had to be developed; that it was government land, not proved up; that it was a wildcat proposition and very much of a gamble; and that it would take \$1,000 if they went into it together; and proposed that if he would go in for one-half of it they would take it for the firm. Dennis refused to go into it, and said, in substance, that the firm should not go into it; that he was without funds to invest in it himself; and that he would not go into anything in which McLeod was interested. Upon this refusal of Dennis, Gordon, on his own behalf, agreed with McLeod, Wheat, and Wilson to take a one-fourth interest with them on the terms proposed. Mrs. McLeod thereupon assigned to Wheat, Wilson, and Gordon each a one-fourth interest in the land. She apparently held the other one-fourth as trustee for McLeod. The four then began the erection of derricks for drilling wells, and sought to find persons who would take leases and

drill the same. These were the services referred to as part of the consideration given by Gordon for the property. It does not appear that much of Gordon's time was spent therein, or that it seriously interfered with his proper attention to the affairs of the Dennis-Gordon Company. Gordon's share of the outlay was \$1,000. Before expending more, they succeeded in obtaining lessees, who proceeded with the work and drilled the wells. Oil was found, and the land at once became valuable. The services of Gordon in this enterprise were all performed after he had made the proposal to Dennis, above stated, and after Dennis had refused to go into it. If this refusal was not procured by concealment or misrepresentation, the consent of Dennis that Gordon might go into it on his own account and his refusal to allow the firm to take a part in it would estop him from claiming that Gordon's subsequent reasonable attention to the new enterprise, not materially interfering with his attention to the firm business, should nevertheless inure to the benefit of the firm.

[3,4] The law governing partnerships is settled by the Civil Code. The relation between partners is confidential. With respect to the firm property and business, each is trustee of the other. Section 2410. In the conduct of the business, each must act in the highest good faith toward the other, and may not obtain any advantage over him by the slightest misrepresentation or concealment. Section 2411. A general partner, who agrees to give his personal attention to the partnership business, may not engage in any other business which gives him an interest adverse to that of the firm, or which prevents him from giving to the firm business all the attention which would be advantageous to it. Section 2436. Except as thus bound, he may engage in any other business without being accountable to the firm for the profits thereof. Sections 2437, 2438.

[5] The evidence shows that the statements made by Gordon to Dennis respecting the property were true. The land was undeveloped; it was not known that it contained oil; and if none was discovered all the money and effort expended in it would be a total loss. It was truly a gamble and a speculation. The value afterwards shown to be in the property was practically all the result of the money expended and the exertions of the interested parties after they had made their agreement. There is nothing to indicate that Gordon had any greater knowledge of the existence of oil in the land than Dennis had. The latter had not had as much experience as Gordon in the development of oil land, it is true. But he had had some experience in such matters, and had made some deals in oil lands. He does not claim that he was so destitute of common knowledge on the subject that he did not know that a mineral location was valueless if there was no mineral in the

land, and that, in order to make an undeveloped oil location on government land of any value, both money and time had to be expended in discovering the oil believed to be contained in it. The information he received was therefore sufficient for him to understand that if he and Gordon went into the speculation together they would have to give to it time and services, as well as money, and that Gordon must do the same if he alone went into it with the other parties. The refusal of Dennis to take an interest, and his consent that Gordon alone should do so, was equivalent to an agreement that Gordon should do his part in assisting the independent concern without giving the Dennis-Gordon Company any claim or account thereof.

The evidence does not compel the conclusion that Gordon was acting in bad faith, or with the intent to deter Dennis from taking an interest in the property. The finding of the court implies that he acted in good faith, and we must take it as true. No effort at concealment is shown to have been made by Gordon; nor is there anything indicating that he did not believe that the land and its prospects were as he represented it to Dennis when he asked him to take a share therein. No money of the firm was used. The fact that the \$1,000 which Gordon paid was soon returned to him out of the profit is not material. Having the right, under the circumstances, to acquire the interest for himself, he was entitled to the profit as his own. It follows from all these considerations that the court below properly found that the stock for which these lands were exchanged was not a part of the firm assets.

There is no substantial ground for the claim that the Hale-McLeod Company stock is firm assets. McLeod had obtained some interest or right in the three sections, above mentioned, by an agreement with the original locators that he would protect the locations for them by doing the necessary development work. Several months after the transaction hereinbefore set forth had occurred, McLeod offered Gordon a one-fourth interest in this contract with the locators, for the sum of \$2,100. He also offered to loan Gordon the money to pay for this interest. Gordon informed Dennis of the offer of the interest and proposed to let him in on the deal on the same terms; but he did not say anything about McLeod offering to loan him the money. He informed him, however, of the condition of the land, the plan contemplated for development and discovery of oil, and that it was his opinion that it was good property, and that they would make money on it, either in cash, or by acquiring shares in some corporation to be formed with the land as capital. Dennis thereupon stated that he had no money to invest, and refused to go into it. There is no evidence that Gordon devoted any time

or attention whatever to this enterprise. As a partner of Dennis, he was under no obligation to use his own credit in borrowing money to loan to Dennis to enable Dennis to go into the deal, either as a member of the firm, or on his own account. With respect to new enterprises in which the firm had no interest, he was not bound to pay money for Dennis as a contribution for Dennis to the enterprise. If he had advanced such money, the transaction would have been an individual matter between them, and not a part of the firm business. There is no evidence of any concealment by Gordon respecting this property. So far as he appears to have been concerned with it, the business was in no wise adverse to the interests of the firm. No reason appears why he could not buy an interest in it without taking it as firm property.

The shares in the Wellman Oil Company were not firm assets. They were obtained in the following manner: The Western Crude Oil Company, after Gordon became a stockholder therein, obtained a large block of stock in the Wellman Oil Company. It desired to raise funds for its own development work, and for that purpose offered to its stockholders the Wellman stock at a fixed price in proportion to their holdings of the Western Crude stock. Gordon took 17½ shares at the price named and paid his own money for them. It was a mere investment of his own funds. His relations to the firm did not make it his duty to offer the property to the firm, or to buy it for the firm. It was in no way connected with the firm business, nor adverse to its interests.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

PEOPLE v. DELHANTIE. (Cr. 1,740.)
(Supreme Court of California. Aug. 6, 1912.)

1. GRAND JURY (§ 88*)—STENOGRAPHERS—QUALIFICATIONS.

A stenographer, selected under Pen. Code, § 925, to report grand jury proceedings, need not be the official reporter of the superior court; and Code Civ. Proc. §§ 270, 271, relating to official reporters, are inapplicable.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 81; Dec. Dig. § 38.*]

2. INDICTMENT AND INFORMATION (§ 12*)—OBJECTIONS TO INDICTMENT—IRREGULARITY OF GRAND JURY PROCEEDINGS.

Under Pen. Code, § 995, specifying the grounds upon which an indictment may be set aside, it is no objection that no copy of the stenographer's report of testimony taken before the grand jury was served on defendant within five days after adjournment of the grand jury, nor that the grand jury never caused the person appointed as reporter to transcribe such testimony.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 76; Dec. Dig. § 12.*]

3. CRIMINAL LAW (§ 970*)—MOTION IN ARREST OF JUDGMENT—GROUNDS.

Under Pen. Code, § 1185, which authorizes a motion in arrest of judgment for defects in an indictment not waived by failure to demur, etc., objections that no copy of the stenographic report of the testimony taken before the grand jury was served on defendant within five days after the adjournment of the grand jury, and that the grand jury never caused the reporter to transcribe such testimony, are not available, on such a motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.*]

4. CRIMINAL LAW (§ 83*)—JURISDICTION—GRAND JURY PROCEEDINGS.

The jurisdiction of the superior court of a criminal case does not depend upon compliance with Pen. Code, § 925, which governs grand jury proceedings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 112-114; Dec. Dig. § 83.*]

5. CRIMINAL LAW (§ 1168*)—TESTIMONY BEFORE GRAND JURY—SERVICE OF COPY.

The requirement of Pen. Code, § 925, for service upon accused, within five days after the discharge of the grand jury which indicted him, of a copy of the stenographic report of testimony taken before the grand jury is directory; and noncompliance therewith is not reversible error, in the absence of prejudice to accused, where the copy is served within a reasonable time and early enough to enable him to properly make such defense as he has to the matters shown thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. § 1168.*]

6. GRAND JURY (§ 40*)—STENOGRAPHIC REPORT OF TESTIMONY—TRANSCRIPTION—TIME.

A reporter, appointed under Pen. Code, § 925, to report testimony taken before a grand jury, may make a certified transcript after the grand jury has been discharged.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 85-86; Dec. Dig. § 40.*]

7. HOMICIDE (§ 127*)—MURDER—INDICTMENT—SUFFICIENCY.

An indictment, charging that accused on a specified day, at and in a specified county, willfully, unlawfully, and feloniously, and with malice aforethought, killed and murdered a specified person, being contrary to the form, etc., of the statute, sufficiently charges murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 192-194; Dec. Dig. § 127.*]

8. CRIMINAL LAW (§ 1170½*)—REVIEW—HARMLESS ERROR—CROSS-EXAMINATION OF ACCUSED.

Where one accused of murder testified that he did not remember of having attacked decedent or another person, it was not prejudicial error to permit the district attorney to ask him, on cross-examination, if he did not remember lying in wait in an alley for such other person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8129-8135; Dec. Dig. § 1170½.*]

9. CRIMINAL LAW (§ 1170½*)—REVIEW—HARMLESS ERROR—CROSS-EXAMINATION OF ACCUSED.

It was not prejudicial error to permit one accused of murder to be asked, on cross-examination, if, when he stabbed decedent and "knew that he was a dead one," accused did not remember leaving, as against objection that

the question improperly assumed that accused knew decedent was dead.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8129-8135; Dec. Dig. § 1170½.*]

10. CRIMINAL LAW (§ 479*)—EXPERTS ON SANITY—QUALIFICATIONS—SUFFICIENCY.

Physicians showed sufficient observation of accused to qualify them to testify to his sanity, where they had acted as commissioners on examination of accused for insanity, and where one of the physicians had had accused under his observation for an hour or more six days prior to such examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1067, 1068; Dec. Dig. § 479.*]

11. CRIMINAL LAW (§ 452*)—EXPERTS ON SANITY—QUALIFICATIONS—SUFFICIENCY.

A state prison warden was sufficiently acquainted with accused to qualify him, under Code Civ. Proc. § 1870, subd. 10, to give an opinion as to accused's sanity, where the warden had had accused in his custody for about three years next preceding the date of the particular offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1063-1065; Dec. Dig. § 452.*]

12. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a trial for murdering a fellow convict, it was not prejudicial error to permit the district attorney to ask the warden of the prison whether decedent had the reputation of being a "busybody," where defendant's witnesses testified that decedent was a "stool pigeon" and a trouble maker.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

In Bank. Appeal from Superior Court, Marin County; E. T. Zook, Judge.

Edward Delhantie was convicted of murder, and he appeals. Affirmed.

George H. Harlan, for appellant. U. S. Webb, Atty. Gen., J. H. Riordan, Deputy Atty. Gen., and Thomas F. Boyd, Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was charged by the grand jury of Marin county, by indictment presented in the superior court on March 1, 1912, with the crime of murder, alleged to have been committed in said county on February 16, 1912. His trial in the superior court was commenced on April 8, 1912, and resulted, on April 11, 1912, in a verdict of "guilty of a felony, namely, murder in the first degree." On April 15, 1912, judgment of death was pronounced. This is an appeal by defendant from such judgment.

1. When the matter was under investigation by the grand jury, that body appointed one F. O. Sirard as a reporter to report the testimony taken. Mr. Sirard was present as such reporter during the taking of the testimony by the grand jury, and took down such testimony in shorthand. The grand jury presented the indictment in this case on March 1, 1912, and on the same day was finally discharged by the court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from farther attendance. Mr. Sirard failed to certify as correct or present any long-hand transcript of such testimony until March 8, 1912, and no copy of the same was served on defendant prior to said day. It further appeared that such testimony was not transcribed before the discharge of the grand jury.

Section 925, Penal Code, provides in part, as follows: "The grand jury, on the demand of the district attorney, whenever criminal causes are being investigated before them, must appoint a competent stenographic reporter to be sworn and to report the testimony that may be given in such causes in shorthand, and to transcribe the same in all cases where an indictment is returned. If an indictment has been found against a defendant, a copy of the testimony given in his case before the grand jury shall be served upon him within five days after the discharge of the grand jury, or if the grand jury has not been discharged, at least five days before the cause is set for trial. * * * No person other than those specified in this and the succeeding section is permitted to be present during the session of the grand jury, except the members and witnesses actually under examination. * * *"

It is not claimed that a copy of the testimony was not served upon the defendant in ample time to enable him to prepare for trial, or that he suffered any prejudice whatever from the failure to serve him with such copy within five days after the discharge of the grand jury.

[1-3] Based upon the facts we have stated, a motion was made to set aside the indictment, on the ground that it was not found, indorsed, and presented as prescribed in the Penal Code, in that (1) no copy of the testimony was served on defendant within five days after the adjournment of the grand jury; (2) that the grand jury never caused the person appointed as stenographic reporter to transcribe such testimony; (3) that the testimony was not taken down by an official reporter qualified or appointed as required by sections 260, 270, and 271, Code of Civil Procedure; and (4) that a person was permitted to be present during the session of the grand jury and when the charge embraced in the indictment was under consideration, other than as provided in section 925, Penal Code, viz., said F. O. Sirard. The last specification is based entirely on the claim that Mr. Sirard was not such a person as could be appointed by the grand jury as reporter, for, of course, the "competent stenographic reporter," who may be appointed under the provisions of section 925, Penal Code, and is in fact appointed and sworn, is one of the persons specified in that section who may be present. There is nothing to indicate that Mr. Sirard was not "a competent stenographic reporter," and the sec-

tion authorizes the selection by the grand jury of *any* competent stenographer. It is not essential that the one selected be the official reporter of the superior court; and sections 270 and 271 of the Code of Civil Procedure have no application. What we have said disposes of the third, as well as the last, specification. The other two specifications have nothing to do with the matter of the finding, indictment, and presentation of the indictment, and are not available on a motion to set aside an indictment. Section 995, Pen. Code. The motion to set aside the indictment was properly denied. Similar objections were made on a motion in arrest of judgment; but they were not available thereon. Section 1185, Pen. Code.

[4] It is insisted that by reason of the facts we have stated, the superior court was without jurisdiction to proceed with the trial of defendant upon this indictment. We are unable to perceive any merit in this claim. The jurisdiction of the superior court was not dependent upon compliance with the provisions of section 925, Penal Code. It obtained jurisdiction of the cause for all purposes by reason of the presentation by the grand jury of the indictment charging defendant with the crime of murder, alleged to have been committed in Marin county. If any substantial right given defendant by section 925, Penal Code, was denied him, it could amount at most simply to error, reviewable in such manner as the law provides.

[5] The only right given to an indicted defendant by this section, so far as the testimony taken before the grand jury is concerned, is, where the testimony has been taken down in shorthand on the demand of the district attorney, to have a longhand copy thereof furnished him "within five days after the discharge of the grand jury, or if the grand jury has not been discharged, at least five days before the cause is set for trial." The manifest object of this provision is to enable him to know the testimony upon which the charge against him is founded, and to enable him to make his defense. We have no doubt that, as has been held several times with relation to subdivision 5 of section 869, Penal Code, requiring the shorthand reporter at a preliminary examination within ten days after the close of such examination to transcribe into longhand his shorthand notes and certify and file the same with the county clerk, that the specification as to time is directory merely (see *People v. Buckley*, 143 Cal. 375, 381, 77 Pac. 169, and cases there cited); and that, if the defendant is served with a copy of the testimony within a reasonable time and early enough to enable him to properly make such defense as he has to the matters shown thereby, he cannot be heard to complain of the failure to comply literally with the terms of the statute. In such event such

noncompliance is absolutely without prejudice to the defendant. As we have said, it is not even suggested that a true copy of the testimony given before the grand jury was not in fact served upon defendant in ample time to enable him to make such defense as he had.

[4] There is nothing in the claim that all powers and duties of the reporter appointed by the grand jury end with the discharge of that body. The law by express provisions defines the duties of one so appointed, among which is the duty to transcribe the testimony in all cases where an indictment is returned. There is nothing in the law requiring this to be done during the life of the grand jury that appointed him; and it is manifest from the language used that it was contemplated that in some cases it would necessarily be done after that body had adjourned. The appointment of the reporter vests him with the power and makes it his duty to make and furnish this transcription, even though the body that appointed him has been finally discharged; and when he makes and certifies the transcription he does it as the officer or agent upon whom the law has devolved that duty, regardless of whether or not the grand jury has been discharged. It follows from what we have said that there was no error whatever on the part of the trial court in this matter, and that the failure to serve defendant with a copy of the testimony within five days after the adjournment of the grand jury does not warrant a reversal.

[7] 2. The indictment charged that the defendant, on the 16th day of February, 1912, at and in the county of Marin, state of California, willfully, unlawfully, feloniously, and of his malice aforethought, did kill and murder one William Kaufman, a human being, contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the people of the state of California. That such language sufficiently charges the crime of murder for all the purposes of an indictment or information is too well settled in this state to require discussion. See *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093, and cases there cited; *People v. Hyndman*, 99 Cal. 1, 33 Pac. 782, and cases there cited. The trial court therefore did not err in overruling the demurrer and the motion in arrest of judgment.

[8] 3. On cross-examination of the defendant, he having testified substantially on direct examination that he did not remember anything about having attacked either Peterson or the deceased during the morning of February 16th, the district attorney asked him various questions as to his want of recollection, among others, "You don't remember laying in wait in that alley for Mr. Peterson?" This was assigned as error by counsel for defendant; the claim being that there

was no evidence to show lying in wait on the part of defendant, and therefore nothing to warrant such a question. The trial court thought it was proper cross-examination, and a careful reading of the testimony theretofore given satisfies us that the court was correct in its conclusion. Nor are we able to see that the question was such as to warrant us in holding that the defendant was prejudiced by the asking thereof, even if it were not proper cross-examination. The question does not appear to have been answered.

[9] The defendant could not have been prejudiced by the asking of the question: "And then when you had stabbed him [Kaufman] and knew he was a dead one, you do not remember leaving; you do not remember that?" The only objection made on account of this question was that it improperly assumed that defendant knew that Kaufman was dead. The defendant answered substantially that he had no recollection of any of these things.

If we assume that the district attorney exceeded the bounds of legitimate argument in the few words he said regarding the defense of insanity, which we do not at all concede, it is very clear to us that it cannot be held, especially in view of the instructions of the court in regard to such defense, that the defendant was at all prejudiced thereby.

[10] 4. Two physicians, Dr. Miller and Dr. Hayden, were allowed to testify substantially that in their opinion the defendant was sane on January 30, 1909. The only objection to Dr. Miller's testimony was that his period of observation was too short to enable him to form an opinion; and the objection to Dr. Hayden's testimony was that no proper foundation had been laid. The competency of Dr. Miller as an expert on insanity was not questioned by the objection to his testimony, and such competency was fully shown by the evidence as to both witnesses. Each of these witnesses had officiated as a commissioner on an examination of defendant for insanity in Fresno county, which was had on January 30, 1909, and the knowledge of each as to defendant was acquired at that time, except that Dr. Miller also had defendant under his observation for an hour or more six days prior to such examination. We think that the evidence shows a sufficient opportunity for examination and observation on the part of the witnesses to warrant the court in allowing their opinions as to sanity or insanity of defendant on January 30, 1909, to go to the jury.

[11] 5. Warden Hoyle had the custody of defendant in the California State Prison at San Quentin for something like three years next preceding the date of the homicide, and the evidence as to his observation of him and his conversations with him during this period were such as to support the conclusion of the trial court that he was suffi-

ciently "an intimate acquaintance" of defendant, within the meaning of that term as used in subdivision 10 of section 1870, Code of Civil Procedure, to give his opinion as to his mental sanity. No other objection was made to his testimony on this subject.

[12] 6. The question whether the deceased, Kaufman, had the reputation in the prison of being a hussybody was, of course, absolutely immaterial to any issue involved on the trial of this case. No objection on this ground, however, was interposed on the trial to the question asked Warden Hoyle in this regard. In asking the question, the district attorney was undoubtedly seeking to rebut certain immaterial testimony on the part of witnesses for the defendant to the effect that deceased was both a "stool pigeon" and a trouble maker. We are of the opinion that there was no error in overruling the specific objection made, viz., that no proper foundation for the question had been laid, and that it had not been shown that the warden had any knowledge on the subject. But in any event it is clear that the whole matter was of very small importance and without prejudice to defendant's cause.

No other point is made for reversal. We have considered the whole record and find no reason to doubt that the defendant had a fair trial on the merits, and that the judgment should be affirmed.

The judgment is affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; SLOSS, J.; MELVIN, J.

Ex parte MONTGOMERY. (Cn. 1,690.)
(Supreme Court of California: Aug. 16, 1912.)

1. MUNICIPAL CORPORATIONS (§ 616*)—ORDINANCES—REGULATION OF BUSINESS—VALIDITY.

Los Angeles Ordinance No. 22,798 (New Series), which makes it unlawful to operate a lumber yard or other specified industries within the residence district described by the ordinance, is a constitutional exercise of police power.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1355, 1356; Dec. Dig. § 616.*]

2. MUNICIPAL CORPORATIONS (§ 611*)—ORDINANCES—REGULATION OF BUSINESS—VALIDITY.

A city has a large discretion in enforcing such police measures as ordinances prohibiting the operation of industrial establishments, etc., in the residence district.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1344-1349; Dec. Dig. § 611.*]

3. MUNICIPAL CORPORATIONS (§ 616*)—ORDINANCES—REGULATION OF BUSINESS—VALIDITY.

Los Angeles City Charter (St. 1911, p. 2063) art. 1, § 2, subd. 21, which authorizes the city to regulate or prohibit, etc., specified business enterprises, does not limit the city's general police power, under subdivision 24, or under Const. art. 11, § 11; and hence Ordinance No. 22,798 (New Series), which prohibits operation of lumber yards, etc., within the residence district, is not invalid, because lumber yards are not specified in subdivision 21.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1355, 1356; Dec. Dig. § 616.*]

In Bank. Application by W. F. Montgomery for a writ of habeas corpus. Writ discharged, and petitioner remanded.

E. J. Fleming and James S. Bennett, for petitioner. Guy Eddle, City Prosecutor, for respondent.

MELVIN, J. [1] A writ of habeas corpus was issued from this court, directed to the chief of police of the city of Los Angeles, by whom petitioner was imprisoned by virtue of a warrant issued out of the police court of that city. Petitioner was charged with misdemeanor, in that he did "erect, establish, maintain, and carry on a lumber yard at No. 132 West avenue 61 within the residence district of said city" of Los Angeles. The sole question presented therefore is the sufficiency of Ordinance No. 22,798 (New Series) of the city of Los Angeles in its application to petitioner. The contention is, first, that the ordinance is in excess of the legislative powers of the mayor and city council of the city of Los Angeles under the charter of said city; and, second, that it is in violation of private rights secured by the Constitution of the United States and the Constitution of the state of California.

[2] The ordinance in question was adopted instead of, and by its terms repealed, Ordinance No. 19,563 (New Series). Like that ordinance, it declared all of the city, except certain enumerated industrial districts, to be a residence district, and prohibited the conduct of certain sorts of business therein. Section 2 of the later ordinance differs in no material particular from the identically numbered section of its predecessor. By that section it is declared unlawful for any person, firm, or corporation to "erect, establish, maintain or carry on within the residence district described in said section 1" of said ordinance. " * * * any stone crusher, rolling mill, machine shop, planing mill, carpet-beating establishment, hay barn, wood yard, lumber yard, public laundry, or wash-house." In *Ex parte Quong Wo*, 118 Pac. 714, we had occasion to examine Ordinance No. 19,563 (New Series), and to determine that it was a legitimate and constitutional exercise of the police power. What was there said applies with equal force to the portion of the later ordinance now before us, and that case disposes of this petitioner's second objection regarding the constitutionality of said municipal by-law. Petitioner affirms that the ordinance is discriminatory by reason of the placing of a "business center" within the lines of the "residence district." Upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this point the evidence is conflicting. It is shown that certain wooden buildings near petitioner's lumber yard are occupied for business purposes; but the return seeks to show by affidavit and by photographic exhibits that the lumber yard is situated in the midst of a section of the city devoted almost exclusively to residences. In any view of the evidence, we cannot say that the city council violated the large discretion vested in it with reference to police measures of the kind here considered; and, unless such abuse of discretion appears, courts are never inclined to nullify ordinances on the ground of their unfairness. See *Ex parte Quong Wo*, supra, and cases there cited.

[3] Petitioner's most important contention is that the enumeration in the charter of Los Angeles of certain trades, callings, and occupations which may be prohibited excludes the prohibition by ordinance of others not so enumerated. The charter provides (subd. 21 of section 2 of article 1) that the city of Los Angeles, in addition to its other powers, shall have the right "to license, regulate, restrain, suppress, or prohibit any or all laundries, livery and sale stables, cattle and horse corrals, slaughterhouses, butcher shops, brick yards, dance halls or academies, public billiard or pool halls or tables, bowling and temple alleys, boxing contests, sparring or other exhibitions, shows, circuses, games and amusements. To license, regulate or prohibit the construction and use of billboards, signs and fences." This, petitioner contends, is a limitation upon the general police power conferred by section 11 of article 11 of the Constitution, and by a similar section of the charter (subdivision 34 of section 2 of article 1, Stats. 1911, p. 2064), which gives the city power "to make and enforce within its limits such local, police, sanitary and other regulations as are deemed expedient to maintain the public peace, protect property, promote the public morals and to preserve the health of its inhabitants." By specifying certain occupations that may be prohibited, petitioner maintains, the charter withholds from the city council the power to prohibit any others; for, he says, the legislative body of a city having a freeholders' charter may be limited in the exercise of police power by a charter provision, citing *Rapp & Son v. Kiel*, 159 Cal. 709, 115 Pac. 651, and *In re Pfahler*, 150 Cal. 81, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911. We do not think that these cited cases sustain the position of petitioner. In both of them the court was passing upon the place of lodgment of the power of a city, and not upon the limitation of the power itself. In *Rapp & Son v. Kiel* the court was discussing a function of the board of supervisors to impose a certain restriction which, under the limitations placed upon the said board, it, as a legislative body, was not authorized to enact. In

re Pfahler also dealt with the place of lodgment of legislative function; but in neither of the opinions in those cases was it held nor implied that a charter may cut down the constitutional power of a city itself. In the *Pfahler* Case we find the court approving the doctrine announced in the opinion in *Odd Fellows' Cemetery Ass'n v. City and County of San Francisco*, 140 Cal. 226, 73 Pac. 987, and using the following language with reference to that case: "It was held that nothing contained in the charter could affect the grant made by the Constitution, and that the city, under such constitutional grant, had the right to exercise the whole police power of the state, so far as local regulations were concerned, subject only to the control of general laws." The provisions of the charter of Los Angeles, quoted above, are not in terms limitations at all, but enumerations of powers. They are expressly given to the city of Los Angeles "in addition to any other powers now held by or that may hereafter be granted to it under the Constitution and laws of the state." If, therefore, the ordinance here considered may be upheld under the general police powers of the city as exercised by its legislative body, it will not fall merely because the city has specific authority under its charter to suppress certain kinds of business. It is to be noted, also, that the ordinance is not one intended to suppress, but to regulate, specified occupations. As a regulatory measure, it comes clearly within the principle of such cases as *Ex parte Quong Wo*, supra; *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; *Grumbach v. Leland*, 154 Cal. 683, 98 Pac. 1059. While a lumber yard is not per se a nuisance, it takes no extended argument to convince one that in a residence district such a place may be a menace to the safety of the property in its neighborhood for various reasons, among which may be mentioned the inflammable nature of the materials kept there.

Let the writ be discharged and the petitioner remanded.

We concur: ANGELLOTTI, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.

MOSSI v. FAIRBANKS. (Civ. 966.)

(District Court of Appeal, Third District, California. June 28, 1912. Rehearing Denied by Supreme Court Aug. 26, 1912.)

LANDLORD AND TENANT (§ 276*)—FORFEITURE FOR NONPAYMENT OF RENT—DEMAND FOR RENT.

The common-law rule requiring a lessor in a lease stipulating for re-entry by him, on default in the payment of rent, to demand payment of the rent due before a forfeiture of the lease can be decreed is not abrogated by Civ. Code, § 791, providing that when the right of re-entry is given the re-entry may be made, after the right has accrued, on three days' notice, as provided in Code Civ. Proc. §§ 1161,

1162, or by section 793, authorizing an action for the possession of real property, leased with a right of re-entry at any time after the accrual of the right of re-entry, without the notice prescribed in section 791; and the right of re-entry for nonpayment of rent does not accrue until a demand has been made for its payment.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1163; Dec. Dig. § 276.*]

Appeal from Superior Court, Humboldt County; George D. Murry, Judge.

Action by Chris Mossi against Marvin Fairbanks. From a judgment of dismissal, plaintiff appeals. Affirmed.

A. W. Hill, for appellant. Pierce H. Ryan, for respondent.

BURNETT, J. The only question involved is whether a demand for the payment of rent is a condition precedent to the enforcement of the forfeiture of a lease. The premises were rented for the term of seven years and four months, commencing on the 4th day of July, 1910, for the monthly rental of \$7.50, payable monthly in advance on the 4th day of each month during said term. It was provided in the lease "that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the party of the first part to re-enter said premises and to remove all persons therefrom." The action was brought to recover possession of the property in consequence of the failure of the lessee to pay the rent as agreed. In the complaint there was no allegation of demand for the rent, and for this omission the court sustained defendant's general demurrer. Plaintiff declining to amend, judgment of dismissal was entered, from which the appeal was taken.

Undoubtedly the general rule is that a demand for the rent must be made before forfeiture will be decreed. In *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153, it is said: "The appellant here claims that she has the right to recover, because there has been a forfeiture of the lease for nonpayment of the rent. Forfeitures are not favored; and our Civil Code contains this provision: 'A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. Section 1442.' To give a landlord a right of re-entry for nonpayment of rent; a demand of the rent, upon or after the last day upon which the lessee has to pay, is essential to complete the forfeiture, and to enable him to maintain an action in ejectment. Taylor on Landlord and Tenant (8th Ed.) § 297; Wood on Landlord and Tenant (2d Ed.) § 514." This case and other authorities are cited in *Clapuscuy*, Clark, 12 Cal. App. 53, 106 Pac. 440, in support of the statement: "Regarding the \$5 payment as rent, there could be no forfeiture under this agreement without demand by plaintiff of the rental up-

on or after the last day given the lessee on which to pay." The decisions in this state, as pointed out by respondent, seem to be uniform in holding that a demand for the rent is required.

In *Gaskill v. Trainer*, 3 Cal. 335, the right to re-enter for nonpayment of the rent was reserved in the contract; but it was declared by the Supreme Court that "the failure to pay cannot alone create a forfeiture. There was an equal necessity that a formal demand should have been made on the day it became due. Nor for the purpose of forfeiture will a waiver of demand ever be implied; but a forfeiture, from its very nature, cannot take place by consent, and it is not favored by the rules of law." It is not disputed that the common law was very strict in its requirement that the demand for rent be made upon the leased premises and at a late hour of the very day when and for the exact amount that was due; but in some respects this strictness has been relaxed, as will be observed by an examination of the cases. Indeed, a change in the statute has modified the rule. The question is fully discussed in *McGlynn v. Moore*, 25 Cal. 384, *Gage v. Bates*, 40 Cal. 384, and *O'Connor v. Kelly*, 41 Cal. 432; but in no decision in the state has it been held, under like conditions as those involved herein, that a request or demand for the rent is not required before a suit can be maintained for a forfeiture of the lease.

In 24 Cyc. p. 1354, the rule is stated as follows: "Ordinarily a demand of performance is necessary after the lessee's breach of a covenant to pay taxes or assessments, or a failure to pay rent, before the lessor can declare a forfeiture. However, the common-law necessity for a demand of rent may be obviated by a statute providing otherwise, by provisions in the lease dispensing with a demand, or by acts of the tenant amounting to a waiver."

It is not contended by appellant that the lease contains any provision dispensing with a demand, or that there has been any waiver on the part of the lessee; but the claim is made that the action was brought under section 793 of the Civil Code, and that this section authorizes recovery without any demand or request for the payment of the rent. The language of the section is: "An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time, after the right to re-enter has accrued, without the notice prescribed in section seven hundred and ninety-one." We think, however, respondent is right in his contention that "appellant has fallen into the error of confusing the notice prescribed in section 791 with the demand required by law before a forfeiture can be declared. Section 791 of the Civil Code provides: 'Whenever the right of re-entry is given to a grantor or lessor in any grant or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

lease or otherwise, such re-entry may be made at any time after the right has accrued upon three days' notice, as provided in sections 1161 and 1162 of the Code of Civil Procedure." Section 1161, C. C. P., provides that a tenant in default for nonpayment of rent is guilty of unlawful detainer after three days' notice to pay the same or surrender possession. Section 1162 provides the manner of service of such notice. Neither section 791 nor 793, C. C., changes the common-law rule requiring a demand for the rent before a forfeiture of the tenant's estate can be declared. Section 791, C. C., in connection with sections 1161 and 1162, C. C. P., simply gives to the landlord a new and summary remedy unknown to the common law, whereby he can in a summary proceeding recover possession from the delinquent tenant, together with treble damages or rents by way of penalty for the tenant's refusal to quit. But before such summary recovery can be had and such penalties enforced, the statute provides, for the protection of the tenant, the service of three days' notice. Simple demand shall not be sufficient; but notice in writing shall be served on him after default made, which notice must be served at least three days before the summary proceedings can be instituted or maintained. Section 793, C. C., does not dispense with the demand required by law, but merely reserves to the landlord his common-law action of ejectment, in addition to his summary remedy under section 791, C. C. Section 793, C. C., simply makes clear by statute that, if the landlord does not desire to avail himself of the summary proceeding provided by the Code, it will not be necessary for him to serve three days' written notice; but it does not relieve him from the necessity of making demand, verbal or otherwise, for the rent." In other words, the right of re-entry for nonpayment of rent does not accrue until a demand has been made for its payment, regardless of the section of the Code under which the action is brought.

It is manifest that this requirement imposes no hardship upon the landlord, and it is in keeping with the general attitude of the law towards forfeitures. It is a very simple matter to provide in the lease that no demand for rent shall be required; or, if this is not done, it should not be considered a very grievous burden to exact of the landlord a request of the tenant for the payment of the rent before depriving him of his possession. It is true that the statute does not expressly require this demand; but it is affirmed by the authorities to be a just and equitable prerequisite to the enforcement of the drastic penalty of forfeiture, and we think it should be left undisturbed until the Legislature has clearly spoken to the contrary. Appellant, speaking of his contention, admits that "we are somewhat embarrassed by a

contrary ruling in *Saner v. Meyer*, 87 Cal. 34 [25 Pac. 153], and in *Clapusc v. Clark*, 12 Cal. App. 53 [106 Pac. 436];" but he thinks they should not be followed. The suggestion, however, is not inappropriate that appellant could easily have followed the doctrine of those cases in preparing the lease, or in making the demand before bringing suit, and thus have saved himself unnecessary trouble and expense.

We think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

PECK v. COYLE. (Civ. 918.)

(District Court of Appeal, Third District, California, July 2, 1912.)

1. CONTRACTS (§ 71*)—EXTENSION OF TIME FOR PAYMENT—CONSIDERATION.

Payments to be made under a contract to purchase land are of themselves sufficient consideration for an extension of time for payment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 295, 296, 298, 316-324; Dec. Dig. § 71.*]

2. VENDOR AND PURCHASER (§ 187*)—CONTRACT TO CONVEY—TIME FOR PAYMENTS—WAIVER.

A vendor waived a provision in the contract, which made time for making payments the essence of the agreement, by receiving payments after they were due by extending the time for other payments, and by telling the purchaser to make what payments he could; that it would "be all right"; that the vendor desired the purchaser "to have the property," etc.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. § 187.*]

3. SPECIFIC PERFORMANCE (§ 121*)—TENDER OF PERFORMANCE—EVIDENCE—SUFFICIENCY.

In an action to specifically perform a contract to convey, evidence held to sustain a finding that the purchaser was able to pay when he offered to pay the amount due under the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

4. SPECIFIC PERFORMANCE (§ 87*)—RIGHT TO RELIEF.

One is not entitled to specific performance of a contract as to which he is himself in default.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 225, 238-241; Dec. Dig. § 87.*]

5. SPECIFIC PERFORMANCE (§ 121*)—DEFAULT BY PLAINTIFF—EVIDENCE—SUFFICIENCY.

In an action to specifically perform a contract to convey, evidence held insufficient to show that plaintiff was ever in default in making payments after demand therefor, etc.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

6. SPECIFIC PERFORMANCE (§ 121*)—TENDER—EVIDENCE—SUFFICIENCY.

In an action to specifically perform a contract to convey, evidence held insufficient to

sustain a finding that plaintiff deposited with the bank the amount of a tender of payment.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

7. SPECIFIC PERFORMANCE (§ 97*)—TENDER OF PERFORMANCE.

Suit lies to specifically perform a contract to convey where proper tender has been made by plaintiff purchaser, though the tender has not been kept good under Civ. Code, § 1500.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286-298; Dec. Dig. § 97.*]

8. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—IMMATERIAL FINDINGS.

In an action to specifically perform a contract to convey, any error in finding that all interest on deferred payments was paid was harmless to defendant vendor, where it appeared that the amount tendered by plaintiff purchaser was larger than the total amount of interest and principal remaining due.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Charles W. Peck against B. M. Coyle. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Holl & Holl and White, Miller & McLaughlin, for appellant. De Ligne & Jones, for respondent.

HAWKINS, Special Judge. The plaintiff and defendant entered into a written contract, whereby plaintiff agreed to buy and defendant agreed to sell certain real property. The purchase price, amounting to \$3,870, was fair and adequate, and was to be paid as follows: \$30 a few days after the execution of the agreement, and the balance in six annual installments of \$640 each, on the 15th of November of each year, the first payment to be made November 15, 1905. Time was made the essence of the contract, and in case of default on the part of plaintiff all payments were to be forfeited as liquidated damages. The plaintiff had the privilege of paying the entire purchase price at any time before maturity; and upon receiving payment defendant agreed to execute a good and sufficient deed, conveying the land to the plaintiff free and clear of all incumbrance. The plaintiff entered into possession of the property and made valuable improvements. He made the first payment of \$30, but failed to pay the installments at the time specified in the contract, but did make certain payments, which were accepted by the defendant. At the time fixed for the fifth payment, a dispute arose as to the amount due and to be paid; whereupon the defendant demanded the entire balance under the contract, and, it not being promptly paid, gave written notice of forfeiture and also that she would at once take possession of the property. The plaintiff thereupon tendered the balance due and demanded a deed, and,

the defendant declining to take the money or execute the deed, the plaintiff brought this action to enforce specific performance of the contract. The court found that the tender was made in the time provided by the contract and as extended by defendant; and that the money was immediately deposited in the name and to the credit of defendant in a bank of good repute and decreed specific performance. The defendant appealed, and presents several points to this court for determination.

[1, 2] First. It is claimed that the evidence does not support the fifth finding of fact to the effect that the defendant waived the provision of the contract, providing that time should be the essence thereof, and extended the times of the payment thereof from time to time. The first payment was made by note on November 15, 1906, and was paid November 17, 1908. The third payment was due November 15, 1907, and \$227.98 was paid thereon on November 17, 1908. At the same time defendant, in writing, extended the time for the payment of the balance of said third payment to November 15, 1909. The record is silent as to the fourth payment; but the extension of the third payment of itself operated to extend the time of the payment of the subsequent installment also to November 15, 1909. The defendant stated at the time the payments were made: "Make what payment you can. It will be all right." "I want you to have the property, and pay all you can." "Raise all the money you can, and it will be all right."

The witness Henderson, who figured the matter up for the parties, was in the best position to know, and he testified that each time she granted an extension defendant told plaintiff and witness that "she reasoned she was getting a good price for the property; that she consulted with witness, and the witness told her why she would consent to it each time." The reasonable inference, under such circumstances, is that the extension was granted to enable defendant to get what money she could, and that payment would not have been made, unless the extension had been granted. The payments themselves were a sufficient consideration for the extension.

The circumstances, coupled with the acts and declarations of the defendant above set out, were a waiver of that portion of the contract which made time of the essence thereof. *Noyes v. Schlegel*, 9 Cal. App. 516, 99 Pac. 723; *Boone v. Templeman*, 158 Cal. 299, 110 Pac. 947, 139 Am. St. Rep. 128.

[3] Second. Appellant also attacks the seventh finding of fact, in so far as it finds, that on November 15, 1909, plaintiff offered to pay the amount then due under the contract, and was ready and willing and able to pay it. The attack is on the ability of the plaintiff to pay. The plaintiff testified that he had at the house at that time enough

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes.

money to make the balance of the third and all of the fourth payment. This would amount to \$851.02, not counting interest. The fifth payment fell due that day, making a total of \$1,491.02, not including interest. By agreement the further consideration of the subject was postponed until the next day. In the meantime the plaintiff saw Mr. Gerber and Mr. Henderson, and the latter, in the words of plaintiff, said: "He would see us through with this affair"; or, as expressed by Mr. Henderson: "I assured Mr. Gerber I would see these people through it financially." He also testified that on November 22d plaintiff had money in a sack; that witness did not let him have that money, but that witness let him have money afterwards. Mrs. Alice Cozzens testified that there was \$2,900, more or less, in the sack; she being present when the money was thrown on the table. The plaintiff testified it was over \$2,900. On November 28th, through the witness McKinney, plaintiff tendered in actual coin \$2,907. We therefore conclude that the evidence justifies the finding that plaintiff was able to pay.

[4, 5] Third. Appellant claims that plaintiff cannot demand specific performance, unless he first makes tender on his part and then keeps the same good under section 1500 of the Civil Code. It is true that plaintiff was not entitled to specific performance while he was in default; but was he in default? As already seen, the plaintiff's time had been extended until November 15, 1909. In the meantime defendant had given a power of attorney to her son, and when plaintiff, on that date, met the son for the purpose of settling matters he informed plaintiff, "We came here for the whole payment on the property." After considerable argument, the son said they would meet the next day and settle up, and plaintiff said, "The money is ready for you any time." The next day the son at first said he had no time to come up, and then said he had to see his sister first. The plaintiff asked for the abstracts of the property. The son said, "We will have them." Plaintiff then said: "Let me know when you are ready, and I will be ready for you." On the 18th the son served written notice on plaintiff that the contract was forfeited, and that defendant would take possession at once. No prior demand had ever been served upon plaintiff that defendant would strictly enforce the contract; nor had notice of any time been served within which plaintiff was required to pay within a specified time. However, an appointment was then made for the next day and, at the request of the son, was postponed until the next afternoon, and this last appointment the son failed to keep. Plaintiff then immediately went to see the defendant, who sent word to her son to take the money and settle up. When the message was delivered, the son said he had to see his sister first.

The plaintiff replied he was ready to see him any time. Again the plaintiff sought the defendant, and she requested that Mr. Henderson, cashier of the bank, come out the next day, November 22d, and plaintiff took Mr. Henderson out and tendered the money by placing it on the table. The defendant said she wanted the money and did not see why she could not take it; but the son went into a rage and threatened violence, and prevented settlement. The plaintiff then again made a formal tender of the actual cash and demand for the deed; the last notice being served November 28, 1909. At no time did the defendant say that she refused the money because it was not paid in time; and she always said she wanted the plaintiff to have the place, and she wanted to take the money if her son would consent. Under such circumstances, it cannot be said that the plaintiff was ever in default; but the defendant was in default from the time that the money was tendered and she refused to take it and execute the deed.

[6] The third finding is to the effect that plaintiff deposited the amount of the tender in the name of the vendor with a bank of good repute in this state, and gave notice thereof to defendant. If this finding is supported by the evidence, it operates to extinguish the obligation of payment by plaintiff. But does the evidence support the finding? The record shows that written notice of the necessary facts was given to plaintiff. The notice alone does not prove the facts. The only other evidence in the record is the statement of the witness, Mrs. Alice Cozzens, that the entire amount of money which is now on deposit at the Sacramento Bank was thrown on the table. This is only a recital, and is not sufficient evidence to support the finding that the money was deposited in the bank in the name of the defendant.

[7] We are of the opinion, however, that the action for specific performance can be maintained where a proper tender has been made, though the tender be not kept good under section 1500 of the Civil Code. *Halle v. Smith*, 113 Cal. 656, 45 Pac. 872; *Latta v. Tutton*, 122 Cal. 279; 282, 54 Pac. 844, 68 Am. St. Rep. 30; *Kerr v. Moore*, 6 Cal. App. 305-308, 92 Pac. 107. The tender operated to relieve the plaintiff from default, and the defendant was thereafter in default until she executed and tendered the deed. Had plaintiff deposited the money to the credit and in the name of defendant, there would remain nothing for him to do when the deed was presented; but, as it is not shown as an affirmative fact by the testimony that the money was so deposited, the plaintiff will be required to pay the money upon delivery of the deed. The failure to make the deposit goes to the form of the judgment only. The law does not require the purchaser to deposit the money in the vendor's name, and thus place himself at the vendor's mercy be-

fore he can maintain an action for specific performance to compel the delivery of the deed. He must, however, be ready with his money when he receives his deed. The intention of the law is that the acts should be concurrent.

[8] Fourth. Appellant also contends that there is no evidence to support that part of the second finding of fact, to the effect that, in addition to the sum of payments of principal therein mentioned, there was also paid all of the interest on the deferred payments up to the 15th day of November, 1908. The witness Henderson testifies that he was present at the time and made a computation as to the amount due under the contract, and that the computation was agreed to as being correct by both plaintiff and defendant. On cross-examination he testified that the amount paid was \$869.96. This must have included only a very small amount of interest. The plaintiff testified that he understood that everything was closed up to November 15, 1908. Conceding that the witnesses were mistaken, and that the whole amount paid was only \$1,537 on principal, and that no interest was paid, still the amount tendered by the plaintiff to the defendant, to wit, \$2,907, was an amount even larger than the total amount of interest, plus the total amount unpaid on principal; and therefore the finding, even if erroneous, becomes immaterial.

Some other points are made in appellant's brief; but, under the view we take of the entire matter, it will not be necessary to discuss them.

While the evidence, as we have held, is insufficient to sustain the finding that the plaintiff deposited the money in the name of defendant in a bank of good repute, such finding is immaterial and may be disregarded. The judgment should be modified by adding to the first paragraph of the decree, and after the order that defendant make, execute, and deliver to plaintiff a good and sufficient deed, the words, "Upon receiving from plaintiff the sum of \$2,907," and, as so modified, affirmed, and it is so ordered; plaintiff to recover costs on the appeal.

We concur: CHIPMAN, P. J.; BURNETT, J.

(19 Cal. App. 338)

WESTERN PAC. LAND CO. v. WILSON.
(Civ. 1,014.)

(District Court of Appeal, First District, California. June 27, 1912. Rehearing Denied by Supreme Court, Aug. 26, 1912.)

1. NEW TRIAL (§ 187*)—INSUFFICIENCY OF EVIDENCE—SPECIFICATIONS—SUFFICIENCY.

Where, in an action for money had and received, defendant set up a counterclaim for services, and alleged a payment of the difference between the sum demanded and the value of the services, and the verdict was for him, a

notice of motion for new trial on the ground of the insufficiency of the evidence, in that the evidence and admissions showed that defendant had in his possession at the commencement of the action and at the time of the trial the sum demanded, of which sum defendant claimed for services a less sum, and that under the verdict defendant was awarded the full amount demanded by plaintiff, did not attack the evidence as insufficient to support the implied finding of the reasonable value of the services rendered; and, under Code Civ. Proc. § 659, providing that the notice of motion for new trial on the ground of the insufficiency of the evidence must specify the particulars in which the evidence is insufficient, the court could not grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 277, 278; Dec. Dig. § 137.*]

2. NEW TRIAL (§ 66*)—GROUNDS—DISREGARDING INSTRUCTIONS.

Where the instructions are contradictory, but one of them authorizes the verdict rendered, a new trial on the ground that the jury disregarded an instruction must be denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 132-134; Dec. Dig. § 66.*]

3. NEW TRIAL (§ 66*)—GROUNDS—DISREGARDING INSTRUCTIONS.

A new trial will not be granted on the ground that the jury disregarded an erroneous instruction.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 182-184; Dec. Dig. § 66.*]

4. PAYMENT (§ 76*)—PAYMENT BY CHECK—QUESTION FOR JURY.

Where a check was given and offered by a debtor as payment, and the creditor retained the check, without expressly refusing it, for about a month, and until after the bank on which it was drawn had closed its doors as insolvent, the question whether the giving and retention of the check was a payment was for the jury, under proper instructions.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 240-248; Dec. Dig. § 76.*]

5. PAYMENT (§ 21*)—PAYMENT BY CHECK—QUESTION FOR JURY.

Where a check is given as payment, the creditor, not refusing it, must return it; and unreasonable delay in returning it may make it a payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 86; Dec. Dig. § 21.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Western Pacific Land Company against Edgar M. Wilson. From an order granting a new trial after verdict for defendant, he appeals. Reversed.

Powell & Dow, for appellant. Humphrey & Hubbard, for respondent.

HALL, J. This is an appeal by defendant from an order granting plaintiff's motion for a new trial.

Plaintiff sued defendant to recover the sum of \$5,500 had and received by defendant for the use and benefit of plaintiff. Defendant answered, and, without denying the receipt of the \$5,500 set up by way of counterclaim a demand for the sum of \$4,145.75 as and for the reasonable value of certain services rendered by defendant to plaintiff

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

as its attorney for a period of 3½ years, and further alleged that on the 14th day of October, 1907, he paid to plaintiff the sum of \$1,404.25, which was the difference between the said sum of \$5,500 and the amount alleged and claimed as the reasonable value of defendant's services to plaintiff, and prayed that plaintiff take nothing by its action. The jury rendered a verdict for the defendant.

The plaintiff in due time gave notice of its intention to move for a new trial, to be heard upon the minutes of the court, which was afterwards made and granted.

The verdict of the jury, being for the defendant, necessarily was in effect a finding that defendant rendered the services as alleged in his answer, and that the reasonable value thereof was \$4,145.75; and that defendant had paid to plaintiff \$1,404.25, the difference between \$5,500, claimed by plaintiff, and said sum of \$4,145.75 set up as a counterclaim.

In its notice of intention to move for a new trial, respondent set forth as grounds for its intended motion all the statutory grounds; but there is absolutely nothing in the record to justify the order on any one of the first six grounds specified, and no claim has been made in this court in support of any of said grounds.

The seventh ground is set forth as insufficiency of the evidence to justify the verdict in certain enumerated particulars. Both appellant and respondent have discussed the question as to the sufficiency of the evidence to support the implied finding that the reasonable value of the services rendered by defendant to plaintiff was \$4,145.75; but appellant in his opening brief also makes the point that the specifications of the insufficiency lay no basis for the contention that the services rendered by defendant to plaintiff were not of the value of \$4,145.75. An examination of the record convinces us that this point must be sustained.

[1] Section 659, subd. 4, Code of Civil Procedure, provides that "when the motion is to be made on the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient. * * * If the notice does not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied."

In the notice of motion, the seventh ground is stated as "insufficiency of the evidence to justify the verdict in the following particulars: (a) In that the undisputed evidence and admissions on the part of the defendant showed that the defendant had in his possession at the time of the commencement of the action and at the time of the trial the sum of \$5,500, of which sum the defendant claimed for his legal services only the sum

of \$4,145.75, and no more, and that under the verdict of the jury as rendered, namely, in favor of the defendant, the defendant is awarded the full \$5,500."

This is in no sense an attack on the sufficiency of the evidence to support the implied finding that the services were of the value of \$4,145.75. It is a statement that the defendant claimed for his services the sum of \$4,145.75, and no more, which is true. It seems to be also a statement that by the verdict in favor of defendant the defendant was awarded for his services the full sum of \$5,500, which is not true. By the verdict the jury in effect found the value of the services to be \$4,145.75, and also found that the defendant had paid the difference between \$5,500 and \$4,145.75, to wit, the sum of \$1,404.25, to plaintiff, as alleged in his answer.

This particular specification does not hint at any attack upon the sufficiency of the evidence to support the implied finding that the services rendered were not of the value claimed by defendant, to wit, the sum of \$4,145.75. Under (b) is set forth another specification in all essentials similar to the one under (a). It does not hint at any attack on the evidence as insufficient to support a finding that the reasonable value of the services rendered by defendant was \$4,145.75.

Other specifications follow under various subheads; but none of them hint or suggest that the evidence does not support the implied finding that the reasonable value of the services was the sum of \$4,145.75.

These specifications, if they do anything, raise the point that the verdict for the defendant was contrary to law, in that it was contrary to an instruction given by the court to the effect that the jury should disregard all evidence as to a check for the sum of \$1,404.25 drawn by defendant, payable to plaintiff, and by him claimed to have been in payment of the balance in his hands at the time the check was given.

[2] The order of the court granting the new trial cannot be justified or supported upon any claim that the evidence does not support the verdict or the finding implied therefrom as to the value of the services rendered by defendant to plaintiff, as the specifications are wholly insufficient to raise this point.

The only other point that can be, or that is, urged in support of the order is the claim that the verdict is contrary to law, in that the jury, in rendering the verdict, disregarded an instruction given by the court to disregard the evidence as to the check above referred to.

The evidence discloses that on or about the 14th day of October, 1907, defendant, who was a director of plaintiff, as well as its attorney, delivered to the secretary of plaintiff an account of services rendered by him for plaintiff, including moneys collected,

and an itemized bill for such services, together with his check, drawn on the California Safe Deposit & Trust Company, and payable to plaintiff, for the balance shown to be due plaintiff, after deducting the amount of his bill from the amount of money (\$5,500) in his hands belonging to plaintiff. This account, bill, and check were presented to the board of directors on the 22d day of October, 1907, but no final action was taken thereon at that time; but the matter seems to have been held for investigation. The check was not cashed, though retained in the possession of plaintiff. Subsequently, on the 30th day of October, 1907, the California Safe Deposit & Trust Company closed its doors as insolvent. At the time of drawing the check, and ever since, defendant had on deposit to his credit with said company upwards of \$10,000. The evidence tends to show that subsequent to November 19, 1907, which was after the closing of the bank, plaintiff offered to return the check to defendant. Subsequently it sued for the full amount of \$5,500 received by him for plaintiff.

Under this state of the evidence and the record, as hereinbefore set forth, as to the pleadings, the court instructed the jury to disregard entirely the evidence as to the check. While the instruction upon this point is not, perhaps, as clear as it might be, the instruction seems to have been intended to prevent the jury from giving or allowing defendant any credit for the amount thereof as a payment on account of the \$5,500 admitted to have been received by him for plaintiff. Nevertheless, the court instructed the jury that "there are two possible verdicts that you may render. One might be: 'We, the jury in the above-entitled action, find a verdict in favor of the defendant.' The other possible form is: 'We, the jury in the above-entitled action, find a verdict in favor of the plaintiff in the sum of ———,' putting down so many dollars accordingly as may be your verdict." The court further stated that it in no way intimated which of these verdicts the jury should select, but stated "that is entirely for you."

Under these latter instructions, it is clear that the jury were authorized to find the verdict which they in fact rendered. The most that can be said is that the instructions were contradictory, and the case does not come within the reason of the rule laid down in *Emerson v. Santa Clara County*, 40 Cal. 543; *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 100, 103, 45 Pac. 1047.

[3] But if it can be said that the verdict of the jury was contrary to the instruction given by the court to disregard all evidence as to the check, it does not necessarily follow that a new trial should or could have been properly granted on account thereof. While

at one time it was held that a verdict rendered in disregard of an erroneous instruction was a verdict against law, and as such entitled the defeated litigant to a new trial (*Emerson v. Santa Clara Co.*, 40 Cal. 543), such is no longer the rule followed in this state. The rule now is that a new trial should not be awarded because of the disregard by the jury of an erroneous instruction. *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970.

This brings us to an examination of the instruction which, it is claimed by respondent, the jury disregarded in its verdict.

[4] This instruction in effect directed the jury to disregard all evidence concerning the check. But it was the giving of this check by defendant, and its subsequent retention by plaintiff, that defendant claimed amounted to a payment. The court determined, as a matter of law, that the giving and retention of the check, under the circumstances disclosed by the evidence, did not amount to a payment. In this we think that the court erred, and the instruction as given was erroneous, and not a correct charge as a matter of law. The check was given and offered as payment. The plaintiff retained the check, without expressly refusing it, for about one month; and until after the bank had closed its doors as insolvent. Under such circumstances, we think it should have been left to the jury to determine, under proper instructions from the court, whether or not the giving and retention of the check had the effect of payment.

[5] Where a check is given as payment, unless it be refused, it is the duty of the creditor to return it; and unreasonable delay in returning a check may make it equal to payment. *Conde v. Dreisam Gold M. Co.*, 3 Cal. App. 583, 589, 86 Pac. 827. Whether or not plaintiff in this case had kept the check for an unreasonable time was a question for the jury to determine, and was not a matter that should have been determined, as a matter of law, by the court. The fact that the check was not returned, or offered to be returned, until after the failure of the bank is significant, and may account for this litigation.

No other grounds are urged, or can be urged upon the record before us, to justify the order granting a new trial.

The order cannot be sustained because of any insufficiency of evidence to support the verdict, because of want of any specification of particulars of insufficiency that even hints at the attack attempted to be made as to insufficiency of evidence; and for the reasons above set forth the verdict is not against law.

The order is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

HARLAN v. LAMBERT et al.

(Civ. 925.)

(District Court of Appeal, Third District, California. June 28, 1912.)

1. ATTORNEY AND CLIENT (§ 165*)—ACTION FOR LEGAL SERVICES—ISSUES—PROOF.

One suing for the reasonable value of legal services rendered must allege the nonpayment thereof; and where nonpayment is put in issue by answer he must prove nonpayment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 365-367; Dec. Dig. § 165.*]

2. TRIAL (§ 397*)—FINDINGS—ISSUES.

Where, in an action for the reasonable value of legal services, the nonpayment of the claim was put in issue by answer, and findings were not waived, the court, to support a judgment for plaintiff, must find that the services had not been paid for.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*]

3. ATTORNEY AND CLIENT (§ 167*)—ACTION FOR COMPENSATION—FINDINGS—ISSUES.

Where, in an action for reasonable value of legal services rendered, the nonpayment of the claim was put in issue by answer, a finding that plaintiff rendered legal services for defendant, that the same were reasonably worth \$650, and that \$150 had been paid, was a finding that the balance had not been paid, and supported a judgment therefor, especially where the court, under the designation "conclusion of law," found that plaintiff was entitled to a judgment for \$500.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 373-375; Dec. Dig. § 167.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Paul C. Harlan against Leonard Lambert and another. From a judgment for plaintiff, defendant Dennie May Lambert appeals. Affirmed.

T. T. C. Gregory, for appellant. Paul C. Harlan, in pro. per.

BURNETT, J. The appeal is on the judgment roll from a judgment against Dennie May Lambert for the sum of \$500. A reversal is sought upon the sole ground that the court failed to find upon the issue of payment. The action was brought to recover the reasonable value of legal services performed by plaintiff for appellant at her special instance and request. The court found that the value of the services was \$650; but it is the contention of appellant that as to nonpayment the court found simply that \$150 had been paid, and that there is no finding that the remainder of the sum had not been paid.

[1, 2] It will not be disputed that it was necessary to allege the nonpayment of the claim, and, since it was put in issue by the answer, that it was equally necessary to prove it. Wise v. Hogan, 77 Cal. 184, 19 Pac. 278; Richards v. Lake View Land Co., 115 Cal. 642, 47 Pac. 683; Dodge v. Kimple, 121 Cal. 580, 54 Pac. 94; Knox v. Buckman, 139

Cal. 599, 78 Pac. 423. Since findings were not waived, it would, of course, follow, in order to support the judgment, that it should be found by the court that the money had not been paid.

[3] The basis for appellant's argument is found in the asserted circumstance that the following are the only findings of fact upon the point: "That said representation of said Dennie May Lambert by said plaintiff and said legal services as attorney and counselor at law rendered, as aforesaid, by said plaintiff to said Dennie May Lambert were and are reasonably worth the sum of six hundred fifty dollars (\$650). That one hundred fifty dollars (\$150) of said last-mentioned sum have been paid." Appellant's claim is that the finding is totally insufficient, in that it does not exclude the inference that the balance of the \$650 may have been paid also; while respondent contends that at most an uncertainty is produced, and therefore the judgment should be upheld by reason of the rule that "an uncertain finding on payment must be construed so as to support the judgment, rather than to defeat it. Warren v. Hopkins, 110 Cal. 506 [42 Pac. 986]."

In support of her contention that the said finding is not sufficient to cover the balance of \$500, appellant cites the case of Barney v. Vigoreaux, 92 Cal. 631, 28 Pac. 678, wherein it is stated in the syllabus that, "in an action upon a promissory note, a failure to allege in the complaint that no part of the sum for which the note was given, except certain payments indorsed upon it, had been paid constitutes a fatal defect, for which a judgment in favor of the plaintiff will be reversed upon appeal." In that case there was a default judgment, and there was not only no allegation that any sum remained unpaid, but there was no positive averment that any definite sum had been paid; the statement being that "the defendants executed and delivered to the plaintiff their promissory note, in writing, in the words and figures following, to wit: * * * And indorsed with the following thereon, to wit." Then follow certain purported payments of interest and parts of the principal and a demand for judgment. It was not alleged that the payee had made the indorsements or received the money; and it is apparent that the complaint was exceedingly weak in the matter suggested. The gist of the opinion is found in this declaration: "The omission to allege in the complaint that some part of the said note had not been paid constituted a fatal defect, for which the judgment must be reversed. Frisch v. Caler, 21 Cal. 71; Darvany v. Eggenhoff, 43 Cal. 895; Scrouse v. Clay, 71 Cal. 123 [11 Pac. 882]."

In the Frisch Case the question was, as stated by the court, "whether a plea of payment is new matter in the sense of the statute." This question was determined,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and it was said in conclusion that "this disposes of the only question raised in the case; but it is proper to suggest an objection to the complaint, which, though apparently technical, is of the essence of good pleading. The fact of nonpayment is not directly alleged, the allegation being that there is now due, etc., which is a mere conclusion of law, and would not have stood the test of a demurrer." There was an allegation of the payment of a certain sum; but the sufficiency of this allegation to negative the payment of the balance was not argued by counsel nor considered by the court. Likewise, in the *Davanay Case*, it was contended that it was necessary for the defendant to plead payment; but the point decided, and the only one involved, was that the general denial, the complaint being unverified, "put in issue the averment of the complaint that the promissory note remained due and unpaid." In *Sereufe v. Clay*, supra, it was held that an averment that the defendant "has refused and still refuses to pay the principal or interest of the note, or any part thereof, and that there is now due the sum," etc., was insufficient.

These cases are not directly in point; and it may be said also, without stopping to specify particularly, that they are not altogether in harmony with the more mature and deliberate expression of the Supreme Court embodied in the opinion of Chief Justice Beatty, in the case of *Penrose v. Winter*, 135 Cal. 289, 67 Pac. 772, wherein it is held that, though the allegation of nonpayment was "in the form of a legal conclusion, in which the material fact was merely implied, but in the absence of any demurrer such faults of pleading are cured by the judgment."

But the truth is that we have here a reasonably clear and unequivocal finding of fact that the \$500 had not been paid. It is plain that the court in its decision had in view three questions of fact, viz.: Were the services performed? If so, how much were they reasonably worth, and how much had been paid for them? The court found, as we have seen, that the services were performed, that they were reasonably worth the sum of \$650, and that \$150 had been paid. This last is equivalent to a finding that \$500 had not been paid, for the simple reason that it clearly implies that \$150 was all that was paid. No one fairly familiar with reputable usage of the English language, unless obsessed by his veneration for ancient forms and ceremonies relating to legal proceedings, so as to obscure his understanding of the paramount importance of the practical administration of justice, would fail to reach the conclusion that B. still owed A. \$500, if a court should find that the latter had performed for the former services that were worth the sum of \$650, and that "\$150 of the last-mentioned sum have been paid." If

the action were by A. against B. for the recovery of horses, and the court should find that B. had received 650 horses which belonged to A., and that he had returned 150 of them, it would be readily understood that the others had not been returned. In truth, our use of the language in every transaction of life is based upon the assumption that such statements as the one here in controversy involve and imply what the logicians call "a universal affirmative." In other words, the affirmation that the defendant paid \$150 is equivalent to a statement that \$150 is all that he paid. Jevons, in his work on Logic, simply expresses the common understanding when he declares that "whenever a term is used alone it ought to be interpreted as meaning the whole of its class." It is also true, as he says further, that "the mark of universality usually consists of some adjective of quantity, such as 'all,' 'every,' 'each,' 'any,' 'the whole'; but whenever the predicate is clearly intended to apply to the whole of the subject one may treat the proposition as universal." If appellant is right in her contention as to said finding, then, of course, respondent would have reason to complain that the court failed to find that his services were not worth more than \$650. The point, however, has not been urged that the finding that the services were worth the sum of \$650 does not mean that they were worth \$650, and no more.

But aside from the foregoing, under the authority of *Jessen v. Peterson, Nelson & Co.*, 123 Pac. 219, there can be no doubt that the findings here are sufficient to support the judgment. In that case, in which a rehearing was denied by the Supreme Court, plaintiff had sued for damages for personal injuries, and she recovered judgment for \$1,000. There was a finding that she had expended \$122.50 for medical attendance, but the court omitted to designate the specific amount in which the plaintiff was damaged on account of personal injuries; but it was declared, as a conclusion of law, "that the plaintiff is entitled to judgment against the defendant in the sum of \$1,000." The Court of Appeal of the First district held that this should be treated as a finding of fact, and, when so considered and read in conjunction with the other probative facts found by the trial court, it was sufficient to support the judgment upon the issue of damages. See, also, *McCray v. Burr*, 125 Cal. 636, 58 Pac. 203. Here, also, under the designation of "Conclusion of law," we have the finding "that plaintiff is entitled to a judgment herein for the sum of five hundred dollars." But whether regarded or not as a finding of fact, in connection with the findings already recited, it should be held sufficient to support the judgment, in harmony with the spirit of *Penrose v. Winter*, supra.

It is believed that the contention of appellant is entirely without substantial merit.

It is undoubtedly true, as said by the Supreme Court in *Millard v. Legion of Honor*, 81 Cal. 342, 22 Pac. 865, through Mr. Justice McFarland, that "one main object of the provision [in reference to the court's 'decision'] seems to have been to prevent a court from summarily ordering judgment without giving any reasons for it—without stating any facts or legal conclusions upon which it is based. There was also, no doubt, some intent to facilitate the review of a judgment on appeal. But surely the main object was not to afford a cover under which a losing party might successfully set a trap to capture a just judgment. The findings come after the case has been tried, considered, and determined, and after the character of the judgment—whether it is right or wrong—has been fixed. They are merely incidental to the main thing—the judgment; and to test their sufficiency by a standard which exacts the extreme of accurate statement and minute detail is to put the incident in the place of the principal. Of course, there ought to be findings on the material issues raised by the pleadings and evidence; but, if it appears that there are in substance such findings, it is not necessary that they should be in the exact language of the pleadings, or in any particular form."

The case here measures up to all the just requirements of legal procedure, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(19 Cal. App. 370)

PEOPLE v. BALLO. (Cr. 181.)

(District Court of Appeal, Third District, California. July 1, 1912.)

LARCENY (§ 14*)—FALSE PRETENSES (§ 16*)—PROPERTY SUBJECT TO LARCENY—ACQUISITION OF POSSESSION BY TRICK.

Where prosecutor intrusted his money to a confederate of accused, under the agreement that accused and the confederate should each contribute a like sum to a common fund for the benefit of all, but did not intend to vest title in the confederate, and it was the fraudulent purpose of accused and his confederate to obtain possession of the money by a trick and appropriate the same to their own use, and neither accused nor his confederate put any money in the common fund, and had no intention of doing so, the money remained the property of prosecutor, and was the subject of larceny; and accused and his confederate, appropriating the money to their own use, were guilty of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34-38; Dec. Dig. § 14;* False Pretenses, Cent. Dig. §§ 20, 25; Dec. Dig. § 16.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Frank Ballo was convicted of grand larceny, and he appeals. Affirmed.

Webster & Webster and S. N. Blewett, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant was convicted of the crime of grand larceny, and from the judgment of conviction and the order denying him a new trial he prosecutes this appeal.

The assault upon the judgment and order is founded principally upon alleged errors of the trial court in the statement of the law to the jury.

The facts are briefly these: The complaining witness, one G. Saloni, an Italian laborer, went to the city of Stockton with an acquaintance of his in the month of December, 1911. They registered at the Roma Hotel, which was conducted by one of their countrymen. Saloni had for some time prior to his arrival at Stockton worked as a laborer for the Feather River Lumber Company, near Portola, in Plumas county, and when he reached Stockton had approximately \$200, a portion of which he carried in two checks, one for \$57 and another for \$54.80. These checks he deposited, for safe-keeping, with the proprietor of the Roma Hotel. It appears that, shortly after his arrival at Stockton, he began drinking rather heavily, and remained more or less in a state of intoxication for several days. While thus conducting himself, he made the acquaintance of the defendant, with whom thereafter he had conversations and drank several times. On the morning of the Thursday following the date of his arrival at Stockton, upon going out on the sidewalk in front of the Roma Hotel, he again met the defendant. Ballo invited Saloni to join him in a drink, and the two, with a third party, went to the Gem Saloon for that purpose. After securing a drink, the defendant and Saloni returned to the sidewalk, when the former declared that he expected some mail, and that he thought he had better go to the post office and ascertain whether any was awaiting him. Accordingly, accompanied by Saloni, he left the place at which they were standing for the ostensible purpose of going to the post office. He took Saloni through various streets and over a devious route until they reached the corner of two streets, at which was located a feed stable. There they met one Manuel Schenone. It appears that, as the defendant and Saloni were in the act of passing Schenone, the latter accosted them by the inquiry: "You are Italian boys, too, aren't you?" The defendant and Saloni, in reply, said that they were; whereupon Schenone exhibited to them what purported to be a bill of the denomination of \$100 and began crying—evidently simulated, judging from subsequent events—and proceeded to explain that he had given a bill of like denomination to a friend, with a request that he take it to the Imperial Hotel, pay his (Schenone's) board bill, and return to him with the change. Schenone said that his alleged friend had been gone a long

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time, and that he was satisfied he would never again see him or his money. Schenone then proceeded to unfold to the defendant and Saloni a tale of how, through his father, he had acquired a small fortune, amounting to \$30,000. He declared that, being without education and business judgment, he was ignorant of how he should handle his wealth. He then suggested that he would like to have the benefit of the business companionship of some of his countrymen who were honest and could be trusted to treat him squarely, and further suggested that the defendant and Saloni join him, and that the three in the future remain together and act and be as brothers to each other. Saloni assured Schenone that he and Ballo were in sympathy with his suggestion, and that he and Ballo would deal squarely with him, and thereupon an association between the three, for the purposes of business and mutual protection, was established. Schenone inquired whether Ballo and Saloni had any money, and was informed that they had; Ballo claiming to have \$300, and Saloni saying that he also had some money. Schenone then suggested that the three pool their money in one common fund, from which each could draw such sums from time to time as his necessities required. Saloni and the defendant readily acceded to this proposition, and Saloni, to carry out his part of the agreement, secured his checks, cashed them, and delivered the money, with some other cash, amounting in all to the sum of \$137, to Schenone. Ballo pretended to deliver to Schenone his share of the pool. Schenone, upon receiving the money of the complaining witness, gave him a handkerchief, saying that it contained some paper money which Saloni could use for present purposes or convenience. Immediately after this transaction, Schenone complained that he had suddenly been attacked by gripings in the stomach and pretended to be suffering intense pain. Several remedies were suggested, when it was finally agreed that, perhaps, peppermint candy might have the effect of allaying the pain. Saloni was dispatched for the candy; Schenone and Ballo remaining together to "await his return." But, upon returning to the place where he had left his "associates," the latter were not to be found, and were not again seen by Saloni until he saw them at the police station; they having been arrested on his complaint.

Schenone, having been separately tried on an information charging him with grand larceny, said charge growing out of the same transaction as that of which the charge against the appellant here is the outgrowth, was convicted of said crime and thereupon appealed to this court from the judgment and the order denying him a new trial, and said judgment and order were affirmed; the opinion in said cause having been filed on

the 17th day of June, 1912. People v. Schenone, 125 Pac. 768.

The instructions given in the case at bar were substantially the same as those given in the Schenone Case; and the objections registered against the court's charge in the present case are precisely the same as those urged against the charge given at the trial of the former case.

Counsel for the appellant claim, as they did in the Schenone appeal, that, if the defendant here was, under the evidence, guilty of any crime at all, it was of that of obtaining money by false and fraudulent pretenses, and not of that of grand larceny; and they therefore particularly complain of the refusal of the court to take that view of the evidence.

But the circumstances (some of which are embodied in the statement above given), as disclosed by the evidence, were sufficient to convince any fair-minded body of men that the defendants were acquaintances prior to the time at which Ballo first met Saloni; that the meeting of Schenone by Ballo and Saloni was no adventitious circumstance, so far as Ballo was concerned; and that the taking of Saloni's money was only the consummation of a preconceived and premeditated scheme or trick hatched by the defendants to effect a criminal design, of which they hoped to make some one a victim, and which they finally worked out on Saloni.

The court, in its charge to the jury, pointed out with clearness and accuracy the distinction between the crime of larceny and that of obtaining property by false pretenses, and, moreover, instructed the jury that, if the evidence was of a character to convince them that the defendant had committed some offense other than that charged in the information, it would be their duty to acquit.

But in the Schenone Case Justice Burnett treats this contention fully and satisfactorily; and there is therefore no necessity for further consideration of it here. But it may here not inappropriately be repeated, as it was declared in that case, that it is very clear that the jury were justified in the case at bar in concluding from the evidence that the prosecuting witness did not intend, when parting with his money under the circumstances shown, to vest in the defendant the title to said money, and that "it was the defendant's purpose at all times to obtain possession of the money by trick and device and afterwards appropriate it to his own use." All the circumstances go to show that neither Ballo nor Schenone put any money in the common pool, and had no intention of doing so, and, as said in the Schenone Case, "until they did so the title to the money remained in the prosecuting witness, and was the subject of larceny." The general charge of the court was full and fair and correctly stated the law pertinent to

the evidence, and the evidence amply justifies the verdict.

No other objections to the record are particularly pointed out or urged.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

MARSICANO v. LUNING.

(Civ. 1,012.)

(District Court of Appeal, First District, California. June 28, 1912.)

ADVERSE POSSESSION (§ 27*) — EVIDENCE — SUFFICIENCY.

Evidence held to support a finding that plaintiff in ejectment to recover a strip adjacent to his lot had never been in possession of the strip, and could not acquire title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 121, 122, 852, 864, 684; Dec. Dig. § 27.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Startsvant, Judge.

Action by P. Marsicano against Oscar T. Luning. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

D. Freidenrich, for appellant. Bourdette & Bacon, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of defendant, and from an order denying a motion for a new trial in an action in ejectment to recover possession of a strip of land 6¾ inches in width with a uniform depth of 57 feet 6 inches.

Plaintiff alleges in his complaint that on the 1st day of May, 1906, and for more than 30 years next prior thereto, he had been the owner and seised in fee and entitled to the possession of the 6¾ inches described in his amended complaint; that on said date the defendant unlawfully ejected him therefrom, and has ever since withheld and still wrongfully withholds possession thereof from him, to his injury and damage in the sum of \$1,000, for which sum, together with the alleged value of the rents, issues, and profits, he prays judgment. The defendant filed an answer, the cause was tried, and the court held against plaintiff, and decided that he was never in possession of said strip of land. Defendant contends that the evidence is insufficient to support the findings.

Ever since the year 1864, plaintiff has been the owner and has held the record title to a certain 20-foot lot on the east line of Stockton street, north of Vallejo street, in San Francisco. The defendant and his predecessors in interest have owned and held the record title to the land adjoining both

sides of plaintiff's lot since 1863. At the time plaintiff purchased his lot, there was a building on it. Subsequently he put a brick foundation under the building on the northerly and southerly side thereof. The building remained on the ground until the great conflagration in April, 1906, when it was destroyed by that fire. In the month following the defendant commenced to erect a building on his lot just north of plaintiff's property. Plaintiff, evidently believing that defendant's building overlapped his lot, wrote him to that effect, and informed him that he would resist any encroachment upon his property. Thereupon the defendant had a survey made of the properties, which showed that his building was within his lines, and he so notified the plaintiff. It was doubtless after this that plaintiff became convinced that his building, which had been destroyed, had encroached upon defendant's lot, and, being unable to induce defendant to accede to his demands, instituted this suit for the purpose of establishing title to the strip of land involved by adverse possession.

If the plaintiff ever had possession of the 6¾ inches, it was by mutual mistake, which was not discovered until just before the commencement of this action, and, perhaps, title by prescription cannot be acquired under such circumstances. *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *American Co. v. Bradford*, 27 Cal. 360; *Alta v. Hancock*, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; *Faulkner v. Rondini*, 104 Cal. 140, 37 Pac. 883; *Smith v. Roberts*, 9 Pac. 104.1. But the findings are so drawn that this proposition is not involved; and the only question we are called upon to decide is whether or not the findings are supported by the evidence.

We think they are. The building having been destroyed, the only reason the plaintiff had for believing that his house had stood partly on the strip of land in question was the presence after the fire of a brick foundation, which he testified he had caused to be constructed under the northerly side of his home. That foundation, he said, was now under defendant's new building. Defendant, on the other hand, testified that the brick foundation wall referred to by plaintiff was a new foundation built by his contractor. Defendant testified: "I built a building on the line of the survey as shown on the map introduced in evidence, and followed the line shown there as the exterior line of the property, the deeds of which have been read. My building is within those lines. On the northerly line of the 20 feet owned by Mr. Marsicano, and north of the 20 feet as described in his deed, there is a wall under that building; it is a new wall, built by C.

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 68 Cal. xx.

P. Moore Building Company. It is a part of a new wall under my entire building. There is no old wall there. * * * I had this property surveyed before I built my building. I had it surveyed, and cleaned the lot up and built there. I know, as a matter of fact, that that is a new brick wall, and was built by myself; there is no old wall there."

It is true that counsel for the defendant at one time during the trial made an admission that strongly tended to sustain plaintiff's view; but later, after a few days' adjournment, and after an amended complaint was filed and the parties were more familiar with the situation, the admission was in effect withdrawn by defendant's counsel, and the cause was submitted on the evidence introduced by the parties.

Under the findings of the court, plaintiff has the 20 feet covered by his deed, and the defendant has the adjoining land, to which the record shows he is entitled. Each has exactly what he thought himself entitled to for over 40 years, and on which during all of that time he has paid taxes.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

CITY OF VERNON v. LOS ANGELES GAS & ELECTRIC CORPORATION.
(Civ. 1,109.)

(District Court of Appeal, Second District, California. June 29, 1912.)

1. GAS (§ 7*) — GAS COMPANIES—USE OF STREETS.

Under Const. art. 11, § 19, which provides that in cities where there are no public works for supplying water or light any duly incorporated company, or any individual, may, under direction of the superintendent of streets, etc., use the streets for laying pipes, etc., neither gas nor water companies are required to show any contracts or existing demands for either commodity, on the part of the city or its inhabitants, in order to entitle them to enter upon the streets.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.*]

2. GAS (§ 7*)—USE OF STREETS—GAS AND WATER COMPANIES.

Under Const. art. 11, § 19, which provides that in cities where there are no public works for supplying water or light any individual or company, duly incorporated, may, under the direction of the superintendent of streets, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, use the streets for laying pipes, etc., the superintendent has no authority, in the absence of ordinance, to require any indemnity, the extent of his authority being to see that the constitutional grant of franchise is not exceeded, and that the work is done in a proper, safe, and expeditious manner; and it is not necessary that he have notice of any change in the size of pipe lines or other matters pertaining merely to the proper manner of laying the pipes.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the City of Vernon against the Los Angeles Gas & Electric Corporation; Judgment for defendant, and plaintiff appeals from an order denying a new trial. Affirmed.

Gesner Williams, for appellant. Wm. A. Cheney and Le Roy M. Edwards, for respondent.

ALLEN, P. J. Plaintiff by its action sought to enjoin the defendant from making excavations in the public streets of the city of Vernon, or laying gas pipes therein, as well as for a mandatory injunction requiring defendant to remove certain pipes already laid.

It is conceded that defendant is a corporation engaged in supplying gas; that the city of Vernon owns and controls no public works for such purpose; that the city of Vernon had an officer performing the duties of street superintendent during all of the times mentioned in the proceedings; that, prior to the 6th day of June, 1910, the defendant entered upon the streets and commenced laying gas mains therein for the purpose of distributing gas from its works at Los Angeles—the two cities being contiguous. This entry and the work of excavation and the laying of pipes were known by the street superintendent, who interposed no objection to the character of the work or the manner in which the same was being done. The city at that time had passed no ordinance regulating such work, or for the damages or indemnity for damages occasioned thereby. After having laid in the streets certain pipes of lesser diameter, on the 23d day of May, 1910, defendant commenced the laying of pipes having a diameter of 12 inches, and continued to lay pipes of such character for a considerable time. On the 6th day of June, 1910, the city passed an ordinance providing that all excavation should be done under the supervision of the street superintendent of said city of Vernon, and that a deposit of 10 cents per square foot of proposed excavation in unimproved streets should be made with the street superintendent as indemnity for damages before any excavation should be made. Thereupon, after the passage of such ordinance, the defendant tendered to the street superintendent the sum of \$750 as indemnity, being the amount required by said ordinance for work thereafter to be done, which sum the street superintendent refused to accept; no objection, however, being made as to the amount tendered. Upon the hearing of the action, the court found that \$1,200 was a sufficient indemnity for damages occasioned by the laying of pipe before the passage of the ordinance, which amount it directed the defendant to pay to the street superintendent, who refused to receive such sum, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the same was deposited in the treasury of the court for the use and benefit of plaintiff. The court finds that the laying of this 12-inch main was necessary to supply the inhabitants of the city of Vernon with illuminating gas, and, as a conclusion of law, determined that under section 19, art. 11, Constitution of the state, the defendant had a right to enter upon the streets and lay its pipes, and that the plaintiff should be enjoined from interfering with such work. Judgment was accordingly entered, and from an order denying a new trial plaintiff appeals.

[1] It is appellant's contention that the constitutional grant of franchises to gas and water companies is restricted to instances where a necessity is shown to exist for supplying an existing demand of either the city or its inhabitants, and that it does not appear that the 12-inch main was necessary in order to supply such demand as then existed in the city. As we construe this constitutional grant, neither gas nor water companies are required to work up or show or have any contracts or existing demands for their commodity in the city, either upon the part of the city or its inhabitants, in order to entitle them to enter upon the streets and lay their pipes. Either of said companies possess the right, having a commodity for sale, to enter upon the streets, lay their pipes, and put themselves in position to supply any demand made upon them, regardless of any existing demand. In section 19, referred to, the right to lay down pipes is given "so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light." The most that can be said of this restriction with reference to the necessity which must exist is that they may not excavate the streets and lay down pipes therein in a manner other than that necessary to a complete and practical system for supplying gas or water to the entire city and its inhabitants. It is probably true that, were a company of this character to undertake to make excavations and lay pipes, and it could be shown to the court that a complete and practical system, necessary and proper for the distribution of its gas to all the inhabitants of the city, did not require certain streets to be used for that purpose, such court might, by an appropriate order, prevent excavations therein.

[2] But in the case at bar the court finds a necessity for all of the pipes for the purposes intended; that the same is not a commercial pipe line, as claimed by plaintiff, which is being laid only for the purpose of conveying gas to points beyond the city, and we find evidence in the record to sustain this finding. This being true, we can see no reason why defendant was not, as to the pipe laid after the enactment of the ordinance,

acting within the clear letter of the law; and, while we do not find any support for the finding that the street superintendent had knowledge of the laying of 12-inch pipe at the time it was commenced and during its continuance until the passage of the ordinance, nevertheless we think this finding is of no particular materiality. The street superintendent did have knowledge of the excavation and laying of pipes for the purpose of introducing gas into the city; he made no objection thereto. He had no authority, in the absence of an ordinance, to require any indemnity. The most that could be said was that his authority existed to the extent only of seeing that the constitutional grant of franchise was not exceeded, and that the work being done was done in a proper, safe, and expeditious manner. Having the right to enter for this purpose, and the street superintendent having knowledge of that fact, it was not necessary that he should have notice of any change in the size of pipe lines, or other matters pertaining merely to the proper and correct manner of laying such pipe. We think all the other findings of the court have some support from the evidence, in so far as they were material in the action, and that, the city having been, by the action of the defendant and through the order of the court, fully indemnified on account of damages, the court was warranted in denying plaintiff any relief and in granting relief to defendant. The material findings, as before said, having support, the motion for a new trial was properly denied; the action of the court in reference thereto being the only question before this court.

The order denying a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

WESTERN COLLEGE OF NEW MEXICO v. TURKNETT.

(Supreme Court of New Mexico. Aug. 13, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 281*)—MOTION FOR NEW TRIAL—NECESSITY.

Where a cause is tried by a jury, and the court directs a verdict for the plaintiff at the conclusion of the evidence, a motion for a new trial must be presented to the trial court, and a ruling had thereon in such court, in order to preserve and present to this court errors alleged to have been committed by the court below during the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661, 3024, 3281; Dec. Dig. § 281.*]

2. APPEAL AND ERROR (§ 281*)—"JURY TRIAL"—DIRECTION OF VERDICT.

Where a jury is impaneled and evidence taken before it on the trial of the cause, it is a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"jury trial," though the jury renders its verdict by direction of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661, 3024, 3281; Dec. Dig. § 281.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3894, 3895.]

3. PLEADING (§ 417*)—ANSWER—DEMURRER—RULING—WAIVER.

Where, after the sustaining of a demurrer to an answer, the pleader elects to amend, he waives the right to allege error on the ruling.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1401, 1402; Dec. Dig. § 417.*]

Appeal from District Court, Eddy County; before Chief Justice William H. Pope.

Action by the Western College of New Mexico against J. W. Turknott. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. Atkeson, of Artesia, for appellant. S. D. Stennis, Jr., of Carlsbad, and Robertson & Atwood, of Artesia, for appellee.

ROBERTS, C. J. This action was instituted in the court below by the appellee against the appellant to recover from the appellant the sum of \$500 upon a subscription contract given to secure the location of a Methodist college at Artesia. Issue was joined and a trial was had, and upon the conclusion of the evidence the court directed the jury to return a verdict in favor of the plaintiff, upon which verdict judgment was rendered, and from which this appeal is prosecuted.

[1] Numerous errors are assigned by the appellant upon the action of the trial court in the admission and exclusion of evidence, as well as upon the action of the court in directing a verdict for the plaintiff; but these errors cannot be considered by this court, for the reason that no motion for a new trial was filed in the court below. The territorial Supreme Court has held repeatedly that in jury trials a motion for a new trial must be made in the court below, and in the event this is not done the Supreme Court will not review the action of the lower court on appeal or writ of error. In the case of Schofield v. Slaughter, 9 N. M. 422, 54 Pac. 757, the territorial Supreme Court had before it the identical question involved in this case, and the court said: "This court has repeatedly held that a motion for a new trial must be made in the court below, and, in the event this is not done, this court will not review the action of the lower court on writ of error. Rogers v. Richards, 8 N. M. 683 [47 Pac. 719]; Territory v. Anderson, 4 N. M. [Gild.] 228 [13 Pac. 21]; Spiegelberg v. Mink, 1 N. M. 308; Sierra Co. v. Dona Ana Co., 5 N. M. 190 [21 Pac. 83]; Territory v. Chavez, 9 N. M. 282 [50 Pac. 324]. The cases above cited are decisive of this case as to the necessity for filing a motion for a new trial. But it is insisted by the plaintiff in error that, in a

case where the court directs a verdict, it is not a jury trial, and therefore the law as above laid down applicable to trials by jury, has no application to a trial by jury where the verdict is rendered by direction of the court. We are unable to accept this view of the law." In the case of Hagin v. Collins, 15 N. M. 621, 110 Pac. 840, the territorial Supreme Court in an opinion written by Chief Justice Pope, in discussing the necessity of a motion for a new trial, in order to have alleged errors reviewed by the Supreme Court, said: "We have repeatedly held that errors not jurisdictional will not be considered on an appeal following a jury trial, where such were not set up in the motion for a new trial. U. S. v. Cook [15 N. M. 124] 108 Pac. 308, and cases cited. This, of course, follows from the elementary principle of procedure that the trial court should have the opportunity to correct its errors before the aid of the appellate court is sought to that end."

[2] We are aware that some of the courts hold that a motion for new trial is unnecessary where a verdict is directed by the court; but the practice has been otherwise in New Mexico, and we can see no good reason for departing from the rule established and so long adhered to by the territorial Supreme Court. The purpose of a motion for new trial is to call to the attention of the court of original jurisdiction its rulings, in order that it may review them, and, if need be, correct errors into which it may have fallen. During the progress of a trial the court is not always able to give deliberate and careful consideration to the many questions presented for its determination, and it is proper that the trial court should have the first opportunity to correct errors occurring upon the trial, thereby saving the litigants the expense of an appeal. The appellant, having failed to file a motion for a new trial, this court will not review the action of the lower court in directing a verdict for appellee.

[3] There remains but one question properly before this court upon the record proper, and that is the action of the court in sustaining the demurrer to appellant's second amended answer. It appears, however, that the appellant was given leave to, and did, amend his answer, and having elected to take the benefit of this leave, and file an amended answer, he thereby abandoned the answer to which the demurrer was sustained, and waived any objection to the ruling upon the demurrer. Bremen Mining Co. v. Bremen, 13 N. M. 111, 79 Pac. 806, and authorities cited.

There being no error apparent in the record, the judgment of the lower court is affirmed.

HANNA and PARKER, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

ROLLEN v. STATE.

(Criminal Court of Appeals of Oklahoma. Aug. 26, 1912.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 161*)—AMENDMENT—TIME.

By leave of court, an information may be amended, as to matters of substance or form, after a plea of not guilty has been entered, and before the trial is begun.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 516-523; Dec. Dig. § 161.*]

2. INDICTMENT AND INFORMATION (§ 161*)—AMENDMENT—FORM.

By leave of court, an information may be amended, as to matters of form, after the jury has been impaneled, when the same can be done without prejudice to the substantial rights of the defendant.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 516-523; Dec. Dig. § 161.*]

3. HOMICIDE (§ 112*)—ASSAULT TO KILL.

One who seeks and brings on an affray cannot shield himself under a plea of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.*]

4. HOMICIDE (§ 244*)—ASSAULT TO KILL—SELF-DEFENSE.

On the facts of this case, it is considered by the court that there was no evidence tending to show that the shooting was in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 507-509; Dec. Dig. § 244.*]

(Additional Syllabus by Editorial Staff.)

5. HOMICIDE (§ 340*)—APPEAL—PREJUDICE.

Error, if any, in an instruction defining the law of self-defense was not prejudicial to defendant, where the evidence did not justify an instruction on self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

Appeal from District Court, Wagoner County; John H. King, Judge.

Joe Rollen was convicted of shooting Ray Feaster with intent to kill, and he appeals. Affirmed.

Archibald Bonds and J. I. Howard, both of Claremore, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

DOYLE, J. The plaintiff in error, hereinafter referred to as the defendant, was convicted of the crime of assault with intent to kill by shooting one Ray Feaster, and was sentenced, in accordance with the verdict of the jury, to imprisonment for five years in the penitentiary. The defendant was prosecuted under an information filed September 24, 1910, and the case was tried December 10, 1910. The judgment and sentence was entered on December 13, 1910.

The information charged: "That Joe Rollen did, in Wagoner county and in the state of Oklahoma, on the 27th day of August in

the year of our Lord one thousand nine hundred and ten, and anterior to the presentment hereof, commit the crime of assault with intent to kill, in the manner and form as follows, to wit: That the said Joe Rollen, at and in the county and state aforesaid, on the day, month, and year aforesaid, did then and there intentionally, wrongfully, unlawfully, and feloniously upon one Ray Feaster, with a certain deadly weapon, to wit, a loaded pistol, in the hands of him, the said Ray Feaster, then and there held, with force and violence, make an assault and battery by then and there shooting and wounding him, the said Ray Feaster, with the felonious intent then and thereby to kill and murder him, the said Ray Feaster, contrary," etc.

Upon arraignment the defendant entered a plea of not guilty. The case was called for trial, and after the jury had been impaneled to try the case, and the state had placed the prosecuting witness, Ray Feaster, on the stand to testify, the state asked leave of court for permission to amend the information by changing the name Ray Feaster, underscored above, to Joe Rollen. The court permitted this amendment of the information to be made by drawing a line through the name Ray Feaster and writing the name Joe Rollen just above the same. The defendant excepted, and moved the court to direct the jury to acquit, which motion was overruled. Thereupon the amended information was filed. The defendant, not objecting to proceeding with the trial, and not asking for additional time in which to plead, stood mute. The court ordered a plea of not guilty entered for him, and the trial proceeded.

[1, 2] The learned counsel for the defendant now contend that: "There being no process of law by which an indictment may be amended, and no provisions of the statute authorizing the amendment of an information charging a felony, the court was without power to allow an amendment of the information, after the defendant had been put upon his trial in said cause; therefore the court erred in permitting the county attorney to amend this information." We do not think that this contention is well founded. The amendment was one in matter of form only. The original information sufficiently charged the offense, when not attacked by demurrer thereto. "Even in the absence of a statute, information, not being founded upon the oath of a grand jury, but filed by the public prosecutor, may be amended, either in matter of form or substance, by leave of court, at any time before trial, even after motion to quash, demurrer, or plea; and the rule applies to informations for felonies under statutes allowing such mode of prosecution, although at common law prosecution by information was limited to misdemeanors. But an information cannot be amended in

matter of substance after trial and verdict, or, by the weight of authority, even during the trial." 22 Cyc. 436. Counsel do not point out in what manner the defendant was prejudiced by this action of the court.

In the case of *Chandler v. State*, 3 Okl. Cr. 254, 105 Pac. 375, 107 Pac. 735, this court passed upon this question. Mr. Justice Owen, delivering the opinion of the court, said: "There is nothing in the record which would indicate that it was with material prejudice to the rights of the defendant. Counsel do not undertake in the brief to indicate how the defendant was prejudiced by the interlineation, and if they are not able to point out any substantial right denied the defendant, or any prejudice done him, certainly this court would not be expected to assume that the court erred in permitting the county attorney to make the amendment."

In *Bishop's New Criminal Procedure* (volume 1, 714), the learned author says: "As to amendments, an information differs from an indictment. Since the prosecuting officer, unlike the grand jury, is always present in court, he may, on leave, amend it to any extent not interfering with the due order of judicial proceedings or otherwise with public interests or private rights. The application may, indeed, be denied; and some hold it not permissible to add new counts or charges; while others allow this, though not properly to the introduction of matter barred by the statute of limitations. It may be amended to cure a defect objected to by plea in abatement, or a variance appearing at the trial. 'After a record has been sealed up,' said Holt, C. J., 'I have known it amended, even just as it was going to be tried.' Of course, therefore, it may be amended after a plea in bar. * * * Mere formal amendments may be permitted without terms, even after issue joined."

In the case of *State v. Cooper*, 31 Kan. 505, 3 Pac. 429, the headnote is as follows: "Where an information filed February, 1883, charged in the past tense that defendant did, in December, 1883, commit an assault with intent to kill, to which information defendant pleaded not guilty, and, after a jury had been impaneled and sworn, he objected to the introduction of any testimony, on the ground that the time charged was subsequent to that of the filing of the information, held, that the court did not err in permitting the county attorney to amend the information by changing the figure 3 to 2, so as to show a date anterior to that of the filing of the information. Such a change is not one working prejudice to the substantial rights of the defendant."

It is obvious that the amendment here permitted by the court was not one in matter of substance, and therefore could not have been prejudicial to the substantial rights of the defendant.

[3-5] It is also contended that the court

erred in the instructions defining the law of self-defense. The error, if any, was harmless, for the reason that the evidence in the case did not justify an instruction upon self-defense. The evidence in substance was as follows: Feaster, the victim of the assault, was sitting in the front room of Ada Wells' house of prostitution in Wagoner, about 10 p. m. August 27, 1910, when the defendant entered and shot him; the ball passing through the left side just above the heart.

According to Feaster's testimony, the first time he ever saw the defendant was when he came into the room where he was talking to Ivy King. The defendant said to her, "You run off and left me and come in here," and said to Feaster, "I am a game son of a bitch," and shot him sitting in the chair. Feaster ran out, and the defendant fired several more shots as he was leaving.

The defendant testified on his own behalf: That he was a Cherokee citizen; lived near Claremore. That on the day in question he was in Wagoner and went to the house where the shooting occurred. That Ivy King met him at the door and told him there was a fellow there that would shoot him if he came in. She then went in, and he followed her. That Feaster, who was sitting down, made an attempt to get up, and, in the language of the defendant, "I taken him to make an effort to get a gun or something, and I jerked my gun; if he hadn't raised up out of his chair, I would never have shot him." And that was the first time he ever met Feaster.

On cross-examination he was asked why he went into the room if he thought Feaster would kill him, and answered: "I thought I would give him a trial if he wanted to shoot me; let him shoot me."

There was no evidence tending, in the remotest degree, to prove that the defendant was, at the time of the shooting, in any apparent imminent danger. On the contrary, the evidence shows, without conflict, that the shooting was without even a plausible pretext of provocation. The sole reliance of the defense for justification being the defendant's statement as to what Ivy King told him. When we consider the rule that what the defendant testifies to against his interest is to be taken as true, there is no evidence tending to show that the defendant acted in self-defense when he made the assault. One who seeks and brings on an affray, cannot shield himself under the plea of self-defense. The facts, as testified to by the defendant on his own behalf, afford no justification for his murderous assault.

As, in our opinion, no error of law to the prejudice of the substantial rights of the defendant occurred on the trial, the judgment is affirmed.

FURMAN, P. J., and ARMSTRONG, J., concur.

TUCKER v. STATE.

(Criminal Court of Appeals of Oklahoma.
Aug. 21, 1912.)

(Syllabus by the Court.)

1. COURTS (§ 104*)—PROCEDURE—OPINIONS—NECESSITY.

By an express provision of the statutes of Oklahoma, this court is not required to prepare written opinions in misdemeanor cases pending before it, but is permitted to render written opinions in misdemeanor cases when, in its judgment, the public interests may be subserved thereby.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 353, 355-358; Dec. Dig. § 104*]

2. CRIMINAL LAW (§ 372*)—EVIDENCE—OTHER OFFENSES.

On a trial where an information charges the illegal sale of intoxicating liquor, and the evidence shows that the sale charged in the information was made by the wife of the defendant at his home, it is competent to introduce testimony of other sales of intoxicating liquor made by the wife at his home, and that large quantities of liquor were kept at the home of the defendant, for the purpose of enabling the jury to determine whether or not the wife was acting for defendant, and that defendant was concerned in the particular sale for which he was being prosecuted, and that such sale constituted a part of a plan or system of the defendant for the sale of liquor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. § 372*]

3. CRIMINAL LAW (§§ 317, 1159*)—WITNESSES (§ 56*)—COMPETENCY OF WITNESS—HUSBAND AND WIFE—EVIDENCE—PRESUMPTIONS—REVIEW—QUESTIONS OF FACT.

Where a defendant is being prosecuted for the sale of intoxicating liquor, and the state's witnesses testify that such sale was made by his wife at his home, she is a competent witness in his behalf; and if he does not place her upon the witness stand or account for his failure to do so such failure will be strongly corroborative of the truthfulness of the state's testimony; and if there is other testimony in the record connecting the defendant with such sale a verdict of conviction will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 732, 3074-3083; Dec. Dig. §§ 317, 1159*; Witnesses, Cent. Dig. §§ 153-156; Dec. Dig. § 56*]

On motion for rehearing. Motion denied.
For former opinion, see 124 Pac. 1134.

Bond & Melton and Barefoot & Carmichael, all of Chickasha, for plaintiff in error. Chas. West, for the State.

FURMAN, P. J. [1] When this case was first submitted, we carefully examined the record and brief of counsel for appellant and came to the conclusion that there was no prejudicial error in the case, and filed a memorandum opinion to that effect. Counsel for appellant question the right of the court to render such an opinion. If they will examine the Session Laws of 1910, c. 13, § 1, p. 18, they will find the following statute: "The Court of Criminal Appeals shall render a written opinion in all felony cases within six months after said cases shall have been submitted for decision:

* * * Provided, the court may, when in its judgment public interest may be subserved, in like manner render written opinions in misdemeanor cases pending in its court."

This court was so flooded with frivolous appeals, especially in misdemeanor cases, that it was found necessary by the Legislature to check this evil. Some members of the Legislature were in favor of denying appeals in such cases; others were willing to allow appeals in misdemeanor cases, but desired to limit them as far as possible. This statute was passed to relieve this court of the necessity of writing opinions in misdemeanor cases, unless we were of the opinion that the questions raised were of sufficient importance to the public interest to require that this should be done. At the time this statute was passed, the court was constantly getting further and further behind with its business, and it would have been impossible to ever catch up without some relief, so the Legislature passed this statute to relieve the court in part of the congested condition of its docket. Many cases were being appealed simply for delay, and if we had been compelled to write opinions in each case our docket would have constantly become more crowded. The effect of this statute has been most salutary. The number of appeals simply for delay is constantly decreasing, because the court can expeditiously dispose of appeals which are without merit.

[2] In their motion for a rehearing, counsel for appellant strenuously insist that the conviction in this case should be set aside upon the authority of *Smith v. State*, 5 Okl. Cr. 67, 113 Pac. 204. We examined this question when the memorandum opinion was written, and we did not think then, and we do not think now, that this case comes within the rule laid down in the *Smith Case*. In *Smith's Case*, Judge Armstrong, speaking for the court, said: "Where the state charges and relies upon a particular sale, the general rule is that proof of other sales, for the purpose of establishing the particular sale charged, is not admissible. The issue on a criminal trial is single, and the testimony should be confined to the issue; and on trial of a person for one offense the prosecution cannot aid the proof against him by showing that he committed other offenses. *Whart. Crim. Ev.* par. 104; 1 *Bish. Crim. Proc.* par. 1120; *State v. Hughes*, 3 Kan. App. 95, 45 Pac. 94; *King v. State*, 66 Miss. 502, 6 South. 168; *Stone v. State* (Miss.) 7 South. 500; *McClure v. State*, 148 Ala. 625, 42 South. 813."

For the purpose of showing that the rule laid down in *Smith's Case* does not apply to this case, we will now discuss the question fully, although this must not be taken as a precedent that full opinions will be written

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep's Indexes
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on motions for a rehearing whenever counsel may be dissatisfied with a memorandum opinion. We would like to write full opinions in all cases; but if we did it would render the statute useless, and we would soon be completely overwhelmed with the volume of business on our docket, and the enforcement of the criminal laws of the state would be practically paralyzed.

It will be observed that Smith's Case only states a general rule, and, like all general rules, it has its exceptions. In Smith's Case, the state claimed that the defendant himself made the sale charged in the information. In the case at bar, an entirely different state of facts is presented. It was not claimed that appellant sold the whisky in person, or that he was present when the sale was made, or had any personal knowledge of this particular sale. On the contrary, it was shown that the sale was made by his wife during his absence from home. The state was permitted to prove that the defendant and his wife resided in the country, about three miles from the city of Chickasha; that he kept for sale some groceries at the house where he resided; that there was also a great deal of whisky and beer kept at this house, and that his wife made frequent sales of whisky, not only to the party charged in the information, but also to other persons; that sales of whisky had been made to different persons by the wife of appellant; that appellant himself had been seen to deliver whisky to parties, and had been present when other sales had been made by his wife. We think this testimony was admissible for the purpose of showing the system of appellant with reference to selling whisky at his house, and that the sale in question was made in accordance with such system, and that he was concerned therein.

In *Carter v. State*, 16 Okl. Cr. 240, 118 Pac. 264, this court held, in a case of embezzlement, where other similar offenses had been testified to which constituted part of a plan or system of embezzlement, that the jury might consider the testimony of such similar offenses, for the purpose of determining, not only the intent of the defendant, but also as to whether or not the defendant did take the money which he was charged with having embezzled. An examination of the authorities cited in *Carter's Case* will show that this is not a new principle of law. That it is applicable to cases of selling whisky by some person, other than the defendant, is shown by the following authorities:

In *Cumberland v. State*, 7 Okl. Cr. —, 122 Pac. 266, a negro porter in a drug store sold whisky to the prosecuting witness. Defendant paid the rent on the building and hired the porter. He denied that he had ever sold whisky, or was concerned in its sale; but the judgment of conviction was affirm-

ed, and in the syllabus the court holds: "Where the evidence shows that a defendant upon trial was concerned in the sale of intoxicating liquors, it is immaterial as to whether or not the sale was made by the defendant, or by another person who was acting with the defendant."

In *Cook v. State*, 4 Okl. Cr. 519, 111 Pac. 660, this court said: "It is immaterial as to whether the defendant was present when the beer was sold or not. He owned the premises and controlled the business. The negro was simply his servant, and a sale by the negro was a sale by the defendant; and the defendant is responsible for any violation of the prohibitory law committed by his negro porter in his place of business, under the circumstances proven by the testimony in this case."

In *Lancaster et al. v. State*, 2 Okl. Cr. 683, 103 Pac. 1066, this court said: "The counsel for the defendant insist that the evidence against the defendant Lancaster is not sufficient to sustain the verdict. It is true that no witness swore that Lancaster sold the whisky to Sherwood, or was present when it was sold to him. It was proven that the whisky was sold in the place of business of Luke Jenkins and Ollie Lancaster, and that this place of business was what is called a 'joint.' It was proven that, soon after the sale for which these defendants were convicted was made, this joint was raided, and 52 bottles of beer were found in the refrigerator behind the bar, and that beer and whisky were found in the warehouse behind the main building. It was proven that the place of business of defendants was fitted up with a bar and fixtures, usually found in such resorts. It was proven that Lancaster paid draymen for hauling cases of liquor from the depot to the place of business conducted by defendants. In the light of the record, we are of the opinion that the evidence not only sustains, but that it required, the verdict rendered by the jury."

And this statement is the basis of the third paragraph of the syllabus, as follows: "Where the evidence shows that two or more persons are acting together in the commission of an offense, they are both guilty, although one of them may not be present when the offense is committed."

In *Roach v. State*, 47 Tex. Cr. R. 500, 84 S. W. 586, the court said: "Appellant objected to the introduction of evidence of other offenses, claiming the same were in no wise connected with the offense on trial, but related to violations of the local option law on other and different occasions. It will be seen that the other transactions were introduced in order to show appellant's system in the sale of liquor. The testimony here shows: That appellant lived in the country, and that prosecutor (who was a neighbor) called at his house on the occasion of the alleged offense, and asked him if he had anything around, or anything about, to which

appellant replied: "Maybe so; look and see." That he then went around the house to appellant's smokehouse, which was east of his residence, and separate therefrom some 10 or 12 feet (appellant in the meantime having gone into his residence). That he found the smokehouse door closed, but not locked. He opened it, and there found a barrel of whisky and a rubber hose, with which to draw the same, lying across the barrel, and a jug. That he drew a half gallon of whisky, and left \$1.50 on the floor, near the wall on the left-hand side of the door. That appellant was not present at the transaction, and did not know whether he got the money or not. On the trial appellant's contest appears to be that he did not make any sale; that he did not receive any money for said whisky; and that the evidence failed to connect him with the transaction as a seller. The other transactions objected to were conducted in a similar manner; and we hold, in accordance with the authorities that this character of testimony was admissible. *Ehrd v. State* [44 Tex. Cr. R. 447], 71 S. W. 957; *Hollar v. State* [Tex. Cr. App.] 73 S. W. 961.

It is claimed that the evidence here does not sustain a charge that defendant sold the liquor; that it shows only that his wife made the sale. In *State v. Coulter*, 40 Kan. 87, 19 Pac. 368, the court, in the syllabus, said: "Where, on the trial of a charge for the violation of the prohibitory law, it is claimed that the liquor alleged to have been sold was not intoxicating, it is then competent to show sales other than those upon which the state elects to try the defendant, for the purpose of showing the purposes for which said liquor was sold and purchased; and it will make no difference if such sales were included in a complaint, upon the counts of which defendant had been acquitted." See, also, *State v. Elliott*, 45 Kan. 525, 26 Pac. 55.

In *State v. Welsh*, 64 N. H. 525, 15 Atl. 146, the court held: "On trial of an indictment for the illegal sale of intoxicating liquors, evidence of sale to other persons, within the year next preceding the first day of the term on which the indictment was found, is admissible to show that defendant was engaged in the business of liquor selling."

In *State v. Peterson*, 98 Minn. 210, 108 N. W. 6, the court held: "The admission of evidence, on the trial of an indictment for selling liquor without a license, of sales by defendant to persons other than the one named in the indictment held, in view of the facts disclosed by the record, not error, though it tended to prove the commission of other offenses. Such other sales were a part of a general scheme and plan devised by defendant to continue in the business of selling intoxicating liquor without a license, and were so related to the sale charged as to render the same proper corroborative evidence."

In *Pitner v. State*, 37 Tex. Cr. R. 208, 39

S. W. 662, the court held: "In a prosecution for illegal sales of liquor, evidence of other sales than that charged in the indictment is admissible to show the system of defendant with reference to selling liquor, and that the sale charged was in accordance with such system."

In *Bennett v. State*, 40 Tex. Cr. R. 445, 50 S. W. 947, it was held: "In a prosecution for an illegal sale of liquor, evidence of other sales than that charged is admissible to show the system of defendant with reference to selling liquors, and that the sale charged was in accordance therewith." See, also, *Hollar v. State* (Tex. Cr. App.) 73 S. W. 961; *Skipwith v. State* (Tex. Cr. App.) 88 S. W. 278; *Ehrd v. State*, 44 Tex. Cr. R. 447, 71 S. W. 957; *Holland v. State*, 51 Tex. Cr. R. 142, 101 S. W. 1005.

In *State v. Roberts*, 55 N. H. 483, the court, in the syllabus, held: "Upon the trial of an indictment for unlawfully selling spirituous liquors, evidence having been introduced by the state of a sale by the respondent's wife. Held, that it was competent for the state to prove sales by the respondent himself, other than those specified in the indictment, at the same place and about the same time, because such sales by him tended to show that the illegal traffic was his business, and that the sale of liquor by his wife was an act done by her as his agent and by his authority." And in the opinion it is said: "The prosecution introduced evidence tending to show a sale by the wife of the respondent to Gotchell. Such proof would sustain the indictment; but, in order that the respondent should be held liable for a sale made by the hand of his wife, the state would be compelled to show, further, that the wife was acting as his servant or agent in the transaction. Without such evidence the proof of a sale by his wife would go for nothing. It was therefore competent to show sales made by the respondent himself, at the same place, other than the sale charged in the indictment, because such sales by him tended to show that the traffic in liquors there was his business, and therefore that the act of the wife was his act." *State v. Bonney*, 39 N. H. 208; *State v. Colby*, 55 N. H. 72."

In *Commonwealth v. Coughlin*, 14 Gray (Mass.) 339, the facts stated were these: "Four witnesses were introduced by the government, who proved a number of sales of strong beer, all of which were made by the wife of the defendant in the dwelling house occupied by herself and the defendant. The circumstances of the sales were that the witnesses went into the house, called for a quart of beer of the wife; she took their vessels, went, as they supposed, down cellar, brought the vessels back with the beer called for, and received from them the pay therefor. There was no evidence that the defendant ever sold or interfered with the sales in any way, except the fact that at

two of the sales he happened to be present in the house. Upon these facts the defendant requested the court to rule that there was no greater presumption that the wife, in these sales, was acting for the defendant as his agent, than that she was acting therein for herself. The judges declined so to instruct the jury, but did not instruct them that it was evidence that the wife was acting in said sales as the agent of the husband. The jury found the defendant guilty, and he files these exceptions."

The court, through Chief Justice Shaw, in the opinion said: "The direction was right. The facts that the husband and wife lived together, and that the house was his, there being no evidence that she carried on a separate trade, were competent evidence to go to the jury to prove that she acted as his agent. *Commonwealth v. Murphy*, 2 Gray [Mass.] 513; *Commonwealth v. Fitzgerald*, 14 Gray [Mass.] 14. Exceptions overruled."

In *Commonwealth v. Hyland*, 155 Mass. 7, 28 N. E. 1055, the court, through Mr. Justice Holmes, held: "On a complaint under the Pub. Sts. c. 101, §§ 6, 7, for keeping and maintaining a common nuisance, there was evidence of illegal sales of intoxicating liquors by the wife of the defendant in his tenement, in which they lived together. The defendant testified that he was out of the state at the time of such sales, and that they were made without his knowledge or consent. Held, that the case was properly left to the jury, who might disbelieve the defendant and infer that the wife was acting as his agent." And said in the opinion: "The jury may have disbelieved the defendant's testimony. In that case the fact that he and his wife lived together in his tenement was competent evidence to prove that she acted as his agent."

In *Commonwealth v. Lafayette*, 148 Mass. 130, 19 N. E. 26, the syllabus reads: "At the trial of a complaint for an unlawful sale of intoxicating liquors, the alleged purchaser testified, on direct examination, that, upon going to the defendant's house, he found in the kitchen the defendant and a woman that he supposed to be his wife; that he poured rum out of a bottle on the table and drank it; and that he thereupon threw down some money and left the house. On cross-examination he testified that he did not see the defendant, but that the woman, at his request, brought him the glass of rum, and said: 'I will call my husband, if you wish to see him; he is in the next room.' The judge instructed the jury that, if they should find that the wife sold the rum as the agent of her husband, the defendant, they could find him guilty. Held, that the purchaser's direct testimony, if believed, was sufficient to warrant a conviction; and that the instruction as to the woman's agency was proper, in view of his testimony on cross-examination."

In *Guarreno v. State*, 148 Ala. 637, 32

South, 833, it was held: "Where, on a trial for an illegal sale of intoxicating liquors, the evidence showed that the sale of liquors was made by the wife of accused at his store, it was necessary to connect accused with the sale, and frequency of such sales by the wife at the store might authorize the inference that the liquor was kept by accused, and that in making the sales the wife was his agent."

In *Trometer v. District of Columbia*, 24 App. D. C. 247, the court said:

"3. Under the third assignment of error, which is based upon the refusal of the trial judge to direct a verdict in favor of the defendant on the whole testimony, the proposition sought to be established is that the defendant is not liable in a criminal action for the act of his wife, done without his knowledge, consent, authority, or procurement. But this proposition in the present case assumes that as proved which has not been proved, and which remains a matter of controversy, namely, the authority of the wife to act for her husband in the matter of the sale of the liquor. Substantially the same question was considered by this court in the case of *Lehman v. District of Columbia*, 19 App. D. C. 233, and determined adversely to the contention of the appellant, and it is unnecessary to repeat the argument of that case here.

"In the case of *Commonwealth v. Hyland*, 155 Mass. 7, 28 N. E. 1055, the rule was laid down by the Supreme Court of Judicature of Massachusetts, through Mr. Justice Holmes, now of the Supreme Court of the United States, that, in a prosecution for maintaining a liquor nuisance, where the evidence showed that all sales of liquor had been made by the defendant's wife at his house or tenement, and the defendant testified that if any sales were made by his wife it was without his knowledge or consent, while he was out of the state, the fact that he and his wife lived together in such tenement was competent evidence that she acted as his agent, and might overcome his own positive testimony to the contrary, if the jury disbelieved that testimony.

"Now, in the present case, it is perfectly plain that the jury in the court below, or the police judge acting in the place of a jury, upon the situation as it was disclosed by the testimony of the two policemen, was fully warranted, if he believed that testimony, in inferring an agency in the wife from the husband to do precisely what she did do. A presumption of agency arose from the circumstances and conduct of the parties, as it may arise in all other cases where the sale of the liquor is not made directly by the proprietor of the place who is sought to be held for it. *Lehman v. District of Columbia*, 19 App. D. C. 233. In the absence of contravening testimony, such presumption takes the place of direct and positive proof. Here there was such contravening testimony; and

the question of agency became a vital and essential element of controversy in the case."

In *Commonwealth v. Newhard*, 3 Pa. Super. Ct. 215, the court held: "Where sales were made by defendant's wife to minors, well known both to defendant and his wife to be such, and where there is evidence that the minors had frequented the saloon and bagatelle room, and had been furnished with liquor in his presence, and the case is submitted to the jury, and a verdict of guilty rendered upon proper instructions as to the bona fides of defendant's orders forbidding sales to minors, the judgment will not be disturbed." See, also, *Commonwealth v. Fitzgerald*, 14 Gray (Mass.) 14; *State v. Colby*, 55 N. H. 72.

[3] If the sales were not made by the wife of appellant, as testified to on behalf of the state, she was a competent witness in his behalf. His failure to place her upon the stand, or to account for his failure to do so, was a tacit admission of the truthfulness of the state's testimony. Like Adam, of old, his only defense was that the woman did it. This plea did not save Adam, and it should not be permitted to save appellant. In such a case as this, a husband should not be permitted to hide behind his wife's skirts. It is true that she might be prosecuted also; but we think that the jury had a right to conclude from the evidence that the appellant was concerned in and responsible for this attempt to convert his home into a bootlegging joint. We do not see how the jury could have done otherwise than convict appellant. The instructions of the court were in harmony with the views herein expressed, and it would be a waste of time to discuss them.

The motion for a rehearing is therefore denied.

ARMSTRONG and DOYLE, JJ., concur.

OGEE v. STATE.

(Criminal Court of Appeals of Oklahoma.
Sept. 6, 1912.)

CRIMINAL LAW (§ 1106*)—APPEAL—FILING TRANSCRIPT—TIME.

Where a judgment was rendered against accused on February 18, 1911, and the transcript on appeal was not filed until August 17, 1911, it was too late to perfect the appeal, which would be dismissed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2890-2892; Dec. Dig. § 1106.*]

Appeal, from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Abe Ogee was convicted of assault and battery, and he appeals. Dismissed.

W. N. Maben, of Shawnee; and McLain Taylor, of Tecumseh, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. Appellant was convicted in the superior court of Pottawatomie county of assault and battery, and his punishment was assessed at a fine of \$5.

Judgment was rendered on the 18th day of February, 1911, but the appeal was not perfected by filing a transcript of the record in this court until the 17th day of August, 1911, which was long after the time allowed by law for perfecting the appeal.

The appeal is therefore dismissed, and mandate will issue at once.

GREGG v. CITY OF KINGFISHER.

(Criminal Court of Appeals of Oklahoma.
Sept. 3, 1912.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 260*)—COUNTY COURTS—CONCURRENT JURISDICTION.

County courts have concurrent jurisdiction with district courts of appeals from judgments of police courts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 567-609; Dec. Dig. § 260.*]

2. CRIMINAL LAW (§ 1151*)—APPEAL—CONTINUANCE—REVIEW.

An application for a continuance is addressed to the sound discretion of the trial judge; and his action thereon will not be reviewed upon appeal, unless it appears from the record that such discretion was abused to the injury of appellant. For a motion for a continuance which was fatally defective, see opinion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.*]

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW (§ 603*)—CONTINUANCE—AFFIDAVITS.

An application for a continuance, failing to show the exercise of diligence to secure absent witnesses and to give their names, or state any evidence which could be obtained by a postponement of the case, was insufficient.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1348-1361; Dec. Dig. § 603.*]

4. CRIMINAL LAW (§ 589*)—CONTINUANCE—GROUNDS—APPLICATION.

That accused, when arrested, was improperly treated by the deputy sheriff was not ground for a continuance.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1315, 1319; Dec. Dig. § 589.*]

5. CRIMINAL LAW (§ 1166*)—CONTINUANCE—GROUNDS—PREJUDICE.

It was not error to overrule a motion for a continuance, because accused was sick and unable to appear in court at the trial, where it affirmatively appeared from the record that he did appear and was present during the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. § 1166.*]

Appeal from Kingfisher County Court; John M. Graham, Judge.

Mrs. D. S. Gregg was convicted of violating a prohibitory liquor ordinance of the City of Kingfisher, and again on appeal from the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

police court to the county court, where her punishment was assessed at a fine of \$75 and imprisonment in the county jail for 30 days, and she appeals. Affirmed.

D. K. Cunningham, of Kingfisher, for appellant. Smith C. Matson, Asst. Atty. Gen., and J. T. Bradley, City Atty., of Kingfisher, for appellee.

FURMAN, P. J. First. This case originated in the police court of the city of Kingfisher, where appellant was convicted for unlawfully conveying malt liquor from one place to another place within the limits of said city, in violation of Ordinance No. 182, of said city of Kingfisher. An appeal was prosecuted from this conviction to the county court of Kingfisher county.

[1] In their brief counsel for appellant say: "The county court had no jurisdiction to try this case, for the reason that it is only given power to try cases on appeal from justices of the peace, not police courts. Persons tried in police court are given right of appeal to district court only. See Snyder, § 746. 'In all cases tried before police judge arising under the ordinance of the city, an appeal may be taken by the defendant to the district court,' etc. There is nothing in our Constitution that we have been able to find which gives the county court jurisdiction to try cases on appeal from police court or judge thereof, nor in the statutes, except general section 1979, Snyder, and this section is not authorized by the Constitution; or, if it be, then there is no provision for the manner in which such appeals may be taken."

By turning to section 1979, Comp. Laws 1909, counsel will find the following: "The county court shall have, concurrent with the district court, appellate jurisdiction of judgments of justices of the peace, and of judgments of police judges in all civil and criminal causes."

In the case of *Meloy v. City of Woodward*, 7 Okl. Cr. —, 120 Pac. 1119, this question was thoroughly considered and discussed by this court in an opinion by Judge Doyle. After an elaborate discussion of the question and a review of all of the authorities, Judge Doyle said: "Our conclusion is that the act of June 4, 1908, only confers jurisdiction on county courts concurrent with district courts on appeals from judgments of police courts." For the reasons in support of this conclusion, see case above referred to.

[2-4] Second. Defendant complains of the action of the county court in overruling her motion for a continuance. A motion for a continuance is addressed to the sound discretion of the trial judge; and his action thereon will not be reviewed on appeal, unless it appears from the record that such discretion was abused to the injury of appellant. The motion for a continuance in this case does not show that the least diligence had been

used to secure the attendance of witnesses; neither does it give the name of any absent witness, or state any evidence which could be obtained by a postponement of the case; but it is simply a complaint against the alleged manner in which appellant was treated by the deputy sheriff when arrested. This did not constitute the least ground for a continuance, and the trial court did not err in overruling the motion.

[5] A further affidavit for a continuance was filed, alleging that appellant was sick and unable to appear in court and attend the trial. This was also overruled by the court. Nothing appears in the record which indicates that the trial court abused its discretion in overruling this application. On the contrary, it affirmatively appears from the record that appellant did appear in court, and was present during the trial of this case.

Third. The evidence in the case sustains the verdict of the jury and the judgment of the court. All of the other questions presented in the brief of counsel for appellant have been so often decided adversely to the contentions therein made that it would be a useless consumption of time to discuss them.

We find no material error in the record. The judgment of the county court is therefore affirmed.

ARMSTRONG and DOYLE, JJ., concur.

WESTERN NAT. INS. CO. v. MARSH.
(Supreme Court of Oklahoma. April 9, 1912.)

(Syllabus by the Court.)

1. **INSURANCE (§§ 375, 389*)—FIRE POLICY—WAIVER OF STIPULATIONS—AUTHORITY OF AGENTS.**

"When a local agent of a fire insurance company, who has the power to accept a risk and deliver the policy of insurance, at and prior to the time of the delivery of the policy, is advised and has full knowledge of the fact that other insurance upon the property is in force, and with that knowledge accepts the premium and delivers the policy, such policy is binding upon the company, notwithstanding the fact that it contains a provision prohibiting the existence of concurrent insurance without written consent thereto indorsed on the policy, and notwithstanding it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing indorsed on the policy."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 949-951, 956-955, 1023, 1031; Dec. Dig. §§ 375, 389.*]

2. **INSURANCE (§ 646*)—FIRE POLICY—CONCURRENT INSURANCE CLAUSE—WAIVER—BURDEN OF PROOF.**

The burden of proof in such cases rests upon the insured to show that the agent of the insurer was advised and had knowledge of the pre-existing insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1663; Dec. Dig. § 646.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig.; Key-No. Series & Rep'r Indexes

Commissioners' Opinion, Division No. 1. Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by Henry A. Marsh against the Western National Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

George C. Beidleman and Joe S. Eaton, both of Okmulgee, for plaintiff in error. Stanford & Cochran, of Okmulgee, for defendant in error.

AMES, C. The policy sued on contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Also the following: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions, as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except as such by the terms of the policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." In the suit on the policy the company defended upon the ground that there was other insurance existing at and prior to the time the policy was delivered, and that consent thereto was not indorsed upon the policy. In avoidance of this defense, the plaintiff replied by saying that the agent of the company, at and prior to the time of the delivery of the policy, was advised and knew of the existence of this other insurance, and that on that account he was entitled to recover, notwithstanding the failure to indorse the consent in writing.

[1] This presents a question which is of first impression in this state. The territorial decisions, following those of the United States, have held that under these facts the company was not liable. *Liverpool, London & Globe Ins. Co. v. Richardson Lumber Co.*, 11 Okl. 583, 89 Pac. 938; *Gish v. Ins. Co. of North America*, 16 Okl. 59, 87 Pac. 869, 18 L. R. A. (N. S.) 826. Those cases were correctly decided, because the Supreme Court of the territory was bound by decisions of the Supreme Court of the United States, and that court had established the rule in *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133,

46 L. Ed. 218. Since the admission of the state, the question has arisen in several cases upon contracts arising prior to statehood, and this court has followed *Northern Assurance Co. v. Grand View Building Association* because it controlled the rights of the parties at that time, but has expressly reserved this question as applied to cases arising since statehood. In *Sullivan v. Mercantile Town Mut. Ins. Co.*, 20 Okl. 460, 465, 94 Pac. 676, 129 Am. St. Rep. 761, this court, in referring to *Northern Assurance Co. v. Grand View Building Ass'n*, say: "While we do not wish to be understood as saying that it is our opinion that the doctrine announced in that case is in harmony with the weight of authorities upon this question, or that it is supported by the better reasoning, yet on account of the fact that the rule announced in said case was the law controlling the courts in the Indian Territory at the time of the trial of the case at bar we are constrained to follow in this case the rule announced therein." In *State Mut. Ins. Co. v. Craig*, 27 Okl. 90, 111 Pac. 325, the same conclusion was reached, but subject to the same reservation; the opinion in this case quoting the reservation from *Sullivan v. Mercantile Town Mut. Ins. Co.*, supra. *Phoenix Ins. Co. v. Ceaphus*, 29 Okl. 608, 119 Pac. 583, follows this rule, but with the same reservation.

This case, however, arose after the admission of the state, and we are no longer bound by the decision in *Northern Assurance Co. v. Grand View Building Association*, although we very frankly concede that the argument of that case is very powerful, and the persuasive force of the decisions of that eminent court have great weight with us as authority. Massachusetts adopts the same rule as the Supreme Court of the United States. *Parker v. Rochester German Ins. Co.*, 162 Mass. 479, 39 N. E. 179; *Putnam Tool Co. v. Fitchburg Mut. F. Ins. Co.*, 145 Mass. 265, 13 N. E. 902; *Pendar v. Am. Mut. Ins. Co.*, 12 Cush. (Mass.) 489; *Worcester Bank v. Hartford F. Ins. Co.*, 11 Cush. (Mass.) 265, 59 Am. Dec. 145. We believe, though, that all the other states hold that, where the local agent is advised and had knowledge of the existing insurance at the time he writes and delivers the policy, the company is bound, notwithstanding the want of a written indorsement. Various reasons are assigned by the courts for this conclusion, and we do not feel that it is necessary for us to undertake to analyze the decisions. There are exhaustive notes on the subject in connection with *Gish v. Ins. Co. of North America*, 16 Okl. 59, 87 Pac. 869, as reported in 13 L. R. A. (N. S.) 827, and the case of *Haapa v. Metropolitan Life Ins. Co.*, 150 Mich. 467, 114 N. W. 380, as reported in 16 L. R. A. (N. S.) 1165, 121 Am. St. Rep. 627, and *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, as reported in 107 Am. St. Rep. 92, the note beginning on page 99.

It seems to us that the local agent of the company, who has authority to make the contract of insurance and to indorse the company's consent to this provision upon the contract, is the company's representative for the purpose of waiving such an indorsement. Indeed, in the policy sued on, which appears to be signed by the president and secretary of the company, it is expressly provided: "But this policy shall not be valid until countersigned by the duly authorized agent of the company at Morris, Oklahoma." If, therefore, this agent had authority to make the contract of insurance, and authority to indorse thereon the consent of the company to the existence of other insurance, it seems to us that when he is advised of this other insurance, and has full knowledge thereof, and executes and delivers the contract and receives the premium from the insured, the company is bound by his knowledge, and that it is immaterial whether we call it a waiver or an estoppel, or any other name; and this conclusion has been reached by the highest courts of the following states: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Indian Territory, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Cowart v. Capital City Ins. Co.*, 114 Ala. 356, 22 South. 574; *Pope v. Glens Falls Ins. Co.*, 130 Ala. 356, 30 South. 496; *Triple Link M. Ins. Ass'n v. Williams*, 121 Ala. 138, 26 South. 19, 77 Am. St. Rep. 34; *Western Assur. Co. v. Stoddard*, 88 Ala. 606, 7 South. 379; *State Mut. Ins. Co. v. Latourrette*, 71 Ark. 242, 74 S. W. 300, 100 Am. St. Rep. 63; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; *Dwelling House Ins. Co. v. Brodle*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458; *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; *Breedlove v. Norwich Union Fire Ins. Soc.*, 124 Cal. 164, 56 Pac. 770; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *West Coast Lumber Co. v. State Ins. Co.*, 98 Cal. 502, 33 Pac. 258; *Kruger v. Western Fire Ins. Co.*, 72 Cal. 91, 13 Pac. 156, 1 Am. St. Rep. 42; *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416, 66 Pac. 249; *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206; *Farmers' & Merchants' Ins. Co. v. Nixon*, 2 Colo. App. 265, 30 Pac. 42; *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 248, 37 South. 62, 67 L. R. A. 518, 110 Am. St. Rep. 118; *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92; *Swain v. Macon Fire Ins. Co.*, 102 Ga. 96, 29 S. E. 147; *Phoenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *Mechanics' & Traders' Ins. Co.*

of New Orleans v. Mutual Real Estate Building Ass'n, 98 Ga. 262, 25 S. E. 457; *German-American Ins. Co. v. Paul*, 5 Ind. T. 703, 83 S. W. 60; *Allen v. Phoenix Ins. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903, 10 Ann. Cas. 328; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339; *Security Trust Co. v. Tarpey*, 182 Ill. 52, 54 N. E. 1041; *Phoenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *Germania Fire Ins. Co. v. Hick*, 125 Ill. 361, 17 N. E. 792, 8 Am. St. Rep. 384; *German-American Ins. Co. v. Yeagley*, 163 Ind. 666, 71 N. E. 897, 2 Ann. Cas. 275; *Farmers' Ins. Ass'n v. Reavis*, 163 Ind. 321, 70 N. E. 518, 71 N. E. 905; *Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Gurnett v. Atlas Mut. Ins. Co.*, 124 Iowa, 547, 100 N. W. 542; *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. 261; *Hagan v. Merchants', etc., Ins. Co.*, 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704, 29 N. W. 411; *Hartford Fire Ins. Co. v. McCarthy*, 69 Kan. 555, 77 Pac. 90; *Hulen v. Nat. Fire Ins. Co. of Hartford, Conn.*, 80 Kan. 127, 102 Pac. 52; *German Ins. Co. v. Gray*, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; *Continental Ins. Co. of N. Y. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; *Niagara Fire Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Phoenix Ins. Co. v. Splers*, 87 Ky. 285, 8 S. W. 453; *London & Lancashire Fire Ins. Co. v. Gertelsen*, 106 Ky. 815, 51 S. W. 617; *Brumfield v. Ins. Co.*, 87 Ky. 122, 7 S. W. 893; *Mongeau v. Liverpool & London Ins. Co.*, 128 La. 654, 55 South. 6; *Bigelow v. Granite State Fire Ins. Co.*, 94 Me. 39, 46 Atl. 808; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272, 42 Atl. 412; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *National Fire Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec. 289; *Morgan v. Ill. Ins. Co.*, 130 Mich. 427, 90 N. W. 40; *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514, 53 N. W. 818, 18 L. R. A. 481, 32 Am. St. Rep. 519; *Farmers' Mut. Fire Ins. Co. v. Gargett*, 42 Mich. 289, 3 N. W. 954; *Mich. State Ins. Co. v. Lewis*, 30 Mich. 41; *Andrus v. Maryland Casualty Co.*, 91 Minn. 358, 98 N. W. 200; *In re Millers' & Manufacturers' Ins. Co.*, 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393, 7 N. W. 735; *Southern Ins. Co. v. Stewart (Miss.)*, 30 South. 755; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 South. 13; *Equitable F. Ins. Co. v. Alexander (Miss.)*, 12 South. 25; *Thompson v. Traders' Ins. Co.*, 169 Mo. 12, 68 S. W. 889; *Cagle v. Chillicothe Town Mut. Fire Ins. Co.*, 78 Mo. App. 431; *Williams v. Bankers' & Merchants' Town Mut. Fire Ins. Co.*, 73 Mo. App. 607; *Parsons v. Knoxville F. Ins. Co.*, 182 Mo. 583, 31 S. W. 117, 34 S. W. 476; *Hamilton v. Insurance Co.*, 94 Mo. 353,

7 S. W. 291; Hartford Fire Ins. Co. v. Landfare, 63 Neb. 559, 88 N. W. 779; Home Fire Ins. Co. v. Hammang, 44 Neb. 566, 62 N. W. 883; Insurance Co. v. Covey, 41 Neb. 724, 60 N. W. 12; Spalding v. New Hampshire Fire Ins. Co., 71 N. H. 441, 52 Atl. 858; Hadley v. Insurance Co., 55 N. H. 110; Patten v. Merchants', etc., M. F. Ins. Co., 40 N. H. 375; Redstrake v. Cumberland Mut. F. Ins. Co., 44 N. J. Law, 294; Lewis v. Guardian F. & L. Assur. Co., 181 N. Y. 392, 74 N. E. 224, 106 Am. St. Rep. 557; Benjamin v. Palatine Ins. Co., 177 N. Y. 588, 70 N. E. 1095; Wood v. Am. F. Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; Forward v. Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; Cowell v. Phoenix Ins. Co., 126 N. C. 684, 36 S. E. 184; Clapp v. Farmers' Mut. Fire Ins. Ass'n, 126 N. C. 888, 35 S. E. 617; Follette v. Mut. Accident Ass'n, 110 N. C. 377, 14 S. E. 923, 15 L. R. A. 668, 28 Am. St. Rep. 693; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; Hartford Protection Co. v. Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Koshland v. Home Ins. Co., 31 Or. 321, 49 Pac. 864, 50 Pac. 567; Arthur v. Palatine Ins. Co., 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; McGonigle v. Susquehanna Mut. Fire Ins. Co., 168 Pa. 1, 31 Atl. 868; Mentz v. Lancaster F. Ins. Co., 79 Pa. 475; Davis v. Fireman's Fund Ins. Co., 5 Pa. Super. Ct. 506; Id., 28 Pittsb. Leg. J. (N. S.) 91; Id., 40 Wkly. Notes Cas. (Pa.) 569; Reed v. Equitable F., etc., Co., 17 R. I. 786, 24 Atl. 833, 18 L. R. A. 496; Fludd v. Equitable Life Assur. Soc., 75 S. C. 315, 55 S. E. 762; Pearlstone v. Phoenix Ins. Co., 74 S. C. 246, 54 S. E. 372; McBryde v. S. C. Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769; Graham v. American Fire Ins. Co., 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707; Vesey v. Commercial Union Assur. Co., 18 S. D. 632, 101 N. W. 1074; Aetna Life Ins. Co. v. Fallow, 110 Tenn. 720, 77 S. W. 937; Home Ins. Co. v. Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705; Continental F. Ass'n v. Norris, 30 Tex. Civ. App. 299, 70 S. W. 769; Hartford Fire Ins. Co. v. Post, 25 Tex. Civ. App. 428, 62 S. W. 140; Wagner v. Westchester Fire Ins. Co., 92 Tex. 549, 50 S. W. 569; Morrison v. Ins. Co. of North America, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63; Osborne v. Phoenix Ins. Co., 23 Utah, 428, 64 Pac. 1103; West v. Norwiche Union Fire Ins. Soc., 10 Utah, 442, 37 Pac. 685; Tarbell v. Vt. Mut. F. Ins. Co., 63 Vt. 53, 22 Atl. 533; Ring v. Windsor Co. Mut. F. Ins. Co., 51 Vt. 563; Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co., 106 Va. 633, 56 S. E. 584; Ga. Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366; Mutual Fire Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209; Mesterman v. Home Mut. Ins. Co., 5

Wash. 524, 32 Pac. 453, 34 Am. St. Rep. 877; Henschel v. Hamburg-Magdeburg F. Ins. Co., 4 Wash. 817, 30 Pac. 736; Medley v. German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99; Woolpert v. Franklin Ins. Co., 42 W. Va. 647, 26 S. E. 521; Coles v. Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. 732; Welch v. Fire Ass'n of Philadelphia, 120 Wis. 456, 98 N. W. 227; Trustees of St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767; Schultz v. Caledonian Ins. Co., Edinburgh, Scot., 94 Wis. 42, 68 N. W. 414; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

We feel that this rule, established by such an overwhelming weight of authority, should be followed by us, and we are the more ready to do so because it accords with our sense of justice. Indeed, this result is foreshadowed by the decisions of this court in *Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808, and in *Port Huron Engine & Thresher Co. v. Ball*, 118 Pac. 393. In *Arkansas Ins. Co. v. Cox*, 21 Okl. page 880, 98 Pac. page 555, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808, it is said: "Defendant insists that the answers of plaintiff in his application as to his interest in the dwelling house and barn insured and the land on which the same was situated were false, and that he did not have the unconditional and sole ownership, both legal and equitable, of the property, and that he was not the owner of the fee-simple title to the land on which said buildings were situated, and that by reason of such facts the policy, under the provision thereof quoted supra, was void. There was no misrepresentation by plaintiff in his application as to who owned the legal title to the land on which the property was situated. His answer to the questions in the application discloses that the same was held in the name of R. L. Folsom. This fact was known to the insurance company by the written application of plaintiff, containing such answer, being before the company at the time it issued the policy sued on; and the company, having with full knowledge issued the policy to plaintiff, cannot now insist upon the clause in the policy requiring the insured to be the unconditional and sole owner of the legal title, but will be held to have waived such condition. The law will not permit it, with full knowledge of the condition of the legal title to the land on which the insured's property was located, to accept the application and the premium note given by the insured in payment of the premium on the policy; and to insert in the policy a provision contrary to the conditions of the title as represented by the application by which it may defeat the right of recovery in case of loss. *German-American Ins. Co. v. Paul*, 5 Ind. T. 708, 83 S. W. 60; *Allen v. Phoenix Ins. Co.*, 12 Idaho, 653,

88 Pac. 245, 8 L. R. A. (N. S.) 903 [10 Ann. Cas. 328].

In *Port Huron Engine & Thresher Co. v. Ball*, the second paragraph of the syllabus is as follows: "Provisions in a contract of sale of machinery, requiring the purchaser, if not satisfied with the machinery at the end of the first day, to notify the company at its home office and give it time to send mechanics to operate the machine, and further providing that, if the purchaser is not satisfied after the test is made by these mechanics, he shall procure some other machine for a competitive test, and further providing that none of the conditions of the contract may be waived, except in writing, signed by an officer of the seller, may all be waived by the seller, if in response to an informal notice it sends agents to examine and test the machinery, who make promises of repairs and adjustments, upon which the purchaser relies in future dealings with the seller."

Upon the importance of adopting a rule established by the great weight of authority, this court, in *Lutz v. Talequah Water Co.*, 29 Okl. 171, 173, 118 Pac. 128, 129 (36 L. R. A. [N. S.] 568), observes: "True it is, as suggested by counsel, there are nearly 50 appellate courts in this nation, each and all industriously grinding out its grist of precedent. But the hopeful observation is to be indulged in this connection that of late years the universal dissemination among these courts of the conclusions reached by all has had a very marked tendency toward bringing uniformity out of judicial precedents, where before there had been conflict. Thus, by the very force of the weight of authority and precedent, a uniform code and system of jurisprudence is being gradually evolved. As a political body of nation, we have numerous jurisdictions, yet the lines separating them are merely arbitrary and artificial. As a people, we have a common destiny; we are one, with one life, one language, one great system of commercialism, and, manifestly, for the peace, tranquillity, economy, and general welfare of all, but one set of laws or rules of action should obtain. There is no reason why the crossing of a state line should change the legal relations, obligations, or duties which one citizen owes to another, and that it does so is distracting and wasteful, and leads to loss, dissent, uncertainty."

[2] The burden of proof, however, clearly rests upon the plaintiff to prove the facts upon which he relies for the waiver. 29 Am. & Eng. Enc. of Law (2d Ed.) 1095. As there was no evidence whatever upon the subject, it was error to submit the case to the jury, and for this reason the case must be reversed.

As the other errors assigned are not necessary to a decision of this case, and as they

may not arise upon a new trial, it will not be necessary to consider them.

The case should be reversed, and remanded for a new trial.

PER CURIAM: Adopted in whole.

INSURANCE CO. OF NORTH AMERICA v. LITTLE.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 18*)—QUESTIONS REVIEWABLE—DEMURRER TO EVIDENCE.

A ruling on a demurrer to the evidence being a decision occurring at the trial, and to review which, on appeal, a motion for a new trial is necessary, it follows that, although the trial court sustained a demurrer to the evidence, yet, upon a motion for new trial being filed, the court has power to grant it.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 24-29; Dec. Dig. § 18.*]

2. INSURANCE (§ 376*)—LOCAL AGENT—AUTHORITY—ACCEPTANCE OF RISK—INCUMBRANCES—WAIVER.

When a local agent of a fire insurance company, who has the power to accept a risk and deliver the policy of insurance, at and prior to the time of the delivery of the policy, is advised and has full knowledge of the fact that a portion of the property insured is incumbered by a chattel mortgage, and with that knowledge accepts the premium and delivers the policy, such policy is binding upon the company notwithstanding it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing indorsed on the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 952-955; Dec. Dig. § 376.*]

Commissioners' Opinion, Division No. 2. Error from Jefferson County Court; G. M. Bond, Judge.

Action by S. R. Little against the Insurance Company of North America. Judgment for plaintiff, and defendant brings error. Affirmed.

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiff in error; C. A. McBrian, of Ryan, for defendant in error.

BREWER, C. This is a suit on a fire insurance policy, dated and issued on December 8, 1908, for the sum of \$750. Suit was filed thereon April 19, 1909, in the county court of Jefferson county, by S. R. Little, defendant in error, who was plaintiff below, against the Insurance Company of North America, plaintiff in error, which was defendant below. On October 8, 1909, the suit was tried to a jury, and at the conclusion of plaintiff's testimony the defendant demurred to the evidence; and the demurrer was sustained by the court. Plaintiff, on the 11th of October, 1909, filed a motion asking that the ruling, decision, and judgment of the court in sustaining the demurrer to the evidence be set aside, and that he be granted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

a new trial. This motion for a new trial was sustained by the court, and on January 5, 1910, the cause was again tried by the court, a jury having been waived by the parties, and a judgment was rendered in favor of the plaintiff for the amount stated in the policy. Motion for new trial was overruled by the court, and, exceptions being saved, the cause comes here for review.

Numerous assignments of error are set out in the petition in error, but the plaintiff in error has presented and urged in its brief but two general propositions in which it claims reversible error may be found. They are, first, that, after having sustained a demurrer to the evidence at the first trial, the court was without power to grant a new trial; and that in doing so it committed reversible error; second, that the court erred in the admission of parol evidence in contradiction of the terms of the policy, by allowing plaintiff to prove that at the time and prior to the issuance of the policy the issuing agent knew, and was informed by the insured, that one of the five billiard tables covered by the insurance had an incumbrance upon it. We will dispose of the questions in their order.

[1] The contention of plaintiff in error as to the first question argued is clearly and forcibly stated in its brief, from which we quote: "The trial court, when it rendered judgment in favor of the defendant after sustaining the defendant's demurrer to the plaintiff's evidence, finally disposed of the case, and its judgment became a final judgment, and as there was no verdict, report, or decision of a jury, referee, or court, upon any issue of fact, no motion for a new trial was authorized or permitted, and the only remedy open to the plaintiff was to prosecute an appeal to the Supreme Court of the state of Oklahoma, and by failing to prosecute such an appeal the former judgment of the trial court became final, conclusive, and binding upon both the parties to the action. When the court entered the order which purported to grant a new trial, it attempted to do something which it had no power to do." This contention cannot be sustained under the decisions of this court, and of the state of Kansas, from which our Practice Act came. It has been several times held, both in this state and in Kansas, that a demurrer to the evidence and a ruling thereon are merely steps in the progress of the trial, and that such a ruling is a decision occurring at the trial, made during the progress of the trial, to review which a motion for a new trial must have been filed and overruled, and exceptions saved. This is the effect of the recent decisions of this court.

In the case of *Stump v. Porter* (Okl.) 120 Pac. 639, there was a trial before a jury, and at the conclusion of the plaintiff's evidence the defendant demurred thereto. The demurrer was overruled, and exceptions taken. The action of the court in this regard

was sought to be reviewed in this court on appeal. In disposing of the matter the court say: "They are not available to him, however, for the reason that he failed to file, have considered, and passed upon any motion for a new trial; and the well-established rule is that the ruling on a demurrer to the evidence is a decision occurring on the trial, and, in order to enable the Supreme Court to review such ruling, it is necessary that a motion for a new trial be made and filed within the time prescribed by law." It follows that a motion for a new trial was necessary and proper to be filed in the lower court, and that the court had power to act on it, either granting the same, as was done in this case, or by overruling it. *Ardmore Oil & Milling Co. v. Doggett Grain Co.*, 122 Pac. 241 (not yet officially reported); *Gruble v. Ryan et al.*, 23 Kan. 195; *Pratt v. Kelley*, 24 Kan. 110; *Norris v. Evans*, 39 Kan. 668, 18 Pac. 818; *Lott v. K. C. Ft. S. & G. R. Co.*, 42 Kan. 293, 21 Pac. 1070; *Coy v. Mo. Pac. Ry. Co.*, 69 Kan. 321, 76 Pac. 844.

[2] 2. The second contention of plaintiff in error would be sound under the decisions of the territorial Supreme Court in *London & Globe Ins. Co. v. Richardson Lumber Co.*, 11 Okl. 583, 69 Pac. 938, and *Gish v. Insurance Co. of North America*, 16 Okl. 59, 87 Pac. 869, 13 L. B. A. (N. S.) 826, which cases followed the rule announced by the Supreme Court of the United States in *Northern Assurance Company v. Grandview Building Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and also under the decisions of this court rendered in cases arising prior to statehood. *Sullivan v. Merc. Town Mut. Ins. Co.*, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761; *State Mut. Ins. Co. v. Craig*, 27 Okl. 90, 111 Pac. 325; *Phoenix Ins. Co. v. Ceaphus*, 29 Okl. 608, 119 Pac. 583. This court, however, in the three cases last cited, specifically limited its decision on this point to cases arising prior to statehood, and reserved its decision thereon, in cases arising since the erection of the state of Oklahoma, where the contract of insurance was entered into since statehood.

Recently this court, in the case of *Western National Ins. Co. v. Henry A. Marsh*, 125 Pac. 1094 (handed down at this term, and not yet officially reported), had under consideration and decided this question adversely to the contention of plaintiff in error. In that case the authorities are collected and considered at length, and it is shown that in 42 states of this Union parol evidence, such as was admitted in this case, and under the circumstances of this case, may be admitted. The syllabus in that case is as follows: "When a local agent of a fire insurance company, who has the power to accept a risk and deliver the policy of insurance, at and prior to the time of the delivery of the policy, is advised and has full knowledge of the fact that other insurance upon the property is in force, and with that knowledge ac-

cepts the premium and delivers the policy, such policy is binding upon the company, notwithstanding the fact that it contains a provision prohibiting the existence of concurrent insurance without written consent thereto indorsed on the policy, and notwithstanding it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing indorsed on the policy." It will be observed that in the case quoted from parol evidence was admitted to show a waiver of the "concurrent insurance" clause in the policy. In this case it was to show a waiver of the clause providing a forfeiture in case the personal property "be or become incumbered by a chattel mortgage." There is no distinction between the two cases in principle.

On the authority of the last-cited case, which is supported by the great weight of authority, we hold that under the facts and circumstances of this case the court did not err in admitting the evidence complained of.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

MERCHANTS' & PLANTERS' INS. CO. v. MARSH.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. PLEADING (§§ 196, 355, 428*)—DEPARTURE—REMEDY.

An objection to a pleading on the ground of a departure must, in this jurisdiction, be raised by a motion to strike. It cannot be raised by demurrer, or by an objection to the introduction of evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 453-455, 1102-1110, 1433-1436; Dec. Dig. §§ 196, 355, 428.*]

2. INSURANCE (§ 375*)—AGENTS—CONDITION—POWER TO WAIVE.

A local agent of an insurance company, who has authority from the company to solicit, execute, and deliver contracts of insurance, has power to waive the conditions of the policy, such as the "additional insurance clause" and the "incumbrance clause" at the time of the execution and delivery of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948-951, 956-965; Dec. Dig. § 375.*]

3. INSURANCE (§§ 375, 378*)—LOCAL AGENT—POWERS.

A local agent of an insurance company, whose only power is to solicit applications for insurance, and forward them to the company for approval, when, if approved, the company issues the policy and causes it to be delivered to the insured, has no power to waive any of the provisions of the policy so delivered, and notice to such agent of "additional insurance" taken out by the insured after the delivery of the policy is not notice to the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 948-951, 956-965, 968-997; Dec. Dig. §§ 375, 378.*]

(Additional Syllabus by Editorial Staff.)

4. PLEADING (§ 180*)—REPLY—NEW MATTER—DEPARTURE.

Comp. Laws 1909, § 5642, provides that, when an answer contains new matter, plaintiff may reply, denying generally or specifically each allegation controverted by him, and may allege any new matter not inconsistent with the petition and constituting a defense to the new matter in the answer. *Held*, that where, in an action on a fire policy, plaintiff alleged compliance with all the terms and conditions thereof, and defendant answered, alleging a breach of the additional insurance clause without the insurer's consent indorsed on the policy, a reply, admitting the taking out of additional insurance without consent of insurer indorsed on the policy, but alleging that, because of the knowledge thereof and acts of defendant's agent, the clause was waived, constituted a departure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by H. A. Marsh against the Merchants' & Planters' Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and rendered.

Davidson & Malloy, of Tulsa, for plaintiff in error. Stanford & Cochran, of Okmulgee, for defendant in error.

BREWER, C. This is a suit brought to recover on a fire insurance policy. It was commenced in the district court of Okmulgee county on October 3, 1908. The policy was issued August 10, 1907. The property insured was destroyed by fire June 2, 1908. The plaintiff in the district court recovered the full amount named in the policy, and is defendant in error in this court.

In the petition filed below the plaintiff declared on the policy, attached copy to his petition as part thereof, alleged the loss of the insured property by fire, the value of the property destroyed, and "that more than 60 days have elapsed prior to the commencement of this suit, after sufficient proof of the loss and damage by fire as aforesaid, and that the plaintiff has duly complied with all the terms and conditions of said policy to be kept or performed." The defendant filed answer, consisting of a general denial, and alleged, as special defenses, a violation by plaintiff of the conditions and terms of the policy, in that he had violated the clause prohibiting additional insurance without consent of the company indorsed on the policy; also that a portion of the goods insured had been removed from the premises without such consent; and also that the title to the property was not as stated in the policy, together with other defenses not necessary to be recited here. To this answer the plaintiff filed a general denial by way of reply. Upon the issues thus presented, a jury was impaneled and the cause proceeded to trial. During the trial plaintiff filed an amended reply.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in which he admitted the taking out of additional insurance, and that consent so to do had not been indorsed on the policy, but alleged that, because of the knowledge and the acts of the agent of the company, the said provision had been waived. The plaintiff met the other special defenses by alleging waivers of the same. The defendant objected to the filing of this reply, and after it was filed moved to strike the same, because it was a departure and inconsistent with the allegations of the petition. Defendant also demurred to the reply. Both motion to strike and the demurrer were overruled by the court, to which exceptions were saved. At the close of the evidence defendant asked a peremptory instruction in its favor, which was refused.

Under our view of the case, only two propositions are necessary to be discussed. They are: First, the action of the court in refusing the motion to strike the reply on the ground of departure; second, the question of additional insurance, and the alleged waiver, and the evidence regarding same.

[1.] On the first proposition, that of departure, we think the court materially erred. This is manifest under the former decisions of this court. We are aware that in many Code states this practice is permitted, but in this state, under our Code, it has been held to be a departure, as inconsistent with the petition. The statute relative to what may properly be stated in a reply seems to confine the same to allegations not inconsistent with the petition. The statute is as follows: "Sec. 5642. When the answer contains new matter, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, and constituting a defense to such new matter in the answer. * * *." This statute was construed by this court in a case wherein the pleadings were in a state identical with the case at bar, except that the defect in the case decided was taken advantage of by an objection to the introduction of evidence and by a motion for a judgment on the pleadings. The case referred to is *St. Paul Fire & Marine Insurance Co. v. Mountain Park S. F. Co.*, 23 Okl. 79, 99 Pac. 647. In that case the court held that there was clearly a departure, but that, inasmuch as it had not been taken advantage of in the proper manner, it was waived; and the court proceeds at length to discuss the question, and examines and collects in the opinion numerous authorities, showing that, in case of a departure, the proper way to raise and save the question is by a motion to strike, as was done in the case at bar. It is almost as essential that there be rules regulating pleadings, and the joining of issues, as that there be pleadings

at all; and when a rule has been carefully considered and announced for the guidance of attorneys in an important matter of pleading, it will not do to say that it may be entirely ignored.

We quote somewhat extensively from the case cited above, believing such course to be of service to the bar of the state. After stating the facts as suggested above the court says: "That this was a departure there is no doubt; but neither method of assault called the court's attention to a departure in the reply, which could not be taken advantage of under our practice, except by motion to strike, as the same is no ground for demurrer under our statute. 6 Enc. of Pl. & Pr. 468, lays down the general rule thus: 'In most of the United States departure may be taken advantage of by a general demurrer. In other states, however, it has been decided that advantage is to be taken of a departure in an opponent's pleading by a motion to strike out or by an objection to its filing—citing authorities. We have examined all the works available on code pleading, and in none of them find it laid down or intimated that this defect can be taken advantage of by objecting to the introduction of evidence under the pleadings. The only case called to our attention where it is so held is *Johnson v. State Bank of Seneca*, 59 Kan. 250, 52 Pac. 860, which, while admitting the general rule to be as stated supra, cites no authority to support the rule laid down in that case, and we refuse to follow it. Rather will we follow the practice as indicated in a later case decided by that court in *Surety Co. v. Bragg*, 63 Kan. 291, 65 Pac. 272, in which was recognized the rule as stated in 6 Enc. Pl. & Pr. 468, supra. In that case the pleadings were in a state identical with those in the case at bar, except that the reply was assailed for a departure by both a demurrer and a motion to strike. The former the court refused to consider, because not filed in time. The latter was heard and overruled, which was so far held to be the proper practice that the same was not questioned. On appeal, the Supreme Court held that in failing to strike the reply the trial court erred, and for that reason reversed and remanded the cause for a new trial. In *Magruder v. Admire*, 4 Mo. App. 133, the court held the reply to be a departure, and that the trial court erred in refusing to strike it out. In *Freeman v. Speegle*, 33 Ala. 191, 3 South. 620, it is held that the proper mode of raising the question of departure is a motion to reject or to strike from the files, and that the same could not be raised by demurrer, citing *Railroad v. Mallon*, 57 Ala. 168. See, also, *Morris v. Beebe et al.*, 54 Ala. 300. It is obvious that this is the better practice, as, in case the motion to strike is sustained, it calls attention sharply to the

defect in the pleading, and gives the plaintiff an opportunity to amend his petition before going to trial."

There is nothing to be added to the above. It stands as a careful, well-considered construction of the statute. It imposes no hardship on the pleader; in fact, it was announced to obviate hardship. If the pleader unthoughtfully falls into this error, the motion to strike, stating the grounds, calls his attention pointedly to his mistake, at a time when he can correct it and save his case. If he does not care to do so, but rather prefers, because disagreeing with the wisdom of the rule, to risk his case on the theory that the court will overturn the same upon further consideration, he ought not to complain if the court disappoints him by not doing so.

[2] Second. Our conclusions on the first proposition, as stated above, require a reversal of this case. But the requirements of justice and the rights of the parties in this suit compel us to go further and consider the second proposition. It is admitted that, long after the issuance of the policy, additional insurance on the property was taken out, and was in existence at the time of the loss, and that the consent of the company had not been obtained and indorsed in writing upon the policy in suit; but it is attempted to be shown that the company through its local agent waived the same. The policy sued on is one sometimes called "a home office policy"; that is, one issued direct by the president and secretary of the company, as contradistinguished from one issued by a local agent, and which is required to be countersigned by such local agent. The policy provides: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Upon the question of changes, modifications, or waivers affecting the same, the policy further provides: "And no officer, agent, or other representative of this company, except the president or secretary of this company, in Muskogee, Oklahoma, shall have power to waive, change, or modify any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed, hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative, except the president or secretary of this company, in Muskogee, Oklahoma, shall have such power, or be deemed or held to have waived, changed, or modified such provisions or conditions, and such waiver, if any, shall be written upon or attached hereto. * * *"

The rule has been recently announced in this court that a local agent of an insurance

company, clothed with authority to solicit and execute, by countersigning as agent, a contract of insurance, has power to waive the conditions of the policy, such as the "additional insurance clause" and the "incumbrance clause," at the time of the execution and delivery of the policy. *Western National Insurance Co. v. Henry A. Marsh*, 125 Pac. 1094 (not officially reported); *Insurance Co. of North America v. S. R. Little*, 125 Pac. 1098 (not officially reported). But it will be observed, by referring to those cases, that they were predicated upon the fact that the agent had authority to execute and deliver the contract; that he was in fact, as has been sometimes said, the company's "alter ego"; and, further, that those cases do not extend the rule to cases of alleged waivers after the execution and delivery of the contract, although it is true that there is much authority extending the rule to that length. The case at bar has not been brought within the rule announced in those cases.

[3] In this case the character of the alleged local agent, or the nature or extent of his power and authority, as such, are not in any way made to appear. He did not countersign, nor does his name anywhere appear on the policy, or on the written application upon which it was issued. No attempt is made to show that he was clothed with power to take risks, or execute and deliver policies, for this company. The policy was executed at the home office of the company, by the president and secretary of the company, upon written application of the insured. It is not shown how, when, or by whom it was delivered. The company, in its brief, asserts, and it is not challenged, that the local agent was merely a soliciting agent, with no power except to take applications for insurance and forward them for approval to the home office, which, if approved, issued the policies and caused them to be delivered. The record supports this statement, although it is not clearly shown. This being the nature of the agency, at least as far as the proof shows, the question of the knowledge and acts of such agent relative to implied waivers is very different than in cases where the agent has power to accept the risk and countersign and deliver the contract of insurance.

The burden of showing the power and authority of the agent, and the nature and extent of his agency, was upon the plaintiff. He has not discharged it. This general rule is stated in *Wood on Insurance* thus (section 17): "The burden is upon the person seeking to enforce a parol contract of insurance to establish, not only the making of a contract, but also the authority of the agent to make it, and, if any waiver is relied upon, both the waiver and the authority of the agent to make it. * * *". The general

rule stated in 16 A. & E. Ency. Law (2d Ed.) 915, regarding the power of soliciting agents, seems to be supported by the current of decisions. It is: "A soliciting agent, who is authorized to receive applications for insurance and to transmit them to the company for its approval, but who has no authority to pass on risks or to make contracts of insurance, cannot bind the company by an oral agreement for . . . or consent to additional insurance. . . ."

We are aware that there is much conflict in the authorities regarding the power of such agents, relative to questions of waiver, where they arise, or grow out of the taking of the application; such, for instance, as misstatements made in the application, when written out by the agent for the insured, etc.; many cases holding the company liable upon the ground that the taking of the application, and matters done by him in connection therewith, are within his power. But, in cases where the agent has only the power to take applications and forward them to the company for its approval, and after the policies have been issued thereon and delivered, we think the great weight of authority supports the rule that such agent has no power to change, modify, or waive any of the conditions of the policy, and that, if he does so, it would not be binding on the company. In support of this general proposition we cite the following cases from 15 states: O'Brien v. New Zealand Insurance Co., 108 Cal. 227, 41 Pac. 298; Smith v. Continental Ins. Co., 6 Dak. 433, 43 N. W. 810; Rockford Ins. Co. v. Bolrum, 40 Ill. App. 129; Dryer v. Security Fire Ins. Co., 94 Iowa, 471, 62 N. W. 798; Armstrong v. State Ins. Co., 61 Iowa, 212, 16 N. W. 94; Bowlin v. Hekla Fire Ins. Co., 36 Minn. 433, 31 N. W. 859; Putnam Tool Co. v. Fitchburg Mutual Fire Ins. Co., 145 Mass. 265, 18 N. E. 902; Edlines v. Ins. Co. of North America, 121 Mass. 439; Embree v. Insurance Co., 62 Me. App. 133; Home Fire Ins. Co. v. Garback, 48 Neb. 827, 67 N. W. 864; Heath v. Insurance Co., 58 N. H. 414; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531; Van Allen v. Farmers' Joint-Stock Ins. Co., 64 N. Y. 469; Healey v. Imperial Fire Ins. Co., 5 Nev. 268; Insurance Co. v. Johnson, 23 Pa. 72; Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34; Fleming v. Hartford Fire Ins. Co., 42 Wis. 616; Duluth Nat. Bank v. Fire Ins. Co., 65 Tenn. 76, 1 S. W. 689; 4 Am. St. Rep. 749; Wineshiek Ins. Co. v. Holmgren, 58 Ill. 516; 5 Am. Rep. 65; Critchett v. American Ins. Co., 53 Iowa, 404, 5 N. W. 543, 30 Am. Rep. 230; Stockton v. Fireman's Ins. Co., 30 La. Ann. 577, 89 Am. Rep. 277.

The pleading admitted a violation of a provision in the policy, which it is not doubted is a valid one. The evidence wholly fails to show a waiver of the provision by

the company, or any one shown to have authority to waive the same for the company. The court should have instructed a verdict for the defendant below.

The cause should therefore be reversed, and judgment entered for defendant.

PER CURIAM. Adopted in whole.

(33 Okl. 323)

GULF, C. & S. F. RY. CO. v. STATE.
(Supreme Court of Oklahoma. July 23, 1912.)

(Syllabus by the Court.)

1. RAILROADS (§ 9*)—REGULATION—ORDERS OF CORPORATION COMMISSION—REVIEW.

On appeal from an order assessing a penalty under section 19, art. 9, Williams' Constitution, against a railway company for an alleged violation of an order of the Corporation Commission, the Supreme Court has jurisdiction to pass upon the power of the Commission to make the order violated, and whether it is reasonable and just, notwithstanding such an order is not appealable when made.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9*]

2. COMMERCE (§ 58*)—RAILROADS (§ 6*)—REGULATION—INTERFERENCE WITH INTERSTATE COMMERCE—STATUTORY PROVISIONS.

Order No. 148 of the Corporation Commission is not violative of the commerce clause of the federal Constitution, and was not superseded by the act of Congress of May 8, 1910, c. 208, 36 Stat. 350 (U. S. Comp. St. Supp. 1911, p. 1329).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-86; Dec. Dig. § 58*; Railroads, Cent. Dig. § 7; Dec. Dig. § 6*]

3. RAILROADS (§ 9*)—REGULATION—ORDERS OF CORPORATION COMMISSION.

As construed by the Corporation Commission, it cannot be said that order No. 148 is unreasonable or unjust.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9*]

Appeal from the State Corporation Commission.

Appeal by the Gulf, Colorado & Santa Fe Railway Company from an order of the Corporation Commission. Modified and affirmed on rehearing.

Cottingham & Bledsoe, of Oklahoma City, for appellant. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

KANE, J. This is an appeal from an order of the Corporation Commission imposing a fine of \$500 on the plaintiff in error for failing "to make report to Corporation Commission in time specified on derailment of passenger train," in violation of Order No. 148 of the Commission, which requires all railway companies operating within the state, upon the happening of an accident, to at once telegraph to the Commission the following information in the following class of accidents: All accidents resulting in loss of life or limb or serious injury to passengers or employees. The telegraph report shall show the date, time, and place of accident, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

train or trains involved, the number of passengers killed or injured, if any. The accident, which was not reported within the time prescribed in the order, was the derailment of a passenger train at a bridge on the Washita river on appellant's line of railway, which occurred on the 14th of December, 1910. The passenger train left the track and plunged into the river, killing 1 and injuring about 40 passengers. It appears that the appellant is an interstate railway, and that the train was an interstate train, engaged in interstate as well as intrastate traffic.

[1] Appeals from Order No. 148 were taken to this court by several railway companies, which were dismissed upon the ground that the court is without jurisdiction to review such order. *St. L. & S. F. R. R. Co. v. State et al.*, 24 Okl. 805, 105 Pac. 351; *A. T. & S. F. Ry. Co. v. State*, 24 Okl. 807, 105 Pac. 352. It is now contended by the Attorney General that, "this court having twice declined to review the Commission's general Order No. 148, on appeals attempted for that express purpose, holding that it had no jurisdiction to do so ([24 Okl. 805, 807] 105 Pac. 351 and 352), we assume that the same will not be inquired into in the present proceeding, except for the purpose of determining the Commission's power to make the same; it being jurisdictional as to Order No. 466, herein appealed from, predicated thereon."

As the Corporation Commission is only empowered by the Constitution to enforce compliance with its lawful orders by adjudging fines or penalties against the delinquent or offending parties or companies, after a hearing wherein an opportunity is afforded to introduce evidence and be heard, "as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation" (Constitution, § 19, art. 9), this court must have jurisdiction to pass upon the power of the Commission to make the order violated, and whether it is reasonable and just, when cases of this class come before it on appeal. *A. T. & S. F. Ry. Co. v. State*, 26 Okl. 166, 109 Pac. 218.

[2] The grounds upon which the appellant seeks a reversal may be briefly stated as follows: (1) Order No. 148, in so far as it relates to common carriers engaged in interstate commerce, covers the same subject-matter embraced within certain sections of the act of Congress of May 6, 1910, c. 208, 36 Stat. 350 (U. S. Comp. St. Supp. 1911, p. 1329), entitled "An act requiring common carriers engaged in interstate and foreign commerce to make full reports of all accidents to the Interstate Commerce Commission, and authorizing investigations thereof by said Commission," and is therefore superseded by the federal act. (2) Order No. 148 is unreasonable and unjust, because "the urgency of the higher duty of looking after and caring

for the injured and the dead, and clearing the track, so as to permit the resumption of transportation" render it practically impossible for a report to be made upon the spur of the moment covering with any degree of accuracy the matters inquired about. (3) The Commission erred in adjudging the defendant guilty of a violation of Order No. 148, because it appears conclusively from the evidence that it had no intention to violate same, but there was an honest endeavor on behalf of the railway company to comply with the same. And it further appears that as quick as the attention of the officers was called to the fact that officers are required to report by wire the report was promptly made.

In a former opinion, the first contention of the appellant was sustained, upon the supposition that the act of Congress of March 3, 1901, c. 806, 31 Stat. 1443 (U. S. Comp. St. 1901, p. 3176), was still in force. Counsel for appellant cited that act as controlling, and our attention was not called to its repeal and the enactment of the act of May 6, supra, until the petition for rehearing was filed; whereupon counsel for appellant voluntarily corrected the error, but still insist that under either act their first contention is well taken. We cannot agree with counsel. The latter act, while entitled practically the same as the former, differs from it in several important particulars. Both acts require common carriers engaged in interstate commerce by railroad to make to the Interstate Commerce Commission a monthly report of all collisions and derailments of trains, and of all accidents which may occur to its passengers or employees, and empower the Commission to investigate such collisions, derailments, or accidents; but section 3 of the latter act also provides "that when such accident is investigated by a commission of the state in which it occurred the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the state commission investigation."

Counsel for appellant argue that, while in the section that deals with investigations the concurrent right of the state to make such investigations is recognized, no such recognition is found in the part relating to the reporting of accidents; therefore the rule, that if the state and Congress have a concurrent power that of the state is superseded when the power of Congress is exercised, applies, because Order No. 148 provides for reporting, and not investigating, accidents. We think the power to investigate accidents includes the power to require reports concerning them. Before there can be an investigation, there must be information from some source that an accident has occurred. The most natural way to secure this information is to require the officers of the carrier, who have it at first hand, to supply it. In many cases, no doubt,

no investigation would follow the nature of the report disclosing that it was not necessary. It is the duty of the state to establish such reasonable regulations as are necessary for the safety of all engaged in business or domiciled within its borders. Passengers and employes on interstate trains, while within the state, belong to that class. *C., R. I. & P. Ry. Co. v. Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290.

Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 496, 56 L. Ed. 729, involved the power of the Interstate Commerce Commission to prescribe a uniform system of bookkeeping and require annual reports from common carriers upon the Great Lakes, both as to their interstate and intrastate business. The Commerce Court limited the enforcement of the order of the Commission to interstate traffic. The Supreme Court held that the right to prescribe a system of bookkeeping and require reports by the Commission extended to the intrastate business of the carrier, upon the ground that the prescribing of bookkeeping and the exacting of reports as to intrastate matters "was not to enable it [the Interstate Commerce Commission] to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction." The order herein involved is in the nature of a local regulation for caring for the safety of the employes and passengers of all common carriers while within the state, and is not in any proper sense an attempt to regulate interstate commerce.

On the whole, we are of the opinion that Order No. 148 of the Corporation Commission is not violative of the commerce clause of the federal Constitution, and was not superseded by the act of Congress of May 6, 1910, c. 208, 36 Stat. 350 (U. S. Comp. St. Supp. 1911, p. 1329).

[3] As construed by the Corporation Commission, it cannot be said that Order No. 148 is unreasonable or unjust. Mr. E. C. Patton, connected with the legal department of the Commission, who, no doubt, speaks with authority, has filed a brief herein, wherein he states that when Order No. 148 was made the Commission had before it the rules and regulations of the carriers by rail of the state, requiring trainmen, immediately on the happening of an accident, to report the same by wire to some of the general officers of the company, usually the superintendent or general superintendent. That "the order of the Commission is made in view and with an understanding of the rules and regulations in force by the railroad companies, and no conductor or other employe is required by this order to leave his duties in caring for the train, but this report is made upon receipt of the same

by the general officers of the company, who alone can, in the line of their employment, make reports that would bind the company. The commission has never penalized any road for failure to comply with this order, when the same was made within 12 hours after the happening of the accident. In what time the railroads shall make this report depends upon the circumstances in each case. It is absolutely necessary, in order to continue the operation of the road, for a telegraphic report to be made by trainmen to the superior officers at the earliest possible moment. It is necessary that same be made so that wrecking crews may be sent out, if necessary. Hence the order of the Commission was promulgated so as to be complied with in connection with the already established rules and duties of the carriers. The only additional duty the carriers must perform in complying with this order is for the general superintendent or division superintendent, as the case may be, when he receives the telegraphic report, to repeat the same, or such parts thereof as may be necessary, to the Commission. This has been done repeatedly. Mr. Beacom, general superintendent of the Rock Island at El Reno, reports accidents for the Rock Island; the division or general superintendent of the Frisco does likewise; the division superintendent or general manager of the Santa Fé does likewise; the reports for the Gulf, Colorado & Santa Fé Railway are made from Galveston, or such point as Mr. Pettibone, general manager, may be. Some roads at times permit the dispatcher to repeat the message to the Commission which he receives from the scene of the accident. Hence the report is made to the Commission with less inconvenience or expense than most any other report required."

It is obvious that thus construed Order No. 148 does not interfere with what counsel term "the higher duty of looking after and caring for the injured and the dead, and clearing the track, so as to permit the resumption of transportation."

In the briefs and argument of counsel for the respective sides, the remaining question, Is the evidence sufficient to support the order appealed from? is practically abandoned; it being stated in open court by the Attorney General, and concurred in by counsel for appellant, that if the jurisdictional questions were decided in favor of the appellee the fine may be assessed at one dollar. We think the state of the record justifies this agreement, and we therefore affirm the order appealed from in all particulars, except that the penalty assessed shall be one dollar, in conformity with stipulation of counsel, instead of the sum as assessed by the Corporation Commission. All the Justices concur, except, DUNN, J., absent, and not participating.

SHANNON et al. v. STATE, ex rel. DAVIDSON et al.

(Supreme Court of Oklahoma, March 26, 1912.)

(Syllabus by the Court.)

COUNTIES (§ 161)—INDEBTEDNESS—ALLOWANCE OF CLAIMS.

By virtue of section 9 of an act of the Legislature entitled "An act relating to the issuance of warrants or certificates of indebtedness, etc." (Sess. Laws, 1910-11, p. 180), the board of county commissioners is without authority to allow and approve a claim against any fund of the county, or to order a warrant therefor issued on such fund, where, during the fiscal year in which the claim is presented, claims have already been allowed and approved on such fund equal to the estimate made and approved by the excise board for such fund for the current fiscal year; and this is true, although there be to the credit of such fund a balance unexpended, derived from the taxes and revenues collected during the preceding year.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 220; Dec. Dig. § 161.*]

Error from District Court, Creek County; Wade S. Stanfield, Judge.

Mandamus, on the relation of Holmes Davidson and another, against L. O. Shannon and others. Judgment for relators, and defendants bring error. Reversed and remanded, with directions.

W. Morris Harrison, of Sapulpa, for plaintiffs in error. McDougal & Lytle, of Sapulpa, for defendants in error.

HAYES, J. This action was brought in the court below, on relation of defendants in error, Holmes Davidson and Theodore Berryhill, as guardian of Earl Berryhill, who will be hereafter referred to as relators, to compel by mandamus plaintiffs in error, constituting the board of county commissioners of Creek county, to approve certain claims of relators against the county, and to order warrants drawn therefor.

The judgment of the trial court sought to be reversed, by this proceeding awarded the peremptory writ as prayed for by relators. The trial in the court below was upon an agreed statement of facts, which, in so far as they are material to the question presented by this appeal, are as follows:

Relator Holmes Davidson is the county jailer of Creek county, and has in his care and custody the state and county prisoners confined in the county jail, and is charged with the duty of boarding and keeping them. The county, it is admitted, is indebted to him for the board of said prisoners in the sum of \$363; that relator has rendered and filed his account therefor in due form, as required by law. It is admitted that said claim is correct and due by the county, and is a proper charge against the contingent fund of the county; but the board of county commissioners refused to allow said claim, and to order a warrant issued therefor, for the reason

that the estimate approved and allowed by the excise board for the fiscal year 1911-12 for the contingent fund was exhausted. Relator Earl Berryhill is the owner of a building rented and occupied by the county, and it is admitted that the county is indebted to him as rents thereon in the sum of \$780; that an account therefor has been duly made and presented to the board of county commissioners for allowance; that said claim is a just charge against the court fund of the county, but that the county commissioners refused to allow said claim, for the reason that the estimate approved and allowed by the excise board for the court fund for the fiscal year 1911-12 has been exhausted. Although warrants have been drawn against the contingent and court funds of the county in an amount equal to the estimate made and approved for said funds for the fiscal year 1911-12, it is admitted that there is a balance on hand in the county treasury to the credit of the contingent fund in the sum of \$1,062; and a balance to the credit of the court fund in the sum of \$24,000, which said sums were paid into the treasury as taxes under the levy made for the fiscal year 1910-11; and that all charges against said funds for the fiscal year 1910-11 have been paid.

The sole question presented by the record in this proceeding is whether, under the provisions of an act of the Legislature approved March 15, 1911, entitled "An act relating to the issuance of warrants and certificates of indebtedness, etc." (Sess. Laws, 1910-11, p. 180), the board of county commissioners is authorized to allow claims against any fund in any fiscal year in excess of the estimate made and approved for such fund for said year, by reason of the fact that there is cash on hand in the treasury to the credit of such fund left over from the taxes levied and collected during the preceding year. Section 2 of the act makes it the duty of every officer authorized to allow, issue, or draw warrants against the public funds of any county to number them in their numerical order as they are issued on each fund, beginning with number 1, and issuing them consecutively each fiscal year; and the series for each year is required to be designated by writing the fiscal year on the warrant for which the levy to pay same has been made.

Section 4 requires that: "Each and every warrant or certificate of indebtedness must be drawn against a specific fund; and there shall be shown on such warrant or certificate of indebtedness by the officer or person issuing, drawing or attesting the same, the amount of the estimate made and approved for such purpose for the fiscal year or the specific amount authorized by a bond issue for said purpose; the amount of warrants or certificates of indebtedness issued or drawn against said fund and the net balance to the credit of said fund."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r. Indexes

Section 6 provides that: "Warrants and certificates of indebtedness may be issued to the amount of the *estimate made and approved by the excise board for the current fiscal year* or to the amount authorized for such purpose by a bond issue." (Italics are ours.)

Section 7 makes it unlawful for any officer to issue, approve, sign, attest, or register any warrant or certificate of indebtedness in any form in excess of the estimate of expenses made and approved for the current fiscal year, and renders a warrant so issued invalid against the county, and makes the officer issuing same and his bondsmen liable therefor.

Section 9 reads as follows: "It shall be unlawful for the board of county commissioners, the city council or the commissioners of any city, the trustees of any town, board of education, township board, school district board or any member or members of the aforesaid commissioners, or of any of the above-named boards, to make any contract for, incur, acknowledge, approve, allow or authorize any indebtedness against their respective municipality or authorize it to be done by others, in excess of the estimate made and approved by the excise board for such purpose for such current fiscal year, or in excess of the specific amount authorized for such purpose by a bond issue. Any such indebtedness, contracted, incurred, acknowledged, approved, allowed or authorized in excess of the estimate made and approved for such purpose for such current fiscal year or in excess of the specific amount authorized for such purpose by a bond issue, shall not be a charge against the municipality whose officer or officers contracted, incurred, acknowledged, approved, allowed or authorized or attested the evidence of said indebtedness, but may be collected by civil action from any official contracting, incurring, acknowledging, approving or authorizing or attesting such indebtedness, or from his bondsmen."

It is plain that the foregoing section makes it unlawful for respondents in this case to approve the claims of relators, unless the term "estimate made and approved" for any current fiscal year includes a balance left over to the credit of any fund from the taxes collected during a previous year, but that the term "estimate made and approved" has no such meaning seems clearly to be foreclosed by other provisions of the act; for the Legislature has, by section 3, defined this term in the following language: "The term 'estimate made and approved' as used herein is defined to mean the 'timized statement of the estimated needs of a municipality for its current expenses for the ensuing fiscal year, as approved and fixed by the excise board or by vote of the municipality, adding thereto the amount necessary to create a sinking fund to meet maturing bonds, judgments and interest coupons, but the

amount or limit to which warrants and certificates of indebtedness may be issued, shall not include the ten per cent. to be added to the estimate for delinquent taxes."

Applying this definition to the language in section 9, it is plain that the effect of that section is to limit the approval of claims by the board of county commissioners, not to the amount of funds that may be in the treasury at any time, or that may be received into the treasury during any fiscal year, but to the estimate of expenses made and approved by the excise board for that year. In other words, when a claim is presented to the county commissioners, in order for them to determine their authority relative to approving same, they are required to look, not to the condition of the account in the treasury, but to the amount of the estimate made and approved by the excise board, and the total amount of warrants or certificates already drawn against the fund for that year. If the amount of warrants previously drawn during the fiscal year, including the claim presented, does not exceed the amount of the estimate made and approved for that year by the excise board, the claim may be approved and a warrant ordered issued; but, if the amount of warrants previously issued, including the claim presented for allowance, exceeds the estimate made and approved for the fund against which the claim is a charge for any year, then there is nothing in the statute that authorizes the board to allow same, although there may be money in the treasury credited to such fund for previous years, but not exhausted by the charges against the fund for said years. To sustain relators' contention that the board of county commissioners are under duty to allow their claims because of the balance in the fund, derived from the taxes of a previous year, would be to extend the meaning of the terms of this statute as specifically defined by the statute itself. It is apparent that the Legislature intended that the terms of the statute should have a definite, fixed, unmistakable meaning, requiring no construction, because the statute has defined them, and has made the officers who violate the statute by approving claims or drawing warrants in excess of the amount authorized thereby liable personally for such warrants or claims, and subjects them to a prosecution for misdemeanor, and upon conviction to a fine of not less than \$100 nor more than \$1,000, and a forfeiture of their office.

Section 4 of an act of the Legislature entitled "An act to provide for the levying of taxes on ad valorem basis, etc.," approved March 17, 1910 (chapter 64, p. 199, Sess. Laws 1910), creates in each organized county in the state an excise board, to be composed of the county clerk, county treasurer, county judge, county superintendent, and county attorney, who shall perform the duties thereafter provided.

Section 4 makes it the duty of the excise board to meet at the county seat on the last Saturday in July of each year, for the purpose of examining the estimates of expenses of the county and for each city and incorporated town, township, and school district in the county, and to revise and correct any such estimate, where the amount thereof is in excess of the just and reasonable needs of the municipality for which same is made; and when they have approved each estimate, if the same is within the limits for current expenses provided for by section 1 of the act, said board shall then ascertain the assessed valuation of property taxed ad valorem in the county, and shall ascertain the probable income of the county and of each municipality or division thereof, other than ad valorem taxes, and then they shall make a levy sufficient to meet the expenses of the current year as approved in said estimates, and additional amounts necessary to provide a sinking fund to pay at maturity all bonded indebtedness of the county. Added to this amount, there shall be levied 10 per centum additional for delinquent taxes.

We think the Legislature by this section intended to provide, and does provide, that the excise board, in arriving at what amount of taxes shall be necessary to be levied in any year upon ad valorem basis in any county, shall first ascertain the probable income of the county for that year from all sources, including any balance that may be available from the revenues collected by the county during the preceding year or years unexpended; that such total income from all sources shall then be deducted from the estimate approved and allowed for the current year, and a sufficient levy of taxes upon ad valorem basis shall then be made by the board to raise the additional sum necessary under the estimate approved, unless such amount shall require a rate exceeding the rate fixed by the statute. The excise board may consider at such time the balance to the credit of any fund in the county treasury, for the purpose of determining the amount of taxes necessary to be levied; but when the board of county commissioners is called upon to approve or allow any claim against any fund of the county, or any officer, whose duty it is to issue a warrant when such claim is allowed, is called upon to issue such warrant, they may look only to the estimate made and approved by the excise board, and to the amount of claims allowed or warrants already issued thereunder during such fiscal year, to determine whether they are authorized to approve the claim, or to issue a warrant therefor. This view seems to us to be in entire harmony with the purpose of both of the foregoing acts of the Legislature, and to be the only procedure authorized by the plain language of the statute; and to give to it any other meaning

would be to legislate additional language into a statute whose language is not sufficiently ambiguous to require construction.

We are not unaware that this rule may operate to embarrass the administration of affairs in some counties, where the estimates made and approved by the excise board have proven insufficient to meet the expenses of the county; but it is an embarrassment that flows from the operation of the plain letter of the statute, and the courts are not justified in going beyond the law expressed in a plain statute, although to do so might relieve a difficult situation.

The validity or constitutionality of the act involved has not been questioned.

It follows from the foregoing views that the judgment of the trial court should be reversed and the cause remanded, with direction to dismiss.

TURNER, C. J., and KANE and DUNN, JJ., concur. WILLIAMS, J., absent, and not participating.

NATIONAL LIFE INS. CO. v. HALL et al.
(Supreme Court of Oklahoma, March 19, 1912.)

(Syllabus by the Court.)

1. INTEREST (§ 37*)—STIPULATIONS—AFTER MATURITY OF DEBT,

Where a promissory note drawing 5½ per cent. interest, payable semiannually, contains a clause which provides that the rate shall be increased to 12 per cent. in the event of default in payment of either principal or interest at maturity, held, such increased rate is in the nature of a penalty for nonperformance of contract, and such clause is void under section 1125, Comp. Laws 1909.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. § 37.*]

(Additional Syllabus by Editorial Staff.)

2. "INTEREST" (§ 37*)—"INTEREST" AND "PENALTY" DISTINGUISHED.

The term "interest," when used to designate a rate per cent. to be paid for the use of money, has a distinct significance derived from commercial usage, meaning simply the market value of the use of money, which value may be limited by law; while the term "penalty" is used to designate a clause in an agreement by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract contained in another clause of the same agreement. A "penalty" always includes two distinct agreements, so that when the first is fulfilled the second is void; and when a breach has taken place the obligee has the option to require the fulfillment of the first obligation or payment of the penalty, but not before (citing Words and Phrases).

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. § 37.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Kingfisher County; A. H. Huston, Judge.

Action by the National Life Insurance Company against Howard Hall and others. Judgment for plaintiff for less than the re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexed

Hef demanded, and it brings error. Affirmed.

Warren K. Snyder, of Oklahoma City, for plaintiff in error. W. L. Moore, of Hennessey, for defendants in error.

HARRISON, C. This action was begun May 25, 1908, by the National Life Insurance Company for foreclosure of mortgage on a certain 160-acre tract of land situated in Kingfisher county, and for judgment on principal note of \$1,200 and one past-due interest coupon for \$33, and for interest, costs, and attorney's fees provided for in note and mortgage. The cause was tried by the court May 25, 1909, resulting in judgment in favor of plaintiff for the foreclosure of the mortgage and judgment against Howard Hall and Medora A. Hall, his wife, for \$1,200, with interest thereon at the rate of 5½ per cent. from the 1st day of February, 1908, and for the further sum of \$33, with interest thereon at the rate of 12 per cent. per annum from the 1st day of February, 1908, until paid, and the further sum of \$50 attorney's fees, with interest thereon from the date of judgment at the rate of 6 per cent. per annum until paid.

Plaintiff excepted to this judgment, claiming that he was entitled to 12 per cent. interest on the principal note, instead of 5½ per cent. given in the judgment. This claim for increased rate of interest is based upon the provisions of the note, which provide for the payment of 5½ per cent. per annum until maturity on principal note and interest coupon, and for interest at the rate of 12 per cent. per annum in the event of default in payment of the principal note or any of the coupon notes at maturity. Judgment for the increased rate of interest was refused by the trial court, on the ground that that provision of the note and mortgage providing for an increased rate of interest in case of default in the payment of the several sums, or any of them when they became due, was in the nature of a penalty, and in violation of statute. The note sued on is as follows:

" * * * On the first day of February, 1910, I promise to pay to the order of the Deming Investment Company, a corporation, the principal sum of twelve hundred and 20/100 dollars, with interest thereon at the rate of 5½ per cent. per annum from Dec. 9, 1902, until maturity, payable semiannually, according to the tenor of fourteen interest notes, one being for forty-two and 30/100 dollars, and thirteen others for thirty-three and no/100 dollars each, all of even date herewith; both principal and interest notes payable at the National Park Bank, New York City, N. Y. If default be made for ten days in the payment of any sum, either principal or interest, after the same becomes due and payable according to the terms hereof, then the whole amount herein

promised to be paid, shall, at the option of the holder hereof, at once become due and payable. All sums herein promised to be paid shall bear 12 per cent. per annum interest after maturity, payable annually, whether the same become due according to the terms hereof, or by reason of any default of any payment of principal or interest. Privilege reserved to pay \$100 or any multiple thereof, Feb. 1st, 1904, or at any interest pay day thereafter by giving 60 days' written notice. Dated this 9th day of December, 1902.

his
"Howard X. Hall,
mark

her
"Medora A. X. Hall,
mark

"Attest: E. B. Cockrell.

"Copy: A. W. Westlake.

"M. K. O. Form B. [Copy.]"

[2] It is conceded, and correctly so, by counsel for both plaintiff and defendant in error, that there is but one question involved in this case, namely, whether the increased rate of interest provided for in the note and mortgage, in case of default in payment at maturity, shall be construed as interest proper, or as penalty for failure to pay when due. If it be interest merely, then the provision is valid and binding. If purely a penalty, then it is void under the statutes. Therefore, a determination of the question depends upon the distinction between the terms "interest" and "penalty." On the question of the validity of such a provision, there is a sharp conflict and much confusion among the authorities, which conflict is due, to a great extent, to a difference in statutes, and, to some extent, to a confusion of the terms "interest" and "penalty" and a failure to distinguish between the terms "penalty" and "liquidated damages." See Hubbard v. Callahan, 42 Conn. 524, 19 Am. Rep. 564; Scottish American Mortgage Co. v. Willson et al. (C. C.) 24 Fed. 310, and the line of precedents cited and followed by each of the above authorities; also Conn. Mutual Life Ins. Co. v. Wosterhoff, 58 Neb. 379, 78 N. W. 724, 76 Am. St. Rep. 101, and the line of authorities therein cited and followed. Each term has a distinct significance, and the three should not be used interchangeably. Bouvier's Law Dictionary; Anderson's Law Dictionary; Words and Phrases.

It is true that liquidated damages partake to an extent of the nature of a penalty; but there may be a penalty without any of the elements of liquidated damages; while the term "interest," when used to designate a rate per centum to be paid for the use of money, does not necessarily include the elements of either of the other terms. It derives its distinct significance from commercial usage, rather than from the courts, and means simply the market value of the use

of money, which value, of course, may be limited by law.

Therefore, after a careful review of authorities, observing the confusion and conflict among them; and in view of the statutes, we conclude that the safer determination of the question at bar may be had from the meaning implied by the language of the note. If it appears from the language of the note that the parties had in contemplation, or under consideration, the earning power this money might have after maturity, or what its use might be worth because of some contemplated investment, or what its retention might be worth to the makers, and the minds of the parties met in contract and agreed, as to what the use of such money would be worth in either case, and their subsequent acts show this to be the meaning intended, then we think the increased rate should be treated as *interest on money*, as distinguished from *penalty* for nonpayment. But, on the other hand, if it appears from the face of the note that such provision for an increased rate after maturity, or in case of default, is intended merely as an incentive to prompt payment, or as a punishment for nonpayment, and that after default payment will be enforced anyway, and the acts of the parties show this to be the meaning intended, then it should be treated as a penalty, and as void under the statutes.

The two clauses in the note from which this question arises are as follows: "If default be made for ten days in the payment of any sum, either principal or interest, after same becomes due and payable according to the terms thereof, then the whole amount herein promised to be paid, shall, at the option of the holder hereof at once become due and payable." "All sums herein promised to be paid shall bear 12% per annum interest after maturity, payable annually, whether same become due according to the terms hereof, or by reason of any default of any payment of principal or interest."

Bouvier defines penalty to be "a clause in an agreement by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract contained in another clause of the same agreement." "A penalty is defined to be a clause in an agreement by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract, contained in another clause of the same agreement. A penal obligation differs from an alternative obligation, for it is but one in its essence; while a penalty always includes two distinct engagements, and when the first is fulfilled the second is void. When a breach has taken place, the obligee has his option to require the fulfillment of the first obligation or payment of the penalty, but not before." *Danforth v. Charles*, 1 Dak. 285, 46 N. W. 576.

[1] It is plain from the language of the

note, and under the definitions above quoted, that the increased rate of interest was intended as a penalty, and for no other purpose. Especially is this true in view of the action of the plaintiff in instituting proceedings to foreclose, and demanding the payment of the increased rate before the maturity of the principal note, and as soon as default was made in the payment of one of the interest coupons. Had this clause in the note been intended to mean an increased rate of interest for the use of the money after maturity, and had it been so construed and agreed upon by the parties to the contract, we cannot believe that the plaintiff would have instituted foreclosure proceedings as soon as one of the \$33 interest coupons became due and before the principal note matured.

Section 815 of Wilson's Rev. & Ann. St. 1903 (section 1125, Comp. Laws 1909), reads as follows: "Penalties imposed by contract for any nonperformance thereof are void. But this section does not render void such bonds or obligations penal in form as have heretofore been commonly used. It merely rejects and voids the penal clauses."

In view of the language of this clause in the note and the construction placed thereon by the parties, and in view of their action in the premises, the increased rate therein provided for was not intended as an extra compensation for an extended use of the money. No extension was intended to be granted, and none was granted; but as soon as default was made a forfeiture was declared and the forfeit demanded. It could not have been demanded upon any ground whatever, except for nonperformance of the contract. This, it seems to us, is the test of the question; and, this being true, such clause is void under the statutes, and the court below was correct in so holding.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. CONWAY.
(Supreme Court of Oklahoma. Feb. 6, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 218*)—TRANSPORTATION OF LIVE STOCK—BILL OF LADING—NOTICE OF INJURY.

When a bill of lading, under which live stock are shipped by rail, provides that, as a condition precedent to recovering damages for loss, or injury, or detention, or delay in transportation, the shipper shall give written notice to the company before the stock is removed from the place of destination, and before such stock is mingled with other stock, and that such notice shall be given within one day after the delivery of the stock, such notice is necessary as a condition precedent to recovery.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

2. CARRIERS (§ 228*) — TRANSPORTATION OF LIVE STOCK—NOTICE OF INJURY—BURDEN OF PROOF.

In such a case, the burden of proof rests upon the plaintiff to show that the notice was given within the time provided.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

3. CARRIERS (§ 228*) — HEARSAY — PROOF OF NOTICE.

The testimony of the plaintiff, to the effect that he prepared a written notice and left it with his commission firm at destination, and that they afterwards wrote him that they had filed it with the defendant, is incompetent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.*]

(Additional Syllabus by Editorial Staff.)

4. CARRIERS (§ 218*) — TRANSPORTATION OF LIVE STOCK—INJURY—NOTICE—TIME.

A provision of a live stock bill of lading, requiring immediate notice of claim for injury, detention, or delay before the stock is removed from destination or mingled with other stock, is not invalid as contrary to public policy.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Noble County: W. M. Bowles, Judge.

Action by Mike R. Conway against the Chicago, Rock Island, & Pacific Railway Company to recover damages sustained from delay in the shipment of live stock from Billings, Okl., to Kansas City, Mo., prior to statehood. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiff in error. Henry S. Johnston, of Perry, for defendant in error.

AMES, C. [1] At the trial there was evidence tending to show an unreasonable delay in the shipment of these cattle and a shrinkage in weight and value, caused thereby. The only points necessary to a decision are whether or not written notice, as required by the bill of lading, was necessary, and, if so, upon whom rested the burden of proof. The seventh paragraph of the bill of lading contains the following provision: "That, as a condition precedent to claiming or recovering damages for any loss or injury to or detention of live stock, or delay in transportation thereof, covered by his contract, the second party, as soon as he discovers such loss or injury, shall promptly give notice thereof in writing to some general officer, claim agent or station agent of the first party, or to the agent at destination or to some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, as the case may be, and before such stock is mingled with other stock; and such written notice shall in any event be

served within one day after delivery of the stock at its destination, in order that such claim may be fully and fairly investigated. It is agreed that a failure to strictly comply with all the foregoing provisions shall be a bar to the recovery of any and all such claims."

It will be noticed that this paragraph applies specifically to any injury caused by "delay in transportation"; and therefore the loss claimed is one to which the contract applies. The validity of this provision, in the absence of evidence to the contrary, has been upheld by this court too often to require discussion, and it follows that it was necessary for the notice to be given. St. Louis & San Francisco R. R. Co. v. Phillips, 17 Okl. 264, 87 Pac. 470; Missouri, K. & T. Ry. Co. v. Davis, 24 Okl. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 886; Patterson v. Missouri, K. & T. Ry. Co., 24 Okl. 747, 104 Pac. 31; St. Louis & S. F. R. Co. v. Cake, 25 Okl. 227, 105 Pac. 822; Missouri, K. & T. Ry. Co. v. Hancock, 26 Okl. 254, 109 Pac. 220; Missouri, K. & T. Ry. Co. v. Hancock & Goodbar, 26 Okl. 285, 109 Pac. 223; Midland Valley R. Co. v. Ezell, 29 Okl. 40, 116 Pac. 168; Missouri, K. & T. Ry. Co. v. McLaughlin, 29 Okl. 345, 116 Pac. 811.

It is true that in the Patterson Case, supra, it was held that this notice was unnecessary, where the claim was for hogs killed in transit, which were removed from the car by the employees of the railroad company. But in this case the reason for the requirement applies, as the condition of the live stock at the time they were delivered was very material, and the defendant was entitled to an examination of them, in order that it might ascertain their condition and the extent of the injury.

[2] The notice being necessary, and there being no competent evidence showing the contents of such notice or when it was given, it becomes necessary to decide whether the burden of proof rested on the plaintiff to show that he gave notice, or whether the burden rested on the defendant to show that the plaintiff did not give it. If the burden rested on the plaintiff, then he was not entitled to recover on the evidence offered; while, if the burden rested on the defendant, then the absence of this evidence would not prevent a recovery by the plaintiff.

It will be observed that by the language of the contract the giving of this notice is made a condition precedent to recovery.

This question has been before the court in five cases, in four of which the court has held that the burden rests on the plaintiff, and in one of which the court has accepted the defendant's assumption of the burden of proof.

In St. Louis & San Francisco R. R. Co. v. Phillips, supra, the provision of the bill of lading was substantially the same as here.

*For other cases see same topic and section, NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r. Indexes.

The question arose on the pleadings. The plaintiff sued on the contract. The defendant admitted the execution of the contract, and alleged that the plaintiff had failed to give the notice required. The reply was a general denial, unverified. The plaintiff did not allege affirmatively that he had given the notice; nor did he plead any facts constituting a waiver of it. In the first paragraph of the syllabus, it is said: "Where it is alleged in said answer that this provision of the contract has not been complied with, and where the plaintiff files a reply setting up only a general denial, such written contract is thereby admitted; and where neither the petition nor the reply contains an allegation of compliance with the conditions of the bill of lading or contract, and the said pleadings on the part of the plaintiff contain no allegation of waiver of such contract, and no facts are alleged therein tending to show an actual or substantial compliance with the said bill of lading or contract, and no excuse is offered or set up in the pleadings for the noncompliance, said pleadings do not state a cause of action in favor of the plaintiff, and a motion for judgment for the defendant on the pleadings should be sustained, in the absence of any request for leave to amend by the plaintiff." On page 271 to 17 Okl., 87 Pac. 473, it is said: "Upon this bill of lading and its accompanying shipping contract, the plaintiff based his cause of action. This, of itself, would put upon the plaintiff the responsibility of proving compliance with the material parts of said contract on his part." On page 272 of 17 Okl. 87 Pac. 473, it is said again: "The burden was upon the plaintiff, not only to prove, but to allege in his pleadings, a compliance with the terms of the contract, for breach of which he sues." And on page 275 of 17 Okl., 87 Pac. 474, it is said again: "We take it to be the true rule of pleading that, where there is a condition precedent to be observed before an action can be maintained or a cause of action exist, the plaintiff must show that the condition has been performed, either actually or substantially, or that he has been in some way released from that condition by the act of the opposite party, and that, in the absence of such averment, the petition does not state facts sufficient to constitute a cause of action."

In *St. Louis & S. F. R. Co. v. Cake*, 25 Okl. 227, 228, 105 Pac. 322, 323, the identical question involved in the Phillips Case was decided, and the same clause of a bill of lading was under consideration. It is said in the syllabus: "Where neither the petition nor the reply contains an allegation of compliance with the conditions of the contract, and the said pleadings on the part of the plaintiff contain no allegation of waiver of such contract, and no facts are alleged therein tending to show an actual or substantial compliance with the said contract, and no

excuse is offered or set up in the pleadings for the noncompliance, said pleadings do not state a cause of action in favor of the plaintiff, and a motion for judgment for the defendant on the pleadings should be sustained, in the absence of any request for leave to amend by the plaintiff."

And on page 233 of 25 Okl., 105 Pac. 325, the following is quoted from the opinion in the Phillips Case: "Therefore, the execution of the contract being admitted, and the bill of lading referring thereto and containing practically the same provision in regard to notice as a condition precedent to any claim for damage accruing to the shipper, the compliance with said condition precedent, and with the terms of said contract, could not be predicated or gathered from a general denial. It would certainly seem to be the duty of the defendant in error, upon admitting the execution of the contract, to either specially allege compliance with the terms thereof, or to specially plead some of the facts, if any such there were which might tend to show a substantial compliance with the terms of said contract, and which might tend to relieve him from compliance therewith, or he should in some form have alleged a waiver of the terms of said contract on the part of the defendant. Neither of these things were done by the defendant in error. Now, it is a well-recognized principle of pleading that, where a party relies for his cause of action upon a breach of a written contract, the burden is upon him to allege and prove every material element necessary to his recovery thereunder. In other words, before he can complain of a breach of contract on the part of the other party, he must show that he has actually or substantially complied with the terms of the contract himself, or has been released therefrom by the other party."

In the *Hancock & Goodbar Case*, supra, Mr. Justice Hayes, in a case very similar to the one at bar, held that the plaintiff was not entitled to recover without complying with this clause of the contract. On page 268 of 26 Okl., 109 Pac. 223, he says: "The contract stipulates that, as a condition precedent to the shipper's right to recover any damages for any loss or injury to the live stock shipped, resulting from the carrier's negligence, including delays, the shipper shall, within 30 days after the happening of the injuries complained of, file with the freight or station agent of the carrier his claim for damages, giving the amount thereof, and stipulates that no suit shall be brought against the carrier after the lapse of 90 days from the happening of the injury. The evidence fails to disclose that any claim for damages was filed by plaintiffs before the institution of this action, and the suit was not brought until after the expiration of 90 days from the happening of the injuries complained of. The trial court refused to give, at the request of defendant, in-

structions charging the jury that, if they found that such claim had not been made within 30 days, and suit had not been brought within 90 days from the happening of the injuries, the verdict should be for the railway company."

As there was no evidence in that case to show that a claim was filed within the time limited, it was held by the court that the case should be reversed. This being true, it necessarily follows that the burden was on the plaintiff to offer this evidence. That is the exact condition of the case at bar. There is no competent evidence here to show when the claim was filed, or what the claim was, and, this being true, the Hancock & Goodbar Case holds squarely that the plaintiff was not entitled to recover.

In the Exell Case, *supra*, 29 Okl. 40, 116 Pac. 163, the second paragraph of the syllabus is as follows: "In an action upon such contract for loss and injury to live stock during transportation, a petition, which fails to allege compliance with the conditions of the contract requiring notice of the claim of damages or waiver thereof, is defective and insufficient to state a cause of action." If the failure to allege compliance with the contract renders the petition insufficient, then, of course, it follows that the burden of proof rests upon the plaintiff to show compliance with the contract.

In the Patterson Case, 24 Okl. 747, 104 Pac. 31, however, the fourth paragraph of the syllabus is as follows: "If the carrier seeks to escape liability on the ground that the loss of or injury to the goods is one excepted by a valid special contract, he has the burden of proving, not only the making of such special contract, but also that the loss or injury for which the action is brought falls within a specified exception contained in such special contract." This point, however, was rested on the fact that the defendant had voluntarily assumed the burden of proof, and does not apply to the facts in the case at bar. The conclusion here reached is likewise supported by the decisions of the court in other cases involving the construction of similar provisions in other contracts.

In Gray v. Reliable Ins. Co., 26 Okl. 592, 110 Pac. 728, the first paragraph of the syllabus is as follows: "A policy, providing that in case of loss the insured shall mail written notice to the home office at Oklahoma City within 48 hours after the hail occurred; that the company's adjuster, after receiving such notice, shall make an estimate of such loss, and shall send his written estimate of the same to the home office, and mail or deliver a copy to the insured; that, if the insured be not satisfied with such estimate, the amount of the loss may be ascertained by three competent appraisers, the assured and insurer each selecting one, and the two so chosen selecting a third, and the finding of either two of them to be binding as to the

amount of the loss; that, if, within 20 days after such loss, the insured has not received a copy of the estimate of the adjuster, then the insured shall, within 2 days after the expiration of the said 20 days, proceed in the same manner provided, in case he is not satisfied with the estimate of the company's adjuster, to have the amount of the loss determined by three competent appraisers; that suit may not be maintained, unless notice of such loss is given and the amount thereof thus ascertained. It is further provided that in any event, if the insured failed to send to the home office the amount of his premium note, etc., by registered mail, or if the amount of the said premium note be not so mailed, within 2 days after the expiration of the said 20 days, then the company shall not be liable to the assured for any amount. *Held*, that a petition which sets out the policy, but contains no allegation of the giving of the notice or of any facts excusing a failure to give one, is demurrable as not stating a cause of action."

In National Drill & Mfg. Co. v. Davis, 29 Okl. 625, 120 Pac. 976, decided November 14, 1911, and not yet officially reported, suit was brought by Davis upon a written contract for commissions. The contract, amongst other things, provided: "Said second party agrees to guarantee every sale made by him to be honest, fair, valid, and subject to no defense arising from anything done, or suffered or omitted by said second party." The court quote section 4326, Wilson's Statutes, as follows: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance"—and then say: "It seems that the burden was upon the plaintiff to prove on the trial at nisi plus a compliance with the agreement which he pleaded and relied upon."

The plaintiff seeks to distinguish the Phillips, Davis, and Cake Cases (the others were not published when the briefs were filed) on several grounds, most of which are disposed of by what has been said; but one, undisposed of, is that in those cases the defendant specifically pleaded the contract and alleged the plaintiff's failure to comply with it, while in this case the answer was a general denial. The plaintiff, however, based his cause of action upon the written contract, and excused himself for not attaching a copy as an exhibit to his petition by an allegation that he had delivered his copy to the defendant, who still had possession of it. He further pleaded that he had given to the defendant a written notice of his claim for damages, and excused himself for not attaching a copy of that by the allegation that it was in the possession of the defendant. The suit in this case, therefore, was on the contract, just as

it was in the cases cited; and the only difference is that here the question arises on the proof, and not on the pleadings.

[3] The plaintiff testified that he prepared a written notice and left it with his commission firm in Kansas City; that the firm subsequently wrote him that it had filed the notice; and that he thereafter saw it in the possession of the claim agent of the defendant. It is so manifest that this testimony was insufficient, either to establish the contents of the notice given, or the time within which it was given, that it is unnecessary to dwell on the proposition. Such evidence was wholly insufficient to sustain the burden of proof resting on the plaintiff.

[4] The able argument of the plaintiff that this provision of the contract is against public policy is foreclosed by the previous decisions of the court. Many authorities are cited by the plaintiff to show that this provision of the contract may be waived; but it is unnecessary to consider the question, as there is not sufficient evidence in the record on which to sustain the contention.

For the reasons herein stated, we think the case should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

CLAWSON v. COTTINGHAM et al.
(Supreme Court of Oklahoma, July 18, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICT.

Where a jury decides an issue of fact under proper instructions, their verdict will not be disturbed on appeal, if the evidence tends reasonably to support it; and the facts as found by them will be treated on appeal as true, though controverted by the opposite party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. INDIANS (§ 10*)—INDIAN LANDS—OWNERSHIP BY WHITE MAN—CONVEYANCE.

A white man, not a member of the Osage Nation, could not own lands in the Osage Nation in August, 1906; and a deed from him to lands in that Nation was void, and constituted no consideration for notes given in payment for the land.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 25, 29, 46; Dec. Dig. § 10.*]

3. VENDOR AND PURCHASER (§ 189*)—VOID SALE—ACTION FOR PRICE—ESTOPPEL.

The defendant was not estopped, by taking possession of the land under the deed, from making the defense that it was illegal and void.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 381-383; Dec. Dig. § 189.*]

4. INDIANS (§ 10*)—INDIAN LANDS—SALE AND IMPROVEMENT.

The provision of section 2 of the act for the division of the lands and funds of the Osage Nation (Act June 28, 1906, c. 3572, 34 Stat. 539), "that where members of the tribe

are in possession of more land than they are entitled to after first selection herein, said members shall have sixty days after the approval of this act to dispose of the improvements on said land to other members of the tribe," did not confer on persons, not members of the tribe, the right to dispose of the improvements.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 25, 29, 46; Dec. Dig. § 10.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Osage County; L. N. Poe, Judge.

Action by J. B. Clawson against C. B. Cottingham and Ida Cottingham. Judgment for defendants, and plaintiff brings error. Affirmed.

Boone & McDonald, of Pawhuska, for plaintiff in error. T. J. Leahy, of Pawhuska, for defendants in error.

ROSSER, C. This was a suit by J. B. Clawson against C. B. Cottingham and Ida Cottingham to recover on two notes for the sum of \$600 each, given for part of the purchase price of certain improvements in the Osage Nation. The notes were executed August 19, 1906, and were due respectively, December 1, 1906, and September 1, 1907. J. B. Clawson is a white man, and not a member of the Osage Tribe of Indians. He married a member of the tribe, who died before the notes were given, and by her was father of four children, members of the tribe entitled to a share of the tribal property. C. B. Cottingham is a white man, not a member of the Osage Tribe, but his wife and codefendant is a member of the tribe; and she and their two children are entitled to share in the property of the tribe.

The plaintiff was in possession of the land and improvements, for the purchase price of which the notes were given, and had been in possession for some years before the trade was made; and the defendant C. B. Cottingham had worked the farm as his tenant for several years. The defendant C. B. Cottingham had raised a corn crop on it the year he purchased it, and retained all the corn, including what plaintiff would have received as rent if Cottingham had paid rent, as he was accustomed to do. The land was filed upon and taken as an allotment by defendants Ida Cottingham and some of the children of defendants.

There was a verdict and judgment for the defendants, and plaintiff has appealed.

The court instructed the jury, in substance, that if the plaintiff had made improvements on the land sold, or caused them to be made, on behalf of his minor children, who were members of the Osage Tribe of Indians, and had sold the improvements and possessory right to the land on behalf of his minor children, that they should find for the plaintiff. He also instructed the jury that the parents of minor children were the natural guardians of the children, and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

if plaintiff entered upon the Osage reservation and reduced the land in question to possession, and had placed lasting and valuable improvements there for the benefit of his minor children, that he had a right to sell the improvements and could recover; and that if the improvements were placed there for the use and benefit of any other person than his minor children that he was a trespasser and had nothing to sell. He also instructed the jury that the notes "imported consideration," and the burden was on the defendants to show that plaintiff was not entitled to recover. This statement of the law seems to be as favorable as the plaintiff was entitled to.

The plaintiff had no right to the possession of the lands, or to hold them for any purpose, except on behalf of his children and for their benefit. Section 2118 of the Revised Statutes of the United States provides: "That every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States and any Indian tribe, who surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees or otherwise, is liable to a penalty of one thousand dollars. The President may moreover take such measures to employ military force as (he) may judge necessary to remove any such person from the lands."

[1] The jury found that plaintiff was not dealing with the lands on behalf of his minor children, and there is sufficient evidence to sustain their finding; and this court will treat the fact that he was acting in his own interest as established. *City of Wynnewood v. Cox*, 122 Pac. 528. While the plaintiff stated that he was representing himself and his children, still a reading of his entire testimony shows that he considered the lands and moneys for the price of the land his own, as the following extracts from his examination will show: "Q. What interest were you referring to for yourself? A. I had money I handled all the time. I had some interest in there, because I had some money in there. Q. It was your money that you were trying to get out of the place? A. No, sir; everything that is mine is part my children's. Q. Why didn't you take the notes in their name? A. Because I didn't want to. I have always done a straight forward business." The fact that he took the notes in his own name, and brought suit upon them in his own name, is strong indication that he considered them his.

[2] It has been decided several times that section 2118 prohibits any person, except a member of an Indian tribe, from holding or attempting to hold lands within the reservation of such tribe. See *Denton v. Capitol Townsite Co.*, 5 Ind. T. 396, 82 S. W. 852; *McLaughlin v. Ardmore Loan & Trust Co.*, 21 Okl. 173, 95 Pac. 779; *Combs v. Miller*, 24 Okl. 576, 103 Pac. 590.

[3] It is contended that the defendants are estopped to deny the consideration of the notes sued on; but an estoppel cannot arise out of a transaction which is void as contrary to public policy. In this case the law prohibited the plaintiff from dealing with the land, as he attempted to do; therefore the law will not create an estoppel in his favor. See *Mayes v. Cherokee Strip Live Stock Ass'n*, 58 Kan. 712, 51 Pac. 215; *Sheldon v. Donohoe*, 40 Kan. 348, 19 Pac. 901; *Swanger v. Mayberry*, 59 Cal. 81; *Light v. Gonover*, 10 Okl. 732, 63 Pac. 968.

[4] The plaintiff claims that section 2 of the act for the division of lands and funds of the Osage Nation in Oklahoma Territory, and for other purposes (34 Stat. 839), gave him the right to sell the land. The provision upon which he relies is as follows: "That, where members of the tribe are in possession of more land than they are entitled to after first selection herein, said members shall have sixty days after the approval of this act to dispose of the improvements on said land to other members of the tribe." This transaction took place within 60 days; but, as already stated, the plaintiff was not a member of the tribe, and, as found by the jury, was selling the land for himself, and not for his children. He had no right to either hold or sell it for his own benefit. This being true, the provision relied upon does not apply, and he cannot recover.

The judgment should be affirmed.

PER CURIAM, Adopted in whole.

GAMEL v. HYND

(Supreme Court of Oklahoma, March 19, 1912.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 452*)—ACTION BY TRANSFEREE AGAINST MAKER—DEFENSE—FRAUD.

It is no defense to an action by the transferee of a negotiable promissory note against the maker that the payee was induced by fraud to transfer the note to plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1302, 1352-1364, 1367-1376; Dec. Dig. § 452.*]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 1177*)—DISPOSITION OF CAUSES—REVERSAL.

While ordinarily on reversal, where the facts are undisputed, it is the duty of the Supreme Court to render judgment, yet, where it appears that material evidence on defendant's behalf was excluded, because not in proper form, the case will be remanded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8597-4604, 4606-4610; Dec. Dig. § 1177.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Pontotoc County; Robt. M. Raffey, Judge.

Action by J. A. Gamel against J. C. Hynds

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and Agnes Hynds, Judgment for defendants, and plaintiff brings error. Reversed and remanded.

R. W. Shepherd, of Chickasha, and J. F. McKeel, of Ada, for plaintiff in error. Clinton A. Galbraith, and Tom D. McKeown, both of Ada, for defendants in error.

ROSSER, O. This was an action by J. A. Gamel against J. C. Hynds and Agnes Hynds on three notes for the sum of \$800 each, dated at Sulphur, Ind. T., August 17, 1906, and due, respectively, August 17, 1908, August 17, 1909, and August 17, 1910, executed by the defendants to N. B. Breckenridge, and by him transferred to plaintiff as collateral security for a note which Breckenridge had executed to him. The notes, upon their face, show that they were given for a part of the purchase price of certain real property in the town of Ada, Ind. T., and show that they were secured by a vendor's lien on the property. Upon the trial of the cause, there was a verdict and judgment for the defendants, and plaintiff has appealed.

[1] The court instructed the jury that if the notes were transferred by Breckenridge to the plaintiff as collateral security for the note given by Breckenridge to plaintiff, and if the execution of that note was secured by fraud and misrepresentation on the part of the plaintiff, they should find for the defendants. This was error. The defendants had no right to defend the action upon the ground that the assignment of the notes from Breckenridge to Gamel had been procured by fraud. The maker of a promissory note cannot, in an action brought against him by the indorsee or transferee thereof, litigate questions that can properly arise only between the holder and his immediate indorser. *Hulley v. Chedic*, 22 Nev. 127, 36 Pac. 783, 58 Am. St. Rep. 729; *Johnson v. Conklin*, 119 Ind. 109, 21 N. E. 462; *Butler v. Sturges*, 6 Blackf. (Ind.) 186; *Blacker v. Dunbar*, 108 Ind. 217, 9 N. E. 104; *Fairfield v. Adams*, 16 Pick. (Mass.) 381; *Nicolay v. Fritschle*, 49 Mo. 67; *Cocker v. Cocker*, 2 Mo. App. 451; *Brown v. Clark*, 14 Pa. 469; *Wells v. Schoonover*, 9 Helsk. (Tenn.) 805; *Hutchings v. Rienhalter*, 23 R. I. 518, 51 Atl. 429, 58 L. R. A. 680; *Brown v. Chenoworth*, 51 Tex. 469; *Gelsreiter v. Sevier*, 33 Ark. 522; *Booker v. Robbins*, 26 Ark. 660.

In *Caldwell v. Lawrence*, 84 Ill. 161, the court said: "One of them pleaded specially that plaintiff, for a valuable consideration, had delivered the note back to the payee, and thereby had parted with all his right and interest in the note, and that the right of action had revived in the payee. A demurrer was sustained to this plea, and, we think, very properly. The legal title to the note was still in plaintiff, and the facts averred simply showed that the payee was equitably entitled to the proceeds; but this is a question with which defendant need not concern

himself. It is not alleged he had any defense to the note as against the payee; and in whom were the equities is a matter of no consequence. Had the plea set forth facts which constituted a defense to the note, either in whole or in part, a very different question would have been presented. The legal title of the note remaining in plaintiff, the fact that payee may have been the equitable owner constitutes no sort of defense to the action. The suit was rightfully brought in the name of the party in whom was the legal title to the indebtedness; and it can make no difference to defendant who may have been the equitable owner of the note, if he had no defense on the merits."

In *Robinson Reduction Co. v. Johnson*, 10 Colo. App. 135, 50 Pac. 215, the court said: "The defendant undertook to inquire into the consideration of the assignments to the plaintiff, and the court refused to admit the evidence. If the defendant owed the debt, payment to the assignee would discharge it; and it is immaterial what, as between assignors and assignees, the consideration was, or whether there was any. *Welch v. Mayer*, 4 Colo. App. 440, 36 Pac. 613; *Walsh v. Allen*, 6 Colo. App. 303, 40 Pac. 473." See *Blackford v. Westchester Fire Ins. Co.*, 101 Fed. 90, 41 C. C. A. 226; *Allen v. Brown*, 44 N. Y. 228.

The assignor or indorser on negotiable instruments must protect his own interest, where he has been induced to assign or indorse through fraud; and the maker cannot defend or set up matters of defense which only exist between the indorser and indorsee. Breckenridge would have the right to protect himself by proper proceedings, if he was defrauded into transferring the note.

In the present case a defense on the merits was pleaded, in that it was claimed that the notes were executed as an accommodation; but there was a failure of proof upon that allegation, and the proof as to how plaintiff became the holder of the notes became immaterial, because it was a question with which the defense had no concern.

The conclusions arrived at here are in no way in conflict with the decision of *Jones v. Wheeler*, 23 Okl. 771, 101 Pac. 1112. In that case it was shown in the evidence on the part of plaintiff that the note was transferred by the executor of the estate of Wm. G. Wheeler without authority, order, or proceedings in the probate court, and it was held that a transfer of the executor, without such an order or authority, was without validity, and did not convey the title to the note; and the effect of the decision was that a recovery by the transferee or indorsee would not have been a protection against a suit by the true owners of the note. In the present case, however, it is admitted that the legal title to the note passed to the plaintiff; and until the indorsement or transfer to him was canceled by proper proceedings brought by the

payee, Breckenridge, plaintiff had the right to sue upon the note, and a judgment in his favor would have been a bar to any action against the maker by Breckenridge.

There was an effort made to prove the judgment of the court of Mexico in favor of Breckenridge upon the note, for the payment of which the notes in suit in this case were transferred as collateral, but it failed for want of proper certification; and there was absolutely no proof offered, or attempted to be offered, tending to show that the notes sued on were given for the accommodation of Breckenridge.

[2] Ordinarily, where the facts are undisputed, it is the duty of this court to render judgment; but it appears in this case that some material evidence on behalf of defendants was excluded because not in proper form, and it is therefore deemed proper that this case should be reversed and remanded. If it should appear upon another trial that the defendants were accommodation makers of the notes, and that the plaintiff obtained them by fraud, the defendants would be entitled to prevail.

PER CURIAM. Adopted in whole.

JORDAN et al. v. NEER et al.
(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES (§ 157*)—OFFICIAL BOND—SURETY'S LIABILITY.

Sureties on the official bond of a sheriff are only answerable for the acts of their principal while engaged in the performance of some duty imposed upon him by law, or for an omission to perform such duty.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 354-371; Dec. Dig. § 157.*]

2. SHERIFFS AND CONSTABLES (§ 157*)—OFFICIAL BOND—SURETIES' LIABILITY—COLOR OF OFFICE.

To constitute color of office, such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorized the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties on his official bond.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 354-371; Dec. Dig. § 157.*]

(Additional Syllabus by Editorial Staff.)

3. SHERIFFS AND CONSTABLES (§ 100*)—MISCONDUCT OF DEPUTIES—SHERIFF'S LIABILITY.

Where plaintiff's husband was shot and killed by deputy sheriffs, and the shooting was not justifiable under the circumstances, but constituted a trespass for which the deputies would be answerable in damages, the sheriff would also be liable as an individual participant

in the affair, if he was present, aiding, assisting, abetting, or encouraging.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 158-173; Dec. Dig. § 100.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Washington County; Presale B. Cole, Judge.

Action by Pauline Neer and others against John D. Jordan and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

John E. Palmer, J. R. Charlton, and Montgomery & O'Meara, all of Bartlesville, for plaintiffs in error. Chas. W. Pennel, of Bartlesville, and F. J. Oyler, of Iola, Kan., for defendants in error.

BREWER, C. This is a suit against the sheriff of Washington county, two of his deputies, and the sureties on his official bond.

It was brought by Pauline Neer, as widow of John Neer, deceased, to recover for the alleged wrongful death of her husband at the hands of the sheriff, John D. Jordan, and his deputies, R. S. Duke and John C. Vann. It was tried in the district court of Washington county on September 27, 1909, and resulted in a verdict and judgment of \$2,500 against all of the defendants, except one of the bondsmen, for whom the court directed a verdict.

The portion of the petition intended to show liability upon the part of the defendants, including the sureties on the official bond, is as follows: "Plaintiff further states that on the 20th day of January, 1909, at about 11 o'clock p. m. of said date, the deceased, John Neer, was legally, lawfully, and peaceably traveling along and on the public highway on West Third street, in Bartlesville, Washington county, Oklahoma, and at a point on said West Third street just beyond Ipne avenue, in said city aforesaid; that the defendants, John D. Jordan, John C. Vann, and R. S. Duke, did, while making a raid on the joints in said West Bartlesville, Oklahoma, and while on duty and acting in their official capacity as sheriff, deputy sheriff, and undersheriff of said county and state, together and acting in concert, wantonly, willfully, carelessly, negligently, recklessly, unlawfully, and maliciously fire off and discharge their revolvers, which were then and there loaded with powder and leaden balls, at and into the back and body of him, the said John Neer, and from the effects of said wounds thus received he, the said John Neer, then and there died; and that the said John Neer did not in any manner whatsoever contribute to said injury aforesaid."

The defendant Jordan answered by general denial; and, further, that he had nothing to do, or connection with, the killing; and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

if Duke and Vann, or either of them, did in fact do the killing that it was done in self-defense. Duke and Vann answered, admitting that they were present and participated in the shooting *mêlée* during which Neer lost his life, but that they and each of them acted only in his necessary self-defense.

The sureties on the bond denied liability, and set up the special defense of an alteration of the instrument, through the striking out of the name of one bondsman and substituting that of another person, after the bond had been approved and filed.

At the beginning of the trial, the defendants objected, each for himself, and the bondsmen for themselves, to the introduction of any evidence under the petition. At the close of plaintiff's evidence, the defendants, each for himself, and the bondsmen for themselves, demurred to the evidence and moved for an instructed verdict. These being overruled and exceptions saved, the defendants introduced their testimony.

A number of questions are urged; but, as we view the case after a careful study of the pleading and the evidence, it is unnecessary to review all of them.

At the close of all the evidence, the following instruction was asked by the sheriff and refused by the court: "There can be no recovery against John D. Jordan in this case for any shooting done by Duke or Vann, unless you believe from the evidence that the said Jordan was, present, aiding, abetting, or assisting the said Duke or Vann." "Also, in the interest of the bondsmen, the following instruction was requested and refused: "There can be no recovery against the sheriff or his bondsmen for any act of either Vann or Duke, because there is no evidence tending to show that any act done by the defendants Vann or Duke was required by their office as deputy sheriff, or was done by virtue of said office." The first instruction should have been given under the evidence in this case; and the second should have been given, in so far as it related to the bondsmen.

[1] The plaintiff seems to have been careful, both in the pleading and in the evidence, to show that at the time of the difficulty in which Neer lost his life that both Neer and his companions were proceeding quietly along the highway in the peace of the state, and violating no law, and that the officers had no warrant for their arrest, and that they were not committing a misdemeanor in the presence of the officers which would justify or authorize an arrest. If this is true, the two deputies, in halting or accosting the young men, could not have been in the exercise of any authority conferred on them by law, or necessary or proper to be done under authority of their office. If plaintiff's evidence is true, the deputies Duke and Vann were naked trespassers. If the defendants' evidence is true, Duke and Vann in a civil manner asked the young men to

"stop" or "hold on a minute," and were answered by shots from the revolvers of the young men, which they returned in their necessary self-defense. Under none of the proof were the bondsmen liable, because nothing done by the deputies was done by virtue of their office; and, not being so done, their act, if wrongful, was not within the obligation of the bond, under a number of decisions of this court, in which this rule is announced and adhered to under the doctrine of stare decisis.

[2] In the recent case of *Tuman v. Sherrill et al.*, 29 Okl. 100, 116 Pac. 426, the authorities in this jurisdiction are collected and reviewed. In that case suit was brought against a constable and his bond for an alleged injury inflicted on plaintiff by the constable. The trial court sustained a demurrer to the evidence, and the cause was appealed to this court, in reviewing which the court say: "The demurrers to the evidence were sustained, on the ground that the plaintiff did not show that the officer was acting under legal process, or that there was cause for arrest without warrant, but proved merely a naked trespass, for which no action upon the bond will lie." In that case the court referred to the cases of *Dysert et al. v. Lurty et al.*, 3 Okl. 601, 41 Pac. 724, *Lowe et al. v. City of Guthrie*, 4 Okl. 287, 44 Pac. 198, decided by the Oklahoma Territorial Supreme Court, also to the case of *Uhandler v. Rutherford*, 101 Fed. 774, 43 C. O. A. 218, decided by the Circuit Court of Appeals, Eighth Circuit, and quotes with approval the rule announced therein, as follows: "To constitute color of office, such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability upon the sureties in his official bond." Therefore the court should have instructed the jury to return a verdict in favor of the bondsmen.

[3] The court should also have given, in effect, the instruction asked by the sheriff. As to him, there was a question for the jury. There was no proof of liability upon his part because of the official relation between him and the deputies; but there is some proof, however slight, that, if the deputies were in fact in the wrong and committing a trespass, that tended to associate or connect the sheriff with the difficulty. In other words, if the shooting by the deputies was not justifiable under the circumstances, but was a trespass for which they are answerable in damages, and the sheriff was present, "aiding, assisting, abetting or encouraging" the commission of the wrongful act, then he would be liable as an individual

participant therein. Upon a new trial, if the evidence should justify it, such instruction should be given. The views herein expressed eliminate the necessity of passing upon a number of other interesting questions, as they grew out of the question of the liability of the bond, and will not arise in a retrial of the case.

The cause should be reversed and remanded, to be proceeded with in accordance herewith.

PER CURIAM. Adopted in whole.

BRISSEY et al. v. TROTTER.

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—EVIDENCE.

Where there is evidence reasonably tending to support a verdict, a judgment based on the verdict will not be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001*.]

2. APPEAL AND ERROR (§ 882*)—INSTRUCTIONS—RIGHT TO ALLEGE ERROR.

A party cannot be heard to complain of an instruction in substance the same as one requested by himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8591-8610; Dec. Dig. § 882*.]

(Additional Syllabus by Editorial Staff.)

3. APPEAL AND ERROR (§ 231*)—INSTRUCTIONS—ERROR NOT SHOWN.

An instruction complained of on a writ of error will not be reviewed, where the defect is not specifically pointed out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1332; Dec. Dig. § 231*.]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by David Trotter against W. C. Brissey and James Trotter. Judgment for plaintiff, and defendants bring error. Affirmed.

Warren K. Synder and Harry White, both of Oklahoma City, for plaintiffs in error, W. F. Wilson, John Tomerlin, and H. E. Elder, all of Oklahoma City, for defendant in error.

ROSSER, C. This was a suit by David Trotter, hereinafter called plaintiff, against W. C. Brissey and James Trotter, hereinafter called defendants, to recover the value of certain cattle and certain fodder, cotton seed, cane, and corn. David Trotter is the nephew of James Trotter and a cousin of the wife of W. C. Brissey. The petition alleges that, while plaintiff was of unsound mind and unable to understand the nature of the transaction, the defendants induced him to trade the cattle and feed stuff to defendant Brissey

for a certain tract of land in Roger Mills county. It further alleges that as soon as he recovered his mind, and was able to understand and to transact business, he demanded the return of the property which he had delivered to the defendants, and offered to convey the land to W. C. Brissey. He recovered a judgment, and defendants have appealed.

[1] The defendants, as one of the grounds for reversal, say that the evidence was not sufficient to show that the plaintiff was of unsound mind at the time of the transaction. The evidence upon the part of the plaintiff shows that for some time before the trade he was in bad health; that his conduct was peculiar; that he could not talk connectedly; that he was restless; that while engaged in conversation with people visiting at his house he would abruptly leave, without any excuse or reason; that he left his home during a rain storm, against the objections of his neighbors, to go to the home of defendant James Trotter. It also shows that a short time after the transaction some steps were taken by his relatives to have him examined with reference to his sanity. The deed was made November 6, 1906, and on the 13th of January, 1907, James Trotter wrote to Thos. Boyd, plaintiff's father-in-law, the following letter: "Jones City, Okla. Jan. 13, 1907. Mr. Thomas Boyd—Dear Sir: I write to you in regard to Dave. He seems better at times, but my opinion is that Dave never will do anything with that land but west and if I were you I would go and see the land at once and if it is as good as represented you can buy the other 80 now cheap and hold it all or you can sell it all to Sam Eoff in and make at least 6000\$. I don't think Dave has any notion of doing anything at all at least he said he never will work any more. I have almost come to the conclusion that Dave has a motive in doing just as he is for a purpose and I think that the sooner you take hold for Nerry and the child the better. Dave never was cheated in the trade. The land is worth at least 600\$ more than he gave for it so says good men that knows the land. Dave will not sell the land to you or anyone else. I write you this as a friend, not for pay or profit. I am sorry I had anything to do with the cattle but my honest opinion is that the cattle deal or the land deal had anything to do with Dave's mind."

There was sufficient testimony to justify the jury in finding that the plaintiff was of unsound mind at the time the contract was made. Where there is evidence reasonably tending to support the verdict, this court will not disturb it. *Harfill v. Parkenson*, 27 Okl. 528, 112 Pac. 970; *Loeb v. Loeb*, 24 Okl. 384, 103 Pac. 570.

[2] The defendants assign as error the giving of the following instruction: "The jury are instructed that they must presume and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

find that D. A. Trotter, at the time of the execution of the deed by the defendant W. C. Brissey and the bill of sale by the plaintiff, D. A. Trotter, and the making of the trade complained of, was of sound mind and competent to execute the same, unless a preponderance of the evidence in this case proves the contrary; that if, after considering all of the evidence in the case, the jury are unable to determine from the evidence whether D. A. Trotter, the plaintiff, at the time of such transaction, was of sound mind and mentally competent to execute said papers and make said trade, they should find from their verdict that he was of sound mind and was so competent."

Why this instruction was error is not pointed out. It is an exact copy of one requested by the defendants, except that the word "prove" in the first line is "presume" in the one requested and marked "Given" by the trial judge. The use of "prove" instead of "presume" was evidently a clerical error, and could not have misled the jury, when considered in connection with the other instructions.

Defendants complain of the following instruction: "The court instructs you that the fact that a man makes an unprofitable trade or poor bargain, or that he is generally unthrifty in his business, does not of itself prove him to be of unsound mind, or what in the law is termed non compos mentis." This instruction is the latter half of the fifth instruction requested by the defendants.

[3] Defendants also complain of the following instruction: "If you believe from the evidence that at the time of the trade with the defendant Brissey the plaintiff's mind was so deranged that he could not understand and comprehend the effect and consequences of that act, and was not fully conscious of what he was about, your verdict should be for the plaintiff for the sum which you find to be the reasonable market value of the cattle and feed which the plaintiff traded to the defendants, or either of them, which were subsequently acquired by the defendant Trotter after the same were traded to the defendant Brissey, with interest thereon from that date at the rate of 6 per cent. per annum."

It is not shown how or why this instruction was error. It seems to be suggested that interest should not have been allowed from the time of the trade, but only from the time of the offer to rescind. No argument is made, or authorities cited, in support of this proposition. A remittitur of \$100 was entered, which cured any excess in the verdict, if there was any. Other suggestions are made as to instructions; but they are not of sufficient importance to require consideration.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

CHICAGO, R. I. & P. RY. CO. v. STONE.
(Supreme Court of Oklahoma. March 12, 1912.)

(Syllabus by the Court.)

1. CARRIERS (§ 282*)—INJURY TO TRESPASSERS—GROSS NEGLIGENCE.

It is gross and wanton negligence for a railroad company, in the operation of its trains, to leave a string of freight cars unattended, or not under control, upon a siding or passing track where there is a sufficient grade to permit of the cars, either by gravitation or lack of control, running down such inclined track and onto the main line or track, and there collide with a regular passenger train then due.

(a) The failure in such a case to discharge a manifest duty is not to be excused by the fact that the party injured, himself free from contributory negligence, was a trespasser on the train with which the freight cars collided in escaping from the side track and running out and onto the main line.

(b) The commission of such gross and wanton negligence is a violation of a manifest duty to the public, trespassers and all, themselves free from contributory negligence, not to turn such power loose without being under control.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116; Dec. Dig. § 282.*]

2. FINDINGS—EVIDENCE—JUDGMENT.

Evidence examined, and held sufficient to support the findings of fact of the trial court and the judgment entered thereon.

3. CARRIERS (§ 282*)—TRESPASSERS—INJURIES.

In the absence of wanton or gross negligence on the part of the employees of a railroad company, it is not liable for injury to trespassers on its cars or trains.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116; Dec. Dig. § 282.*]

(Additional Syllabus by Editorial Staff.)

4. CARRIERS (§ 244*)—TRESPASSERS—KNOWLEDGE OF CARRIER'S SERVANTS.

That a trespasser on a carrier's passenger train was permitted to occupy a position in a coach until the return of the carrier's ticket auditor or the arrival of the conductor without any attempt being made to remove him, and with the knowledge of the auditor that he was a trespasser, during which time he was injured in a wreck due to the gross negligence of the carrier, did not change his status as a trespasser.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1115, 1116; Dec. Dig. § 244.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Noble County; William M. Bowles, Judge.

Action by Jesse Stone, by his next friend, James H. Stone, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiff in error. Moss, Turner & McInnis, of Oklahoma City, for defendant in error.

SHARP, C. It is admitted that defendant in error, at the time of his injury, was a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig., Key-No. Series & Rep'r Indexes

trespasser upon a regular passenger train of defendant company. He neither had a ticket nor money with which to pay his fare from Banner to Oklahoma City, his point of destination. The accident occurred in the west end of the railroad yards at Yukon, the first station beyond where defendant in error surreptitiously took passage, and but a few miles (presumably the first stop) from where he entered the train. The passenger train on which he was riding left El Reno about 30 minutes late, and was running at the rate of about 30 miles an hour when approaching the west end of the passing track at Yukon station. On this passing track were some 12 or 15 freight cars, which in some way, not clearly shown, were permitted to run downgrade to the switch block and onto the main track and collide with the incoming, regular passenger train from the west, and on which defendant in error was aboard. The engineer of the passenger train did not discover that the freight cars on the siding or passing track were in motion until the engine was within a few feet of them, and until too late to prevent a collision. These loose freight cars struck the passenger car on which defendant in error was riding, thereby causing the injury complained of. By agreement of counsel a jury was waived, and all issues of fact and law were submitted to the court. The findings of fact made by the court included that defendant in error was a trespasser; and when he suffered the damage complained of that the east-bound passenger train, upon which he was riding, was running at the rate of 30 miles an hour, and that on the side track within the town or village of Yukon was a string of freight cars, which had been left there, and which were moving toward the west; that the engineer discovered these moving cars when within about 20 feet of them, and applied the air brakes and endeavored to stop the train, but was unable to do so before the collision; that the railroad company was guilty of wanton negligence in leaving and abandoning the freight cars on the switch track in a moving condition, owing to the condition of the track and the grade, and with knowledge that they would likely run onto the main line and wreck the passenger train then due, and which facts were well known to the agents and employes of the defendant; that it was guilty of willful negligence and wanton disregard of human life to leave freight cars on a side track where, if put in motion, they would be liable to run onto the main line track at the time that the passenger train was due.

Three propositions are discussed by counsel for plaintiff in error in their brief: First. That the only duty that the railway company or its employes owe to a trespasser upon one of its trains is not to wantonly or willfully injure him. Second. Trespassers

cannot invoke the rule of *res ipsa loquitur*, and that the verdict cannot be sustained, in an action brought by a trespasser, upon presumptions of negligence under any circumstance. Third. That neither the allegations nor the evidence support the finding of willful and wanton negligence. The latter two points will be first considered under one head.

[1] The petition charged that the wreck and derailment of the coach on which the plaintiff was riding was caused by the employes of defendant negligently and knowingly permitting certain freight cars on a switch and side track of defendant's line of railroad to become unmanageable and beyond the control of the said employes, and to move and run over and along the side track and switch and onto the roadbed upon which the passenger train was running, and in the opposite direction to which the passenger train was being operated, and that by reason of the failure of the employes of defendant to stop the said passenger train before it had arrived at the place and point where the said switch and side track intersected the main line the collision and injury occurred; that by the exercise of reasonable care or diligence the employes of defendant operating said passenger train could have seen the said freight cars coming toward the main line upon which the said passenger train was being operated, and by such use of reasonable care would have known that a collision would have resulted, but that notwithstanding said employes wantonly, recklessly, and indifferently attempted to operate the passenger train at such a high rate of speed as that it would pass by the point where the switch and side track intersected the main line, thereby causing the derailment and accident complained of.

We do not deem it necessary to consider the testimony as to how the string of freight cars moved from the passing track onto the main line. The fact that they did so move is shown, both by the testimony of Roy L. Brown for the plaintiff and F. J. Hasler, the engineer on the passenger train, and is not disputed.

In *Enid City Railway Company v. Weber*, 121 Pac. 235, this court, speaking through Rosser, C., said: "The first question to be decided is whether there is any proof of negligence. That there was such proof is clear. It is the duty of a railroad or street railway company to confine or fasten its cars, so they cannot be driven along its tracks by windstorms or other irresponsible forces. *Brown v. Pontchartrain R. Co.*, 8 Rob. (La.) 45; *Battle v. W. & W. R. Co.*, 66 N. C. 343; *So. Pac. Ry. Co. v. Lafferty*, 57 Fed. 536 [6 C. C. A. 474]; *Continental Trust Co. v. Toledo, etc., R. Co.*, 87 Fed. 133 [32 C. C. A. 44]; *L. & N. R. Co. v. Erving*, 117 Ky. 625 [78 S. W. 460]." The court there further said: "The very fact that the cars had drift-

ed upon the main line raised a presumption of negligence upon the part of the company, unless there were other circumstances in the case changing that presumption." There the cars had been driven out on the main line by a storm or other act which might have tended to excuse the negligent act. On the contrary, it here appears that from the switch, where the accident occurred, up to the station is, to use the language of the engineer, a pretty steep upgrade. To leave a string of freight cars on such siding, not under control, and where the same, either by momentum or gravitation, might run downgrade to where the siding connected with the main line and then upon the said main line, even though in the daytime, and at a time when a regular passenger train was due, would be proof to show such gross and wanton negligence and recklessness as would manifest a disregard of all consequences.

The burden was on the plaintiff to prove the defendant's negligence; but this burden was well borne by him when he proved the presence of the freight cars belonging to it, or under its control, running from the siding onto the main line in a manner such as could not be avoided by the exercise of due and reasonable care on the part of the passenger engineer. In *Webster v. Rome*, etc., R. Co., 115 N. Y. 114, 21 N. E. 725, affirming 40 Hun, 161, it was said: "It is quite true that the burden was upon the plaintiff to establish the defendant's negligence. But this burden was well borne by him when he proved the presence of the car belonging to it upon the track in the way of its passenger trains. The case thus made by the plaintiff could be met by the defendant by evidence tending to show that the car came upon the main track without its fault; and then, upon all the evidence, it was incumbent upon the plaintiff to satisfy the jury that there was negligence fairly attributable to the defendant." The rule of *res ipsa loquitur* is not therefore involved.

[2] We think that the allegations in the petition were sufficiently broad and the proof adequate to support the findings of the trial court. The rule, therefore, announced by this court in *St. Louis & Pacific Ry. v. Gosnell*, 23 Okl. 588, 101 Pac. 1126, 22 L. R. A. (N. S.) 892, and in *Patten v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, and *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 448, 24 Sup. Ct. 408, 48 L. Ed. 513, can have no application, where it appears from the undisputed testimony that the railroad company was guilty of gross and wanton negligence, and which was the proximate cause of the accident.

[3] The question then recurs to the proposition of the liability of plaintiff in error; defendant in error at the time of the accident being admittedly a trespasser. The

question is one not free from difficulty, and under a state of facts such as here presented, has never been before this court. Railroad companies are bound to exercise their dangerous business with due care to avoid injury to others; and when they fail to do so they are liable for damages, even to a trespasser, who has not been guilty of contributory negligence. *White, Personal Injuries on Railroads*, § 1075. A reckless disregard of consequence may be so great as to imply a willingness to inflict an injury, such as to entitle a trespasser to recover, although there is no actual intent to harm him. *Id.* § 1078.

On the contrary, it is the general rule that the railroad company is not liable to a trespasser on its property, in the absence of any wantonness and willfulness or gross negligence. Under settled rules of public policy, railway companies are not to be made liable for injuries received by trespassers upon their trains, unless the injury is inflicted under circumstances indicating wantonness or willfulness in the servants of the companies. The rule seems to be almost universally recognized and approved, and is in consonance with reason and right. *Richmond & Danville R. Co. v. Burned*, 70 Miss. 437, 12 South. 958, 35 Am. St. Rep. 656; *Toledo Ry. Co. v. Brooks*, 81 Ill. 245-292; *Chicago R. R. v. Michie*, 83 Ill. 427; *Toledo Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *McCouley v. Tenn., etc., Co.*, 93 Ala. 356, 9 South. 611; *Louisville Ry. Co. v. Phillips*, 119 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155; *Powers v. Boston & Maine R. R.*, 153 Mass. 188, 26 N. E. 446; *Brown et al. v. M., K. & T. Ry.*, 64 Mo. 536; *Duff v. Allegheny Valley R. R. Co.*, 91 Pa. 458, 36 Am. Rep. 675; *Gardner v. New Haven, etc., Co.*, 51 Conn. 143, 50 Am. Rep. 12.

[4] The fact that defendant in error was in the doorway of the coach where the passengers were standing on a crowded train is not charged as an act of contributory negligence; and the many reported cases, wherein the question of the trespasser's dangerous position is involved, will be of little aid to us in determining the question here presented. The presence of Stone on the train in the coach was known, and his position is not complained of as being one of greater danger than that of the other passengers. No attempt to remove him was made, and for the moment he was allowed to occupy his position in the coach until the return of the auditor or the arrival of the conductor. While there are authorities to the contrary, we adhere to the position that this fact did not change his status, which remained that of a trespasser, though with knowledge and by sufferance of the employees of the plaintiff in error.

In *East St. Louis, etc., Ry. Co. v. O'Hara*, 150 Ill. 580, 595, 37 N. E. 917-919, it is said: "If it be true, as the evidence tends to

show, that the defendant's servants, at the time plaintiff was injured, were running their engine in the dark without a headlight or a bell-ringing, and at a high and dangerous rate of speed, along a much-frequented street, and where many persons were likely to be passing on their way to the ferry landing or otherwise, such acts would be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law to wanton and willful negligence; and it was not necessary, in order to raise an inference of such negligence, to prove that the defendant's servants were actuated by ill will directed specifically towards the plaintiff, or to have known that he was in such position as to be likely to be injured."

In *Illinois Central R. R. Co. v. Leiner*, 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 268, the court, in referring to an instruction given in the trial court, said: "Certainly, in the language of the instruction asked by appellant and given for it by the trial court, the servants of appellant, who were in control of these trains which collided, were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons."

In *Lake Shore & Michigan Southern Ry. Co. v. Bodemer*, 130 Ill. 598, 29 N. E. 692, 32 Am. St. Rep. 218, the facts were that the train which committed the injury was traveling at the unusual speed of 35 or 40 miles an hour in the crowded city of Chicago, over street crossings, upon unguarded tracks so connected with the public street, and so apparently a continuation of a public street, as to be regarded by ordinary citizens as to be located in a public street, along a portion of the said tracks where persons were known to be passing and crossing every day, in conceded violation of a city ordinance as to speed, and without warning of the approach of the train by the ringing of a bell. It was said by the court: "This conduct tended to show such a gross want of care and regard for the rights of others as to justify the presumption of willfulness."

In *Enright v. Pittsburg Junction R. R. Co.*, 198 Pa. 166, 47 Atl. 938, 53 L. R. A. 330, 82 Am. St. Rep. 795, it is said in the syllabus: "A railroad company owes the duty of ordinary care to any person of any age who enters upon one of its trains as a trespasser. This is especially true of children of tender years." There the injured party was a boy of ten years of age, but it will be noted that the court did not confine the rule to those of tender age.

In *Patton v. East Tenn., V. & G. R. Co.*, 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184, the plaintiff was a trespasser upon the track of the railroad. The court, in quoting from a former opinion, said: "The mere fact that a party is a trespasser will not prevent

him from recovering for injuries negligently inflicted by another, which might have been averted by ordinary and proper prudence on the part of the latter." There the death was occasioned by the fact that deceased, who had been walking along the railway track, stepped aside to allow a train coming from the rear to pass, and then stepped back on the track, and was run over by a detached portion of the train that had broken loose from the front part. The opinion is by Lurton, J., now a member of the Supreme Court of the United States, and is an able one; and the principle announced is in entire harmony with the theory upon which plaintiff below recovered judgment.

By section 2941, Comp. Laws 1909, gross negligence is defined as the want of slight care and diligence. By the exercise of such degree of care, the collision and consequent injury would not have happened; and the failure to employ the required degree of care and diligence to those on board the incoming and then due passenger train manifested a reckless disregard of duty, not only toward those to whom the carrier was under a legal duty, but to the public in general.

In *Conley v. Cincinnati, etc., Ry. Co.*, 89 Ky. 402, 12 S. W. 764, the Court of Appeals of the state of Kentucky said in the syllabus: "In an action against a railroad company for the negligent killing of plaintiff's intestate, there was evidence that, as defendant's train was coming towards a small town, the houses of which were on either side of the track, and while some distance from the depot, part of the train was detached, the engine and some of the cars running on ahead and passing the depot, while the detached portion was allowed to come on more slowly down the grade, with no lights in front, no bell or other signal to announce its approach, and no one to look out for persons on the track. The night was dark, and plaintiff's intestate, after having seen the engine with cars attached to it pass by, started across the track, though not at a public crossing, and was run over by the rear portion of the train and killed. Held, that the detaching of part of the train and allowing it to run into the town in such a manner was such a departure from defendant's duty to the public as to entitle plaintiff to recover, though his intestate was a technical trespasser." There the company had turned its rear cars loose, unlighted in front, and therefore not under control, so far, at least, as to render any assistance, the night being dark, in case of collision, to any person that might be on the track. The cars being separated from the engine, their approach would be, at least as compared with the ordinary movements of the train, almost noiseless, not likely to be heard or noticed also on a dark night, and in the absence of a light to arrest the attention, their approach would not ordinarily be discovered

until too late to get out of the way. The case is a particularly strong one. The court further said: "Humanity positively forbids the owner of property that is dangerous to human life and safety to knowingly turn such property loose, even upon his own ground, where it will do mischief even to a technical trespasser. Such conduct is regarded as utterly at war with the principles of humanity, and as smacking of savagery. That the party hurt was a mere trespasser and, otherwise than in this legal aspect, perfectly innocent and harmless does not excuse the person that injured him by means manifestly injurious to human life and safety. By being technically a trespasser, he does not forfeit all right to protection."

Here is an agency possessing most destructive power, which, contrary to manifest duty, is either turned loose, or stationed so that by its own power it may become loose, to run down the grade and collide with a train heavily freighted with human beings, as shown by the testimony. As was said by the court in the above case: "Such conduct is a violation of a manifest duty to the public, trespassers and all, not to turn such a power loose."

In *O., B. & Q. R. Co. v. Mehlsack*, 131 Ill. 161, 22 N. E. 812, 19 Am. St. Rep. 17, it is said, speaking with reference to trespassers: "But as to the former, his duty rests merely upon grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons, whether such persons are on or off the vehicle."

The rule that a railroad company must exercise ordinary care and caution commensurate with the risk of accidents, in operating its trains or cars at places where persons, although trespassers or mere licensees are known or may be expected to be on the tracks, as in towns and cities, and for a failure to exercise such care they are thereby rendered liable, except where contributory negligence is shown, cannot be distinguished in principle from the instant case. Indeed, if any distinction is to be made, the greater reason would seem to exist against allowing loose, uncontrolled cars to run upon the tracks under circumstances such as shown by the testimony in this case. In *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 38, in an opinion by Brewer, J., it was held that: "Where a person has been run over by a railroad train and injured, in an action for damages therefor, a finding that the injury was caused by the gross negligence of the company will not be set aside, when it appears that he was run over by a train, consisting of a locomotive, tender, one baggage and two passenger cars, which was started backward over a public crossing, in a populous city, with the brake on the engine out

of repair and useless, with no brakeman at the other brakes, with no flagman or other person at the rear of the train, or at the crossing, to warn persons of their danger, and no one on the train, except three persons, who were all on the locomotive, without the blowing of any whistle, though with the ringing of a bell, and along a track which from the locomotive could not be seen for a distance of from 40 to 50 feet from the rear of the train." *Mason v. Mo. Pac. R. Co.*, 27 Kan. 83, 41 Am. Rep. 405; *Whitehead v. I. M. & S. Ry. Co.*, 99 Mo. 268, 11 S. W. 751; *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; 33 Cyc. 780 et seq.

The cases cited, and numerous others of similar import, establish, we think, the rule applicable where accidents result to trespassers either on the track, train, or cars of the railroad company, and there is but little in the authorities cited in the brief of plaintiff in error which tends to establish a different rule, when the facts shown by the record here are kept in mind.

We feel that the judgment of the trial court should not be disturbed. The testimony sufficiently showed gross and wanton negligence on the part of the railroad company, acting through its employes, in leaving the freight cars uncontrolled on the siding at Yukon. Having so determined, even though defendant in error be a trespasser, he was entitled to recover for the injuries sustained.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(35 Okl. 74)

TRIBAL DEVELOPMENT CO. v. ROFF
et al

(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 931*)—REFERENCE (§ 99*)—FINDINGS OF FACT—CORRECTION BY TRIAL COURT.

The authority of a trial court to correct findings of fact by a referee is confined to cases where the authority is given, by stipulation of parties, to cases which, under section 5611, Comp. Laws 1909, may be referred without the consent of the parties, and to equitable actions where the parties have consented to the reference; but where it appears that a referee was appointed and made a report containing findings of fact, and that the court, after examining the evidence, set his findings aside and made different findings, it will be presumed that the court had authority to take such action, unless it affirmatively appears that the court was not authorized in any of the ways above stated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931; Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. APPEAL AND ERROR (§ 694*)—REVIEW—WEIGHT OF EVIDENCE—BILL OF EXCEPTIONS.

Where the evidence is not preserved by case-made or bill of exceptions, no question can be considered in this court which depends upon the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.*]

Commissioners' Opinion, Division No. 2. Error from District Court, McClain County; R. McMillan, Judge.

Action by the Tribal Development Company against C. L. Roff and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. W. Hocker, of Purcell, for plaintiff in error. J. S. Estes and Thorp & Thorp, all of Oklahoma City, for defendants in error.

ROSSER, C. This case is appealed from the district court of McClain county, Okl. The case has been before this court before upon a motion to dismiss appeal. The opinion can be found in 28 Okl. 525, 114 Pac. 736. The plaintiff in error presents three assignments of error as follows:

"First. The court erred in not entering judgment according to the finding of the referee; and in overruling motion for judgment non obstante.

"Second. The court erred in its findings allowing judgment for White Bros., because it was contrary to the evidence adduced.

"Third. The court erred in rendering judgment to take of the funds properly to be paid to the several mortgagees, and arising from the sale of the things mortgaged, to pay an alleged indebtedness due from Roff to White Bros., general creditors, or one who claims debt arising from a breach of contract of Roff, and not of the receiver."

[1] Under the first assignment, the question is presented of the right of the trial court to set aside the findings of the referee, and to make different findings. This contention of plaintiff in error is answered in the former decision of the court in this case as follows: "It is further contended that the court, on coming to a different conclusion of law than the referee, should have re-referred the cause to the referee, with instructions to have the report made accordingly. This claim on the part of counsel cannot be sustained; for the referee's conclusions of law are no more binding upon the trial court than are the conclusions of law and judgment of the trial court binding upon this court. Burchett v. Hamill, 5 Okl. 300, 47 Pac. 1053; Martsoff v. Barnwell, 15 Kan. 612. And it is further contended that, on the findings of fact made by the referee being challenged as unsupported by the evidence or in certain particulars, the court was without jurisdiction to examine the evidence and from it make its own findings of

fact. Here, again, in our judgment, counsel are in error. The order appointing the referee, and the terms thereof, are not in the record, and hence not before us for our consideration. In this situation the judgment of the trial court on the matters depending thereon will be presumed to have supporting it essentials necessary to its validity; and if, under any reference which could have been made, either under the statute or by agreement of counsel, the trial court would have been permitted to examine the evidence and make its own findings of fact, the elements necessary to support the judgment are presumed in this court to have existed."

[2] The second assignment, that the judgment is contrary to the evidence, cannot be considered, for the reason that the evidence is not preserved by bill of exceptions or case-made. The case was brought here upon a transcript of the record. Nelson v. Glenn, 28 Okl. 575, 115 Pac. 471.

The third assignment of error cannot be considered for the same reason. The judgment of the court is that White Bros. should be paid \$583.55, and there is nothing properly before this court which shows that this judgment is erroneous. There is nothing in the record showing that the judgment in favor of White Bros. is to be paid out of the funds belonging to the mortgagees, nor that it arose out of a breach of contract by Roff, and not the other receiver.

The judgment appears to be regular upon its face, and is therefore affirmed.

PER CURIAM. Adopted in whole.

METROPOLITAN RY. CO. v. FONVILLE.
(Supreme Court of Oklahoma. May 14, 1912.)

(Syllabus by the Court.)

1. TRIAL (§ 321½*)—UNANIMOUS VERDICT.

In all cases pending at statehood, in which there is a jury trial, a unanimous verdict is required.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 742; Dec. Dig. § 321½.*]

2. APPEAL AND ERROR (§§ 1097, 1195*)—FORMER APPEAL—LAW OF THE CASE—TERRITORIAL COURT.

A decision of the Supreme Court of the territory of Oklahoma on a former appeal became the law of the case and governs this court, as well as the trial court, as to the questions decided on that appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427, 4661-4665; Dec. Dig. §§ 1097, 1195.*]

3. APPEAL AND ERROR (§ 1099*)—REVERSAL ON SECOND APPEAL—NEW TRIAL.

Where an eyewitness to an occurrence, who did not testify at the first trial, testifies at the second trial, and the evidence at the second trial is otherwise substantially different to that offered at the first trial, the case upon reversal will be remanded for a new trial, notwithstanding the decision on the appeal from the judgment on the first trial that, under the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

evidence, the verdict should have been for the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

4. STREET RAILROADS (§ 103*)—CROSSING ACCIDENT—DISCOVERED PERIL.

An instruction to the effect that, although plaintiff was guilty of contributory negligence in placing herself in a position of danger, defendant was liable for injuring her if it failed to exercise reasonable care to avoid injuring her after it discovered, or by the exercise of reasonable care might have discovered, that an accident was imminent, is error. The duty of the defendant to avoid the effects of her contributory negligence did not begin until her danger was actually discovered.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Mrs. F. P. Fonville against the Metropolitan Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shartel, Keaton & Wells, of Oklahoma City, for plaintiff in error. Wm. L. McCann, of Oklahoma City, for defendant in error.

ROSSER, C. Mrs. F. P. Fonville, hereinafter called plaintiff, brought an action in the district court of Oklahoma county, prior to statehood, against the Metropolitan Railway Company, hereinafter called defendant, for damages for personal injuries. She recovered a judgment, and defendant appealed to the Supreme Court of Oklahoma Territory. There the judgment of the district court was reversed, and the cause remanded. The opinion of the Supreme Court of the territory in the case is reported in 19 Okl. 288, 91 Pac. 902.

The case was again tried, and plaintiff again recovered judgment. From that judgment this appeal was taken. After the judgment plaintiff died, and the case has been revived here in the name of her administrator.

The trial court instructed the jury that 9 or more concurring could return a verdict, and the verdict was in fact returned by 11 men. This instruction was excepted to at the time, and is assigned as error.

[1] This case was pending at the time of the admission of the state into the Union, and, under the provisions of section 1 of the schedule to the state Constitution, should have been tried according to the law and procedure in force prior to statehood. *Freeman v. Eldridge*, 26 Okl. 601, 110 Pac. 1057; *St. L. & S. F. R. Co. v. Cundieff*, 171 Fed. 319, 96 C. C. A. 211. See, also, *Blanchard v. Ezell*, 25 Okl. 434, 106 Pac. 960. This rule, however, only applies to cases pending at statehood, and does not apply to a case brought since statehood, though the cause

of action arose before. *Independent Cotton Oil Co. v. Beacham*, 120 Pac. 969.

It has been decided a number of times that a unanimous verdict is required in cases pending at the time of the admission of the state into the Union. *Pacific Mutual Life Insurance Co. v. Adams*, 27 Okl. 498, 112 Pac. 1027; *Choctaw Electric Co. v. Clark*, 28 Okl. 399, 114 Pac. 730; *Swift v. Coulter*, 28 Okl. 168, 115 Pac. 871; *Kerfoot-Bell Co. v. Kerfoot*, 118 Pac. 367, not yet officially reported; *City of Guthrie v. Pearson*, 29 Okl. 813, 120 Pac. 266; *Northern Guaranty L. & F. Co. v. McCurtain*, 120 Pac. 663; *Spurrer Lbr. Co. v. Dodson*, 120 Pac. 934; *Border v. Carrabine*, 120 Pac. 1087. And the plaintiff concedes that the court erred in instructing the jury that a unanimous verdict could be returned, and that this case must be reversed.

[2] It is contended by the defendant that the decision of the Supreme Court of Oklahoma Territory in this case settled the law of the case for all future trials, and that under that decision the plaintiff is not entitled to recover. It is also contended that judgment should be here rendered, directing the district court to dismiss the case.

It is well settled by both reason and authority that a decision of an appellate court upon questions of law must control the case, as to points decided, at all subsequent stages. And a decision of the Supreme Court of the territory of Oklahoma is the law of the case at subsequent stages, even after statehood. *Oklahoma City Electric Gas & Power Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758; *Harding v. Gillett*, 25 Okl. 199, 107 Pac. 665, and authorities cited in these cases. This rule is subject to the qualification that an appellate court may review and reverse a former decision in the same case, where adherence to the former decision would result in gross and manifest injustice. *Oklahoma City Electric Gas & Power Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758. The decision of the court upon the former appeal in this case was not gross error at the time it was rendered, and is the law of the case, so far as applicable to the facts proven at the second trial.

[3] It was held in the decision of the case on the former appeal that under the evidence it was the duty of the trial court to direct a verdict for the defendant. Applying the rule of the law of the case, if the evidence at the trial from which this appeal is taken was the same, or substantially the same, as the evidence at the first trial, the judgment upon this appeal should direct that the case be dismissed, unless it should appear from the record that other evidence exists which might, upon another trial, change the facts proven. It is therefore necessary to determine whether the evidence was substantially the same upon both trials.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff was struck by one of the defendant's street cars as she was driving a team and hack across its Broadway track at Main and Broadway, in Oklahoma City. At the first trial no proof was offered by the plaintiff as to the speed of the car. Upon the last trial the testimony of at least one witness, who was one of two passengers on the car when the plaintiff was injured, was that the car was running 15 miles an hour. After the case was reversed and remanded by the Supreme Court of Oklahoma Territory, plaintiff amended her complaint and alleged that the car which caused the injury was not properly equipped, and that some of the machinery at the power house of the defendant was not in repair. There are other minor differences in the issues and evidence at the two trials, and, considering these differences, it is proper to remand this case for a new trial, rather than dismiss it. This opinion, however, is not to be construed as passing on the value of the evidence at the last trial, but only that it is substantially different from the evidence on the former trial.

[4] In view of the fact that the case may be tried again, it is proper to notice the assignment that the court erred in giving the following instruction: "The duty of the plaintiff to use ordinary and reasonable care in crossing a street railroad track is the same in degree and kind as the duty of the defendant to use ordinary and reasonable care in the operation of its cars; and even though the defendant failed to use such care, and the accident would not have happened, had such care been used by it, still the plaintiff cannot recover if she herself failed to use ordinary and reasonable care, and but for her failure the accident would not have happened, unless it further appears from the evidence that, notwithstanding such negligence on the part of the plaintiff, the accident would not have occurred, had the defendant exercised reasonable care to avoid the injury after it discovered, or by the exercise of reasonable care might have discovered, that an accident was imminent."

This instruction made the defendant liable for failure to exercise reasonable care to avoid the injury, though plaintiff was guilty of contributory negligence in placing herself in a position of danger, whether she was discovered or not, if by the exercise of reasonable care she might have been discovered. This was error. The exact point was decided in the case of *Oklahoma City Ry. Co. v. Barkett*, 118 Pac. 350, not yet officially reported. It was there held that the giving of an instruction identical with the one set forth above was error. In other words, it was held that the doctrine of "last clear chance" did not intervene to protect a plaintiff from the consequences of his contributory negligence, unless he was actually discovered. This case was followed in *Oklahoma City Ry. Co. v. Diab*, 118 Pac. 351.

The cases of *A. T. & S. F. R. Co. v. Baker*, 21 Okl. 51, 95 Pac. 433, 16 L. R. A. (N. S.) 825, and *Clark v. St. L. & S. F. R. Co.*, 24 Okl. 764, 108 Pac. 361, while not so entirely in point, as to the form of the instruction, support the rule laid down in the *Barkett* Case, and it is supported by numerous cases from other states. It seems clear that this view is proper. If the failure to keep a lookout has any bearing in a case of this kind, it is part of the negligence of the defendant in the first instance, and the plaintiff, because of the contributory negligence, is prevented from recovering on account of it. But if the defendant discovers the perilous condition it becomes charged with a different and active duty—that of avoiding the effect of the contributory negligence.

It is not necessary to consider the other questions assigned as error, for the reason that they are not likely to arise on another trial.

The case should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

BUTLER v. BUTLER.

(Supreme Court of Oklahoma. March 19, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 355*)—MOTION TO STRIKE.

A motion to strike a petition from the files because it appears to contain allegations of matter impertinent, immaterial, libelous, and scandalous should not be sustained as to the whole petition, if such petition contains other facts which, if true, would constitute a valid basis for judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1102-1110; Dec. Dig. § 355.*]

(Additional Syllabus by Editorial Staff.)

2. DIVORCE (§ 167*) — IMPERTINENCE AND SCANDAL—STRIKING PLEADING.

A petition to set aside a divorce decree alleged that plaintiff was defendant's lawful wife at the time of divorce; that she was then in the hospital, a physical wreck and of unsound mind, due to a condition brought about by the intimidations and threats of her husband, and that because of such condition was unable to make a defense to the suit for divorce; that none of the grounds of divorce alleged in the petition were true, denying each specifically; that she was compelled by force, threats, and intimidation to waive service of summons, and also set up facts which, if true, would have constituted a good defense to the petition; that the decree was obtained by fraud and false testimony, showing in what the fraud consisted, and also alleging facts which, if true, showed that plaintiff had not been a bona fide resident of the state for a year prior to the filing of the petition. *Held*, that the petition stated facts which, if true, entitled plaintiff to the relief prayed, and that it was error to strike it from the files because of other immaterial, impertinent, and scandalous allegations.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-548; Dec. Dig. § 167.*]

Commissioners' Opinion, Division No. 2, Error from District Court, Garfield County; M. C. Garber, Judge.

Action by Edyth A. Butler against Silas A. Butler to set aside decree of divorce. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Hackney & Lafferty, of Winfield, Kan., for plaintiff in error. McKeever & Walker, of Enid, for defendant in error.

HARRISON, C. This action was filed April 8, 1910. It was instituted under the provisions of article 21, c. 87, Comp. Laws 1909, by Edyth A. Butler against Silas A. Butler to vacate and set aside a decree of divorce granted Silas A. Butler November 15, 1909, by the district court of Garfield county. Summons was issued and served. Within a few days subsequent thereto, plaintiff filed an amended petition. Defendant appeared and moved to strike the petition and amended petition from the files for the following reasons: " * * * That from an inspection and consideration of both petition and amended petition filed herein, it is at once apparent that the matter contained in said petitions, or either of them, does not constitute grounds for consideration by this court, and is not accompanied with the kind of proof that such actions would necessarily require to be attached to and made a part of such petitions, and for the further reason that it appears from an inspection of said petitions, and each of them, that the matter contained therein is frivolous, impertinent, scandalous, libelous, and not in proper and suitable language for either of said petitions, and that it is apparent from the most casual inspection that the purpose of said petition is not to obtain rights or to relate a story of wrongs, but simply to cause trouble, and to disturb the social status of a citizen who has heretofore complied with the laws of Oklahoma, and from casual inspection of said petition it is apparent that it is of such a nature that the court should not waste its time or blot its records by considering or preserving the same, and therefore it is proper and right that said petition and amended petition be each stricken from the records of Garfield county and not preserved in any form or considered as legal documents. * * * "

[1, 2] This motion was sustained, and the pleadings ordered stricken from the files. Plaintiff's counsel refused to plead further, filed motion for new trial, which was overruled, and plaintiff appealed to this court. We think the court erred in sustaining de-

fendant's motion to strike. Notwithstanding the petition contains a great amount of surplus, redundant, immaterial, and possibly scandalous matter, yet among the mass of garbage are material facts which, if true, should receive the court's attention and would justify a vacation of the judgment. If the material allegations are sufficient to warrant a judgment, the plaintiff, especially in an action of this kind, should not be charged with the reprehensible character of the pleadings. The petition alleges, in substance, that at the time the divorce was granted Silas A. Butler she was his lawful wife; that she was then in the hospital at Winfield, Kan., from a condition of health which had been brought about by the advice, procurement, threats, and intimidations of her husband; that at that time she was a physical wreck and of unsound mind; and that because of her demented mental condition she was unable to make her defense in his suit for divorce.

It also alleges that none of the grounds for divorce alleged in his petition were true, giving the alleged grounds and denying them specifically. It shows that by threats, intimidation, and force a waiver of service of summons was procured from her by her husband at a time when she was mentally incompetent to act for herself, and further contains allegations which, if true, would have constituted a good defense to his petition, had she been mentally competent to look after her defense and physically able to do so. It alleges that such decree was procured through fraud and upon false testimony, and shows in what the fraud consisted and wherein the testimony was false. It also shows that defendant had failed to comply with the order of court in the payment of money for the support of the child.

It is further alleged that, some years prior to the filing of her husband's suit, they had removed from Oklahoma to eastern states and resided in eastern states, and returned to Waukomis, Okla., just before Christmas in 1908, which fact, if true, would render the decree void, because the plaintiff had not been a resident of Oklahoma for as much as one year prior to the filing of his petition. These allegations were sufficient to entitle the plaintiff to a hearing, and, if they were found true, were sufficient to entitle her to judgment setting aside the decree of divorce.

Therefore the judgment of the court below, sustaining the motion to strike, is reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(24 Okl. 477)

HILSMEYER v. BLAKE.

(Supreme Court of Oklahoma. June 25, 1912.)

(Syllabus by the Court.)

1. PLEADING (§ 291*)—WRITTEN INSTRUMENT—EXECUTION—VERIFIED DENIAL—AUTHORITY.

Under Comp. Laws 1909, § 5648, providing that allegations of the execution of written instruments and indorsements thereon shall be taken as true, unless the denial thereof be verified by affidavit, it is not necessary that the pleading in question be verified, where only the authority of the party to execute is involved.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 864, 865, 866½-879; Dec. Dig. § 291.*]

2. APPEAL AND ERROR (§ 192*)—OBJECTIONS IN LOWER COURT—PLEADINGS.

Objections that go to the form rather than legal sufficiency of a pleading will be deemed to have been waived, unless raised in the court below in some manner prescribed by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1221-1225, 1239; Dec. Dig. § 192.*]

3. DEEDS (§ 47*)—EXECUTION—SIGNATURE BY MARK—ATTESTATION—ACKNOWLEDGMENT.

An officer's certificate of the grantor's acknowledgment of the execution of a deed filed for record is a sufficient compliance with a requirement of attestation by witnesses to the grantor's signature by mark.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 104-110; Dec. Dig. § 47.*]

4. ACKNOWLEDGMENT (§ 62*)—AUTHORITY OF OFFICER—INTEREST.

Whether or not an officer taking an acknowledgment to a deed is or is not financially or beneficially interested in the transaction is a question of fact; the burden of proof being upon the assailant. Such issue of fact is concluded by the decrees of the court in the same manner and to the same extent as are other questions of fact.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 345-347; Dec. Dig. § 62.*]

5. APPEAL AND ERROR (§ 1012*)—FINDINGS—REVIEW—WEIGHT OF EVIDENCE.

Where a case is tried by the court, without the intervention of a jury, upon controverted questions of fact, and there is evidence reasonably tending to support its findings, such findings will not be disturbed on the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by Hannah Barnett against W. R. Blake and another. The action having been dismissed by plaintiff, the cause proceeded to trial between defendants Blake and Hillsmeier; each claiming title to the land in controversy through separate conveyances from the original plaintiff. From a judgment in favor of Blake, Hillsmeier brings error. Affirmed.

Lewis C. Lawson, of Holdenville, for plaintiff in error. J. B. Patterson, of Okemah, for defendant in error.

SHARP, C. This action was brought by Hannah Barnett against W. R. Blake and Fred E. Hillsmeier, defendants below. The action was afterwards dismissed by the plaintiff, and the cause proceeded to trial between the two defendants; each claiming title to the 120 acres of land in controversy through separate conveyances from the allottee, the said Hannah Barnett. The deed through which defendant in error claimed title was executed November 6, 1909, and filed for record in the office of the register of deeds at Okemah, on November 8, 1909. The deed to plaintiff in error was executed and delivered November 9, 1909. The deed to Blake was charged by plaintiff in error to have been a forgery. The case was tried before the court, who, after hearing the testimony of a large number of witnesses, sustained the Blake deed, and in the decree specially found that on the 6th day of November, 1909, for a valuable and adequate consideration, the said Hannah Barnett sold and by her warranty deed of that date conveyed to the defendant, W. R. Blake, all of her right, title, and interest in the lands in question; that the defendant, Blake, went into the immediate possession of said lands, and that said deed was duly recorded as heretofore shown; that thereafter, and on the 9th day of November, 1909, the said Hannah Barnett attempted to sell and convey said lands to the said Fred E. Hillsmeier; that on said date she executed and delivered to him a deed purporting to convey to him said lands, but that on said date the defendant in error, W. R. Blake, was the absolute owner in fee simple of said real estate, and that plaintiff, Hannah Barnett, had no interest therein; that her deed to Hillsmeier conveyed no title; and that said Hillsmeier took said deed with full knowledge of the prior deed to Blake, and the record thereof, and with notice of the possession of said real estate by the said W. R. Blake.

[1] Counsel for plaintiff in error first complains of the fact that defendant Blake's answer, or, as it was termed by said defendant, "reply," not being verified, the admission in evidence of defendant's deed constituted reversible error. Section 4312, Wilson's Rev. & Ann. St. 1903 (section 5648, Comp. Laws 1909), provides that: "In all actions, allegations of the execution of written instruments and endorsements thereon * * * shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Apparently counsel have misconceived the issues in this particular. Defendant, Blake, did not deny that, subsequent to the time he acquired title through his deed, Hannah Barnett made a second deed to the plaintiff in error, but charged that said second deed was taken with full knowledge of the defendant's rights and possession under his prior deed. The making of a warranty deed in compliance with the pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

visions of the statute conveys to the grantee, his heirs or assigns, the entire interest of the grantor in the premises described. Compiled Laws 1909, § 1202. It mattered not that Hannah Barnett executed a second deed, except in so far as it may have constituted a cloud upon the title of defendant, as said defendant could rest secure and rely upon his prior deed. Therefore, the execution of the deed to plaintiff in error not being put in issue by a verified denial, it was unnecessary for other purposes to verify said reply. In *Flesher v. Callahan et al.*, 122 Pac. 489, this court held that on a failure to verify a pleading as required by section 5648, supra, the execution of the instrument only was thereby admitted, and not the right or authority of the party to make it. The exact question is here presented, Hannah Barnett, having already conveyed her title, had no power or authority to execute a second deed. In *Sawyer & Austin Lbr. Co. v. Champlain Lbr. Co.*, 18 Okl. 90, 84 Pac. 1093, it was said, in construing another provision of the same section, requiring verification of pleadings: "Where the correctness of a verified account is not questioned, but some affirmative defense is pleaded, no verification to the answer is required"—citing cases.

[2] Counsel objects to the sufficiency of the denials contained in the reply; but it nowhere appears in the record that the reply was challenged by demurrer or otherwise in the trial court, and, the objection going to the form rather than the sufficiency of the pleading, as raised, is entitled to no consideration. *Bohart v. Mathews*, 29 Okl. 315, 118 Pac. 944.

[3, 4] Counsel for plaintiff in error, while vigorously denying that Hannah Barnett signed the Blake deed, at the same time denies that the subscription thereto, if found to have been made, is a compliance with section 2965, Comp. Laws 1909, and charges that Willie J. Brown, the notary public who took the acknowledgment, by reason of his interest in the transaction, was disqualified to act in the premises. This court has recently held, in *Campbell v. Harsh*, 122 Pac. 127, that an officer's certificate, to the grantor's acknowledgment of the execution of the deed filed for record is a sufficient compliance with the requirement of attestation of witnesses to the grantor's signature by mark. Other recent cases announcing the same rule are *Sims, Adm'r. v. Hedges*, 123 Pac. 155, and *Walker Bond & Co. v. Purifier*, 124 Pac. 322. Numerous authorities in support of this rule are cited in *First Nat. Bank of Halley v. Glenn*, 10 Idaho, 224, 77 Pac. 624, 109 Am. St. Rep. 204. We have searched the record closely and fail to find any testimony sustaining the charge that the notary public who took Hannah Barnett's acknowledgment to the Blake deed was disqualified to act, either in taking the acknowledgment, or subscribing the name and witnessing the mark of the grantor. While it is true that be-

cause of the probative force accorded to the certificate, as well as the usually important consequences of the instrument itself, public policy forbids that the act of taking and certifying the acknowledgment should be exercised by a person financially or beneficially interested in the transaction, yet there must be evidence to support the charge. The burden of proof in such cases rests upon the assailant of the validity of the certificate. The certificate is prima facie evidence of its due execution. *American Freehold Land Mortgage Co. v. Thornton*, 108 Ala. 258, 19 South. 529, 54 Am. St. Rep. 148. Numerous authorities sustaining this general proposition are cited in a comprehensive note to the above case. The question of whether or not the officer taking the acknowledgment is or is not financially or beneficially interested in the transaction is necessarily one of fact, and is concluded by the verdict of the jury or the judgment or decree of a court in the same manner and to the same extent as are other questions of fact.

[5] Counsel for plaintiff in error, however, complains that the decree of the trial court was wrong, first, because not supported by the evidence; second, because it is contrary to the weight of the evidence; and devotes almost 100 pages of his brief to a discussion of the testimony. This court has repeatedly held that it will not investigate the record to see whether the verdict of the jury or the judgment of the court is contrary to the weight of the evidence, or examine into the evidence to ascertain its credibility; the rule being that where the evidence is conflicting this court will not review it to ascertain where the weight of evidence lies, but if there is evidence reasonably tending to support the verdict or judgment it will not be set aside. *Loeb v. Loeb et al.*, 24 Okl. 384, 103 Pac. 570; *Great Western Mfg. Co. v. Davidson Mill & Bl. Co.*, 28 Okl. 626, 110 Pac. 1096; *Burns v. Vaught*, 27 Okl. 711, 113 Pac. 906; *First Nat. Bank of Guymon v. Arnold*, 28 Okl. 49, 118 Pac. 719; *Wrought Iron Range Co. v. Leach*, 123 Pac. 419; *Davis v. Smith et al.*, 28 Okl. 852, 115 Pac. 1017; *J. I. Case Threshing Mach. Co. v. Oates*, 27 Okl. 412, 112 Pac. 980; *Freeman v. Eldridge*, 26 Okl. 401, 110 Pac. 1057; *First National Bank v. Lookabaugh*, 28 Okl. 603, 115 Pac. 786; *Roberts v. Markham*, 28 Okl. 387, 108 Pac. 127; *Rudyan v. Fisher*, 28 Okl. 450, 114 Pac. 717; *Altorn et al. v. Dennis*, 25 Okl. 185, 105 Pac. 1012; *Eager et al. v. Seeds*, 21 Okl. 524, 98 Pac. 646; *Bretch Bros. v. S. Winston & Sons*, 28 Okl. 623, 115 Pac. 795; *Smith v. Stewart*, 29 Okl. 26, 116 Pac. 182; *Hunter v. Spencer*, 21 Okl. 155, 95 Pac. 757, 17 L. R. A. (N. S.) 622.

Section 20, art. 7, Williams' Ann. Constitution, provides: "In all issues of fact joined in any court, all parties may waive the right to have the same determined by jury, in which case the finding of the judge, upon the facts, shall have the force and effect of

a verdict by jury.* The requirement applies here with particular force. A number of the witnesses in the instant case were Creek Indians, and it appears that a part, at least, of the testimony was introduced through the medium of an interpreter. The trial court has a peculiar advantage in cases of this character in weighing and considering the testimony. Indeed, the opportunity of seeing the witnesses and hearing their testimony in such cases is not only invaluable, but almost essential, to a correct understanding of the testimony. *Kessel et ux. v. Kessel*, 79 Wis. 289, 48 N. W. 382; *Kennedy v. Pawnee Trust Co. et al.*, 128 Pac. 548. As there was evidence to support the findings of the court, the judgment of the court will not be disturbed.

It is objected that all evidence of the transaction of December 31, 1909, was inadmissible, and for that reason the trial court erred in finding for the defendant. Again, we think counsel are mistaken. Much of this testimony tended to contradict that given by Hannah Barnett as to the execution of the original deed of November 6th. The fact of a subsequent change in the consideration did not destroy the title acquired by the defendant. That plaintiff paid Hannah Barnett \$8,000 in cash, in lieu of the payment of the \$1,000 note, and that Hannah Barnett reconveyed to defendant the six lots in the town of Weleetka, forming a part of the original consideration, was not a question in which the plaintiff in error was concerned. To hold otherwise would destroy the right of competent parties to change, alter, or modify a contract once made; besides, plaintiff in error having, without objection, at the outset assumed the burden of proof must recover, if at all, on the strength of his own title, and not on the weakness of that of his adversary.

Other objections to the admissibility of testimony on account of the pleadings cannot be considered; no sufficient objection thereto being made in the trial court.

Finding no error in the record, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(24 Okl. 500)

CARR v. BRAWLEY.

(Supreme Court of Oklahoma. July 18, 1912.)

(Syllabus by the Court.)

GARNISHMENT (§ 30*)—PROPERTY SUBJECT—MORTGAGED PERSONALTY—WAIVER OF MORTGAGE—CONSENT TO SALE.

When the mortgagee of certain cotton gave the mortgagor authority to sell the cotton and deposit the proceeds in a bank in the name of the mortgagor's bondsmen in a suit, and the same was done, the lien of the mortgage was discharged, and the funds, prior to reaching the

mortgage, were subject to garnishment at the instance of a creditor of the mortgagor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 48-50; Dec. Dig. § 30.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Lincoln County; Roy Hoffman, Judge.

Action by E. J. Brawley against E. W. Carr. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. B. Rittenhouse and F. A. Rittenhouse, both of Chandler, for plaintiff in error. W. L. Johnson, of Chandler, for defendant in error.

BREWER, C. Brawley was plaintiff below and Carr was defendant. The defendant in error, E. J. Brawley, as plaintiff below, sued plaintiff in error, E. W. Carr, as defendant below, for the alleged conversion of a sum of money, alleged to have been the proceeds of a crop of cotton raised by a man named Wallace, and on which plaintiff held a mortgage.

It seems that Wallace raised some cotton. He gave two mortgages on it. Carr became the owner of the first mortgage by assignment. Brawley owned the second mortgage. Carr sued Wallace in replevin for the cotton under the first mortgage. Wallace defended and needed bondsmen, so as to retain the cotton and finish gathering it. Brawley agreed for Wallace to sell the cotton and deposit the proceeds in a bank in the name of Ward and Davidson, the bondsmen of Wallace in the replevin suit, to the end that they be held harmless. This was done. Carr prevailed in the replevin suit, and sufficient of the funds in bank were used to pay Carr's judgment. But it seems Wallace was also indebted to Carr on another matter, a promissory note, in no wise connected with the mortgages. Carr sued Wallace on this note, obtained judgment, and garnished the bank, Ward, and Davidson, impounding the balance of the fund derived from the sale of the cotton crop. Issue was joined on the answers of the garnishees and resulted in an order on the bank to pay \$55.68 of the fund into the justice court to apply on Carr's judgment against Wallace. This sum was so paid into court by the bank, where it remained at the time this suit was brought, and at the time of the trial. Brawley was not a party to these proceedings. Under this situation, and while the money was in court, Brawley brought this action in conversion against the justice, the constable, and Carr, the plaintiff. The court sustained a demurrer as to the two officers, but overruled it as to Carr. The case was tried to a jury, who found for Brawley and against Carr in the sum of \$92.67, which appears to have been the total balance of the cotton funds in the bank.

It is contended here, first, that there was no demand; second, that Brawley, in consenting that Wallace sell the mortgaged cot-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ton and put the proceeds in the bank, lost the lien under the mortgage, and that the funds were subject to garnishment at the suit of Carr as a creditor.

We shall not discuss the question of demand, as our views on the second proposition render the same unnecessary.

The second proposition, we think, requires a reversal of the case. The mortgagee gave authority to the mortgagor to sell the cotton and make use of the proceeds, at least temporarily, for his own purposes. He used a portion of the proceeds in discharging a judgment against himself. The remainder was deposited as a general deposit in the bank in the name of Ward and Davidson. Had the mortgagee required them to be deposited in her name after being so deposited, she would have been safe. This course was not pursued.

That there was a waiver of the lien of the mortgage as a result of the mortgagee's consent to the sale is elementary. *Mortgage Security Co. v. Elevator Co.*, 6 N. D. 412, 71 N. W. 130; *Drexel v. Murphy*, 59 Neb. 210, 89 N. W. 813; *Frick Co. v. Milling Co.*, 51 Kan. 370, 32 Pac. 1103; *Partridge v. M. D. Elevator Co.*, 75 Minn. 496, 78 N. W. 85; *Cobbey on Chattel Mortgages*, § 636; *Jones on Chattel Mortgages* (5th Ed.) § 465; *Hammon on Chattel Mortgages*, p. 142.

The lien of the mortgage does not follow the proceeds of a sale of the mortgaged property, where the mortgagee consented to the sale. The case of *Maler v. Freeman*, 112 Cal. 8, 44 Pac. 357, 53 Am. St. Rep. 151, is a case very much in point. In the syllabus it is said: "If a mortgagee of chattels authorized the mortgagor, as his agent, to sell the mortgaged property, and to deposit the proceeds in a bank, to be applied on the mortgage debt, and a sale is made under such authorization, the lien of the mortgage does not attach to the proceeds, and they are subject to attachment by the other creditors of the mortgagor. Neither a trust nor an equitable assignment is created in favor of a mortgagee of chattels on the proceeds of their sale when he authorized the mortgagor to sell them, to collect the proceeds of the sale, and to deposit them in a bank, to be applied on the mortgage debt."

In the opinion it is said: "There are many decisions that the mortgagee of chattels may authorize the mortgagor to sell the incumber-

ed property and apply the proceeds of sale upon the debt secured, and that such an agreement does not render the mortgage fraudulent in law, nor affect the lien thereof prior to the sale (*Brackett v. Harvey*, 91 N. Y. 221; *Murray v. McNealy*, 86 Ala. 234 [5 South, 565], 11 Am. St. Rep. 33; *Lane v. Starr*, 1 S. D. 107 [45 N. W. 212], and cases cited); but we have found no case in which the lien was held to attach to the proceeds unpaid by the purchaser. The doctrine of the case of [*White Mountain Bank v. West*], 46 Me. 15, above cited, is that if the mortgagee 'wished to reach the proceeds in the hands of the purchasers he, like other creditors, should have resorted to a trustee process under the statute.'"

In the case of *White Mountain Bank v. West et al.*, 46 Me. 20, in the course of the opinion it is said: "If West had the right to sell the lumber, then he could give a good title. His stipulation that the avails should be paid over to Carleton was personal only; and any default on his part in this respect could not affect the title of his vendee. Nor did this consent for him to sell make him an agent of Carleton for that purpose. It was a release of the mortgage claim, in case of a sale. The effect of a mortgage with such consent for the mortgagor to sell was to hold the property for the mortgagee against attaching creditors; but from the time of sale the lien of the mortgage was extinguished, and the mortgagee was left with no security but the personal promise of the mortgagor to pay the proceeds to him. And if he wished to reach the proceeds in the hands of the purchasers he, like other creditors, should have resorted to a trustee process under the statute." See, also, *Waters v. Bank*, 65 Iowa, 234, 21 N. W. 582.

If the sale of the mortgaged property in this case had been without consent, and the proceeds could be traced, the party appropriating same having notice of the mortgage, quite a different question would be presented.

We conclude that the plaintiff below, in consenting to the sale of the mortgaged property, waived the lien of the mortgage, and that she had no lien on the proceeds, and that therefore the same were subject to the process sued out by the creditor.

It follows that the cause should be reversed.

PER CURIAM. Adopted in whole.

CRABTREE v. STATE.

(Criminal Court of Appeals of Oklahoma.
Sept. 12, 1912.)

Appeal from Osage County Court; C. T. Bennett, Judge.

W. T. Crabtree was convicted of violating the prohibitory law, and appeals. Appeal dismissed.

Roberts & Scales, of Pawhuska, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, W. T. Crabtree, was convicted, at the July, 1911, term of the county court of Osage county, on a charge of having unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of three months.

The Attorney General has moved to dismiss the appeal on the following grounds: "Because the record shows that this is an attempted appeal from a judgment of conviction for a misdemeanor rendered in the county court of Osage county on the 24th day of July, 1911, and the petition in error and case-made were not filed in this court until the 18th day of October, 1911, more than 60 days after the rendition of such judgment; no order having been made extending the time within which to file petition in error and case-made in this court beyond the 60 days allowed by law."

The motion is well taken, and must be sustained.

The appeal is accordingly dismissed.

LEISHMAN v. STATE.

(Criminal Court of Appeals of Oklahoma.
Sept. 14, 1912.)

Appeal from Oklahoma County Court; John W. Hayson, Judge.

John Leishman was convicted of violating the prohibitory law, and appeals. Reversed.

Giddings & Giddings, of Oklahoma City, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error was convicted in the county court of Oklahoma county on a charge of selling intoxicating liquor, and on the 28th day of March, 1911, was adjudged to pay a fine of \$50 and be confined in the county jail for a period of 30 days. He perfected his appeal in this court in due form.

The proof upon the part of the state establishes the sale. The testimony on the part of the defense flatly contradicts the prosecuting witness. The accused testified on his own behalf that he was in bed sick on the date the sale was made as contended by the state, and his physician, Dr. Kuhn, corroborated his testimony, and says that the accused was in bed for two or three days prior and subsequent to the date upon which the prosecuting witness claims to have purchased the whisky. In addition, the prosecuting witness, after having voluntarily filed the complaint against the accused, went to the county attorney's office and made a written statement to the effect that he did not purchase the whisky.

The following instruction of the court is complained of as ground for reversal, in view of the facts in this case: "You are the exclusive judges of the weight and credibility of the witnesses in this case, and in determining what

weight and credit you will give to the testimony of any witness you will take into consideration the appearance of the witness on the stand, his manner of testifying, his interest or lack of interest in the result of this case, and his opportunity or lack of opportunity for knowing and seeing the things about which he has testified; and if you believe that any witness has willfully testified falsely in any material matter, you may disregard the whole of such witness' testimony, unless the same is corroborated by other witnesses whom you believe have testified truthfully in such matter, or by other competent credible testimony." This instruction has been repeatedly condemned by this court. It should not be given at all, and is held to be especially harmful in a case where the facts are controverted. See *Rea v. State*, 3 Okl. Cr. 269, 105 Pac. 381; *Manning v. State*, 5 Okl. Cr. 532, 115 Pac. 612; *Fletcher v. State*, 2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A. (N. S.) 581. The trial courts are warned against giving such instructions.

Let the judgment be reversed, and the cause remanded, with direction to grant a new trial.

ROBERTS et al. v. STATE.

(Criminal Court of Appeals of Oklahoma.
Sept. 14, 1912.)

Appeal from District Court, Love County; S. H. Russell, Judge.

Press Roberts and Martin Cavins were convicted of aggravated assault, and appeal. Dismissed.

Brown & Brown, of Ardmore, for plaintiffs in error.

PER CURIAM. Press Roberts and Martin Cavins were convicted of aggravated assault on an information wherein they were charged with a felonious assault. The judgment and sentence were entered on November 29, 1910, from which judgment the defendants appealed. On September 10th, by their counsel of record, plaintiffs in error filed a motion dismissing their said appeal.

The appeal is therefore dismissed, and the cause remanded to the district court of Love county, with direction to enforce its judgment therein.

THOMPSON et al. v. MURRAY.

(Supreme Court of Oklahoma. Aug. 20,
1912.)

APPEAL AND ERROR (§§ 361, 773*)—WRIT OF ERROR—DISMISSAL.

The petition in error and case-made were filed and summons in error issued May 29, 1911. On June 23d defendant in error moved to have the petition in error made more definite and certain, by stating the names of the plaintiffs in error on behalf of whom the petition was prosecuted, which motion was sustained on September 12th. This order was never complied with, and on May 9, 1912, defendant moved to dismiss because of such failure, and also because the case had never been briefed. Held that, no response having been made to the motion, or application made for leave to file briefs out of time, or to then comply with the order, the motion would be sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1941-1959, 3104, 3108-3110; Dec. Dig. §§ 361, 773.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Commissioners' Opinion, Division No. 1. Error from District Court, Garvin County; R. McMillan, Judge.

Action by W. W. Murray, as guardian for Ayleene and Winnie Irene Carr, against J. B. Thompson, as trustee for the Roberts-Johnson Rand Shoe Company, and others. From a judgment for plaintiff, defendants bring error. Dismissed.

J. B. Thompson, of Pauls Valley, for plaintiffs in error. Carr & Field, of Pauls Valley, for defendant in error.

AMES, C. On May 29, 1911, the petition in error and case-made were filed and summons in error issued. On June 23d the defendant in error filed a motion to make the petition in error more definite and certain, by stating the names of the plaintiffs in error on behalf of whom the petition in error was prosecuted. On September 12th this motion was sustained. The order of the court has never been complied with. On May 9, 1912, the defendant in error filed a motion to dismiss the appeal for two reasons—one because the case had never been briefed by the plaintiffs in error, as required by the rules of the court, and the other because the order of the court requiring the petition in error to be made more definite and certain has never been complied with. No response has ever been made to this motion, nor has any application been made for leave to file briefs out of time, or make the petition more definite and certain, as required by the order of the court.

The motion to dismiss the appeal should therefore be sustained.

PER CURIAM. Adopted in whole.

SMOOT & ABBOTT v. W. L. MOODY & CO.
(Supreme Court of Oklahoma. Aug. 20, 1912.)

(Syllabus by the Court.)

1. WITNESSES (§ 37*)—KNOWLEDGE OF WITNESS—GRADE OF COTTON—VALUE.

It is not error to refuse to permit a witness to testify as to the grade or value of cotton in Galveston, when it affirmatively appears from his testimony that he did not class the cotton at the time it was shipped by him, and did not know its value at the time involved.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.*]

2. TRIAL (§ 141*)—PEREMPTORY INSTRUCTIONS—UNCONTRADICTIONED EVIDENCE.

It is not error to give a peremptory instruction, when the evidence in favor of one of the parties is uncontradicted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Blaine County; Frank M. Bailey, Judge.

Action by W. L. Moody & Co. against Smoot & Abbott on account. Judgment for plaintiffs and defendants bring error. Affirmed.

I. H. Lookabaugh, of Watonga, for plaintiffs in error. H. N. Boardman, of Watonga, for defendants in error.

AMES, C. The suit was brought by the defendants in error, who will hereafter be called the plaintiffs, upon an open account. The plaintiffs were engaged in the cotton business in Galveston, and the defendants were operating a gin at Dillon, Okl. The defendants consigned cotton at various times to the plaintiffs, under contract, by which they were permitted to draw against the cotton for a reasonable amount, same to be carried on their account, interest to be charged at 6 per cent. per annum, and the cotton to be held by the plaintiffs and sold for the account of the defendants, at their request; it being understood that, in the event the price of cotton declined, the defendants should remit, so as to protect a margin with the plaintiffs. After holding the cotton for several months, the price declined, and the plaintiffs were authorized to sell. After the sales were all made, it was ascertained that a balance was due the plaintiffs, and suit was brought for this balance. The defendants filed an answer and cross-petition, in which they denied the correctness of the account, and alleged that the cotton was improperly graded, and was not sold in good faith, but had been sold long prior to the time when it was so reported to the defendants, at a much higher price than that reported. The plaintiffs' evidence sustained the allegations of their petition, and the defendants' evidence wholly failed to establish the allegations of their cross-petition. The errors assigned are in the rejection of evidence offered by the defendants, and in the giving of a peremptory instruction for the plaintiffs.

[1] The evidence rejected was offered by the defendants for the purpose of showing the grade of the cotton and its market value, but it affirmatively appeared from the testimony of the defendants themselves that they did not have the cotton graded at the time they shipped it, that they did not know anything about Galveston grades, and had no experience with them, that they did not know at the time of the sale what cotton was worth, or what the particular grades were worth, that they did not know how it should have been classed, and that they did not know its weights. This being true, it is manifest that the court did not err in refusing to permit them to testify as to its value.

[2] There being no competent evidence contradicting that of the plaintiffs, the action of the trial court in instructing a verdict for the plaintiffs is correct, and we think the judgment should be affirmed.

PER CURIAM. Adopted in whole.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

MEMORANDUM DECISIONS

Ex parte MAZE. (Cr. 1,722.) (Supreme Court of California. June 6, 1912.) In the matter of the application of Fred L. Maze, on habeas corpus.

PER CURIAM. The writ is discharged, and the petitioner is remanded to custody.

Ex parte SCOGGAN. (Cr. 1,721.) (Supreme Court of California. June 6, 1912.) In the matter of the application of John Scoggan, on habeas corpus.

PER CURIAM. The writ is discharged, and the petitioner is remanded to custody.

BRITISH AMERICA ASSUR. CO. v. COLORADO & S. RY. CO. (Supreme Court of Colorado. May 6, 1912.) Dissenting opinion. For majority opinion, see 125 Pac. 508.

WHITE, J. (dissenting). When the legislative act of 1903 became effective, no loss had occurred under the insurance policy. Therefore I think no right had accrued that could be the subject of assignment under the terms of the policy. To that portion of the opinion holding otherwise I dissent, and am of the opinion that the antisubrogation clause of the legislative act of 1903 is involved in a proper determination of the controversy, and its constitutionality should be determined herein.

FOSSETT v. STATE. (Criminal Court of Appeals of Oklahoma. Sept. 3, 1912.) Appeal from Custer County Court; R. P. Phillips, Special Judge. Mrs. J. M. Fossett was convicted of a violation of the prohibition law, and she appeals. Affirmed. See, also, 6 Okl. Cr. 629, 117 Pac. 653. Leroy Jones, of Cordell, for plaintiff in error. The Attorney General, for the State.

PER CURIAM. The plaintiff in error was convicted on an information which charged the unlawful possession of 32 pints of whisky and 12 bottles of beer, with the intent to sell the same, and was sentenced to be confined in the county jail for a period of 90 days and to pay a fine of \$350. The case was tried without a jury by consent of the parties. It is contended that the evidence is insufficient to support the findings and judgment of the trial court. On a careful examination of the record, we are of opinion that the appeal in this case is without merit. The judgment of the county court of Custer county is therefore affirmed.

(52 Colo. 589)

HOLDEN v. STATE. (Criminal Court of Appeals of Oklahoma. Aug. 21, 1912.) Appeal from Oklahoma County Court; John W. Hayson, Judge. P. W. Holden was convicted of violating the prohibitory law, and appeals. Affirmed. Pruett, Wilson, Sniggs & Wilson, of Oklahoma City, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

PER CURIAM. The plaintiff in error, P. W. Holden, was convicted at the May, 1911, term of the county court of Oklahoma county on a charge of having unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at imprisonment in the county jail for a period of six months and a fine of \$500. We have carefully examined the record and find no error sufficient to justify a reversal of the judgment. It is therefore affirmed.

KELLEY v. STATE. (Criminal Court of Appeals of Oklahoma. Aug. 28, 1912.) Appeal from Ottawa County Court; W. Y. Quigley, Judge. Theodore E. Kelley was convicted of violating the prohibitory law, and he appeals. Affirmed. O. F. Mason, of Miami, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Theodore E. Kelley, was convicted at the January, 1911, term of the county court of Ottawa county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$150 and imprisonment in the county jail for a period of 60 days. Upon a careful examination of the record, we find no error sufficient to justify a reversal of this cause. The judgment of the trial court is therefore affirmed.

NIDIFFER v. STATE. (Criminal Court of Appeals of Oklahoma. Aug. 28, 1912.) Appeal from Ottawa County Court; W. Y. Quigley, Judge. John Nidiffer was convicted of violating the prohibitory law, and he appeals. Affirmed. O. F. Mason, of Miami, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error John Nidiffer, was convicted at the January, 1911, term of the county court of Ottawa county on a charge of selling intoxicating liquor, and his punishment fixed at imprisonment in the county jail for a period of 60 days and a fine of \$150. Upon a careful examination of the record, we find no error sufficient to justify a reversal of this cause. The judgment of the trial court is therefore affirmed.

